STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0195

State of Minnesota,
Respondent,

vs.

Sean M. Ancel,
Appellant.

Filed June 3, 2008
Reversed and remanded
Johnson, Judge

Dakota County District Court
File No. K9-06-1786

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Bradford S. Delapena, Special Assistant State Public Defender, P.O. Box 40418, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Lakeville police officers followed Sean M. Ancel and his cousin, Joshua, as they broke into two homes in one evening. Officers arrested the two men shortly thereafter and found stolen property in their possession. Because it was dark at the time of the burglaries, however, the officers could not see which of the two men actually entered the homes. At Ancel's trial, his cousin testified for the prosecution that Ancel was the one who had entered the homes and taken the stolen property. A Dakota County jury found Ancel guilty.

On appeal, Ancel raises two issues. He argues that the district court erroneously admitted evidence of his prior contacts with police officers, evidence that he was under surveillance, and evidence of his prior incarceration. He also argues that he is entitled to a new trial because the district court judge was improperly involved in plea negotiations. Although the plea negotiations did not result in a guilty plea, Ancel argues that the district court judge became angry with him in the process and, thus, was biased against him. We conclude that the evidence of Ancel's prior contacts with police and the police surveillance was admitted in error. Therefore, we reverse and remand for a new trial.

FACTS

On the evening of May 31, 2006, Ancel and his cousin, Joshua, went to a bar in downtown Lakeville. Unbeknownst to them, the Lakeville Police Department had them under surveillance. Undercover officers were in the bar, watching Ancel and his cousin and attempting to listen to their conversation for approximately 45 minutes.

At approximately midnight, Ancel and his cousin left the bar, and the officers surreptitiously followed them. The two men first went to Ancel's apartment, which was only a few blocks away. The officers saw the men emerge from the apartment building approximately 30 minutes later, followed them for a while, but then lost sight of them for five or ten minutes. The officers next spotted the two men rifling through something that turned out to be a wallet belonging to K.F., a nearby resident. The men went to a bank, where Ancel tried, unsuccessfully, to use the ATM while his cousin sat nearby on the curb. The ATM card they attempted to use belonged to K.F.

The two men then went to a nearby townhome complex where each townhome has a sliding patio door at ground level. Two officers observed one of the men try to open various doors while the other man watched. Because it was dark, the officers could not determine which man was attempting to open the doors. The officers briefly lost sight of the men again but saw them a few minutes later digging through a purse, which belonged to S.K., a resident of one of the townhomes.

The two men then walked to a gas station, where they called a taxi. When the taxi arrived, the two men took their places in the back seat. As the taxi cab was beginning to leave the parking lot, police officers stopped the taxi and arrested the two men. The officers found an identification card with S.K.'s name on it in the back of the taxi near Ancel. The officers also found a $100 bill and five $1 bills in Ancel's front pocket, which were denominations that S.K. reported having had in her purse.

Ancel was charged with two counts of burglary in the first degree, in violation of Minn. Stat. § 609.582, subd. 1(a) (2004). Prior to trial, the district court judge talked

with Ancel's attorney about a sentence of 75 months of imprisonment in exchange for a guilty plea on the charges in this case and in another case that was pending against Ancel. As the district court judge explained on the morning of Ancel's trial:

> I had proposed to your lawyer just off the cuff . . . that somewhere in the middle between 57 months and 90 months was 75 months. I'm kind of thinking now that's probably a little high since the guidelines are 57. I generally after trials just follow the probation department and their recommendations. I think your lawyer will tell you probation is probably a more difficult sentencer than I am.

When Ancel declined to accept that offer, the district court judge made a second suggestion of 63 months of imprisonment for both cases:

> So I guess in one last effort to resolve all these files because, basically, all I'm doing here is setting us up for two felony trials, knowing that I can't go below 57 months, knowing that you've rejected from your lawyer 75 months, my last proposal to you, which I have discretion to do, would be 63 months. One year less than the last proposal, which would mean you would serve approximately 42 months . . . .
>
> . . . .
>
> Yeah, so you're looking at less than three years on my proposal. However, I will tell you this, and you don't have to take it. If you don't take it, I do follow the Sentencing Guidelines. I think you are clearly a repeat offender. I think that notice was properly given to you based upon prior 8 criminal history points. And even though—and I don't make judgment calls—even if you were to be fortunate and be found not guilty here, the other case actually seems like it is an easier case for the State to prove . . . .
>
> . . . .
>
> So you could get, also, consecutive sentences by probation because . . . these crimes are consecutive sentencing crimes. . . .

> Those are your choices. Plea to all of them and you get a concurrent 63 months and you're done, or you take your shot . . . .

After a short recess, the district court judge commented on Ancel's deliberations concerning whether to plead guilty:

> [Ancel] is still undecided about the proposal I made him. I did tell him, and I do believe this, that if he does reject it now, which he has an absolute right to do, that this would not be renewed in any shape or form. We would go to conclusion then and let probation determine his sentence if he lost. If he won, we then go forward with the other case.
>
> . . . I don't want to be mean about it, but, you know, this has been going on for months and months and months. I think he's a fairly sophisticated courtroom individual. This is not new to him. He has eight (8) prior convictions. He's been through the process before. It should not be a shock to him that somebody would maybe make him a proposal to resolve his case. And I guess I'm a little surprised that he's surprised by that.

During a short off-the-record break, the district court judge spoke on the telephone with Ancel's girlfriend and then allowed Ancel to speak to his girlfriend. Ancel then rejected the opportunity to plead guilty in exchange for a sentence of 63 months.

The district court judge proceeded to rule on Ancel's motions in limine in a perfunctory fashion. In the process, the district court judge commented on Ancel's decision to not plead guilty. For example:

> [Motion in limine] Number four, I would not grant that. I'm not really sure what, if anything, regarding incarceration may come up because although this guy is shockingly—I'm trying to phrase this politely—has shockingly made poor decisions in his life, including today, I think the fact that he was incarcerated is clearly relevant to his life history. Since he'll be spending the next 10 years there, I think he should get used to it.

In refusing to exclude evidence that Ancel had prior contacts with police, the district court judge stated, "When you get eight (8) prior points, I'm not going to exclude that from his history." The district court judge continued:

> [Motion in limine] Number six, that the State certainly can impeach him based upon his prior criminal history. I think since they're all theft-related, including six pending theft-related, for which two of which could be sentenced consecutively—in fact, the more I look at him, the more inclined I am to sentence him consecutively.
>
> Boy, you made a bad decision. You know why? I know why you've been in trouble your whole life. It is very simple. A history of very bad decisions.
>
> Uh, so six I'm denying. Seven I'm denying. Spreigel is very appropriate. Eight I'm denying. I don't think the Sentencing Guidelines are even appropriate here or plea negotiations are appropriate. Since he's now looking at 114 months instead of 63.

In addition to denying the motion in limine regarding his prior contact with police, the district court judge denied Ancel's motions in limine to exclude evidence that police had him under surveillance that night and evidence of his prior incarceration.

At trial, the state's key witness was Ancel's cousin, Joshua, who was given use immunity. The jury found Ancel guilty on both counts. The district court judge sentenced him to 50 months on this case. At the same sentencing hearing, the same district court judge sentenced Ancel on another case to which he had pleaded guilty by imposing a second 50-month sentence, to be served consecutively to the sentence in this case. Ancel appeals.

D E C I S I O N

I. Evidentiary Rulings

Ancel argues that his conviction must be overturned because the district court erroneously admitted certain prejudicial evidence. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). "Evidentiary errors warrant reversal if 'there is any reasonable doubt the result would have been different had the evidence not been admitted.'" *State v. Grayson*, 546 N.W.2d 731, 736 (Minn. 1996) (quoting *State v. Naylor*, 474 N.W.2d 314, 318 (Minn. 1991)).

A. Evidence of Prior Contacts with Police and Police Surveillance

Ancel argues that the district court erred by admitting evidence that three police officers knew Ancel from prior contacts and that the police department was conducting surveillance of him on the night of his offenses. Testimony of a police officer that the officer knows a criminal defendant from prior contacts may be irrelevant and prejudicial. In *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002), the supreme court held that an officer's testimony that he knew the defendant from prior contacts was unfairly prejudicial and irrelevant because the defendant's identity was not an issue in the case. *Id*. at 687-88. The court reversed, finding plain error. *Id*. at 688-89.

In this case, the testimony of Lakeville police officers called attention to the fact that several officers knew Ancel. The state's first witness, Sergeant Andy Bohlen,

testified, "From past contacts. I know Sean." Sergeant Bohlen also explained why he was observing Ancel and his cousin from afar that evening by saying:

> Detective Klehr, Watson, and myself were all familiar with Sean from past contacts so we didn't want him to recognize the three detectives. So we asked—I asked two other officers, Sergeant Polinski and Officer Reitmeier, who we felt probably Sean or Josh would not recognize them. We asked them to . . . conduct surveillance inside the bar to watch Sean because we felt he would recognize those two people.

Officer Nicholas Reitmeier was the second officer to testify for the state. He responded to the prosecutor's question whether he knew Ancel and his cousin by stating, "I had never dealt with either of them in the past, which I think is part of the reason why I was assigned to it."

In addition, the district court permitted the police officers to testify that Ancel was the subject of police surveillance that night. For example, Sergeant Bohlen, testified:

> A. . . . I was working the investigative division and coordinating a surveillance operation with some of my detectives.
>
> Q. And who were you surveilling?
>
> A. We were surveilling Mr. Sean Ancel who is seated on the right.
>
> . . . .
>
> A. Basically, we knew where Mr. Ancel resided and we were focusing our investigation on him.

When the prosecutor asked, "Were you specifically watching both [Ancel and his cousin]," Sergeant Bohlen answered, "Specifically our surveillance had been set up to watch Mr. Sean Ancel," not his cousin, Joshua. When Detective David Watson was

asked what the officers were doing on the night in question, he similarly testified, "We were conducting a surveillance operation." When asked, "And who were you conducting surveillance on?," he answered, "the suspect seated to your left," referring to Ancel. Detective Steven Klehr also testified that he was involved with surveillance of Ancel on the same evening.

Before trial, Ancel moved to exclude evidence concerning his prior contacts with the police department. The district court denied the motion stating, "When you get eight (8) prior points, I'm not going to exclude that from his history." This rationale is not a persuasive ground for admitting the evidence. Similarly, the district court denied a motion in limine concerning evidence of surveillance because jurors "have to have a starting point [to the officers' testimony] or none of their testimony would make any sense." We disagree. A lengthy explanation of the events leading up to the officers' observations was unnecessary. *See* Minn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

The state argues that the evidence concerning prior contacts and surveillance was probative because Ancel's identity was an issue at trial. But the officers arrested Ancel and his cousin in a taxi cab while they were in possession of stolen property, which made it unnecessary to present prior police contacts to prove that Ancel was one of the two persons who worked in concert on the burglaries. Also, none of the officers was able to identify Ancel as the person who actually entered the two victims' homes. The state

relied on the cousin's testimony for those purposes. Thus, the evidence did not assist the state in proving identity.

Moreover, the evidence likely was prejudicial. The evidence, which was repetitive, naturally would lead a jury to believe that Ancel was the type of person who often was in trouble with the law, and, thus, likely was guilty of the charged offenses as well. *See Strommen*, 648 N.W.2d at 688 ("It appears that the purpose in asking . . . was to illicit a response suggesting that [the defendant] was a person of bad character who had frequent contacts with the police."). Because there is "reasonable doubt the result would have been different" had the officers not been permitted to testify about the prior contacts or the surveillance, Ancel's conviction must be reversed. *Grayson*, 546 N.W.2d at 736 (quotation omitted).

B. Evidence of Ancel's Prior Incarceration

Ancel also argues that the district court erred by admitting testimony indicating that Ancel had been incarcerated. In response to a question from the prosecutor regarding whether he had spoken to Ancel since his arrest, his cousin testified that "[Ancel] called me collect from jail." After the defense objected on the basis of relevance and was overruled, Ancel's cousin explained that "[Ancel] pretty much couldn't believe he was in jail again."

In *State v. Manthey*, 711 N.W.2d 498 (Minn. 2006), the supreme court examined whether a mistrial was warranted where the jury learned that the defendant was in jail for the crime for which she was on trial. *Id*. at 506. The court noted "that references to prior incarceration of a defendant can be unfairly prejudicial." *Id*. However, in that instance,

the supreme court held that the evidence concerning the defendant's incarceration, although prejudicial, "was not so fundamental or egregious as to require a mistrial and was effectively mitigated by the court's instructions" to disregard the witness's testimony. *Id.*

The reasoning in *Manthey* applies here. The evidence was likely to be more prejudicial than probative, but any prejudice that may have arisen was cured by two separate instructions given by the district court. The evidence concerning prior incarceration was only a brief reference. Moreover, at the beginning of trial, the court stated, "No member of the jury should in any way permit himself or herself to be prejudiced against the defendant because a complaint has been filed against him or because he has been arrested or because he's been brought to trial." Similarly, while instructing the jury at the close of the case, the court again reminded the jury "[t]hat the defendant has been brought before the court by the ordinary processes of the law and is on trial should not be considered by you in any way suggesting guilt." Thus, the admission of the cousin's testimony concerning Ancel's prior incarceration is not reversible error. *See id.*

II. District Court's Plea Negotiations

Ancel also argues that his conviction should be reversed because the district court judge was improperly involved in plea negotiations and became angry with him when he declined to plead guilty. Ancel relies on caselaw providing that a district court judge should neither "usurp the responsibility of counsel nor participate in the plea bargaining negotiation." *See State v. Johnson*, 279 Minn. 209, 216, 156 N.W.2d 218, 223 (1968).

This is not to say that any involvement by the district court is impermissible. *State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004). Rather, the "district court judge has a delicate role in a plea negotiation and necessarily plays a part in any negotiated guilty plea." *Id*. But the role of the district court judge in the plea process is limited because the district court judge must determine the appropriateness of the proffered plea bargain. *Id*. The district court judge's "ultimate judicial responsibility" is to determine that a defendant has not been improperly induced to plead guilty nor permitted to bargain for a plea that is excessively lenient. *Johnson*, 279 Minn. at 215-16, 156 N.W.2d at 223; *see also State v. Nelson*, 257 N.W.2d 356, 359 n.1 (Minn. 1977) (stating that "[district court] judges should be very cautious not to impermissibly participate in plea negotiations"). A guilty plea that is entered after a district court judge improperly injects himself into the plea negotiations is per se invalid. *State v. Moe*, 479 N.W.2d 427, 429-30 (Minn. App. 1992), *review denied* (Minn. Feb. 10, 1992); *see also Anyanwu*, 681 N.W.2d at 415.

The state concedes that the district court judge in this case impermissibly injected himself into plea negotiations. In short, we agree. The district court judge plainly crossed the line by becoming overly involved in the plea process. It appears that the district court judge did not merely "insert himself" into ongoing plea negotiations but, rather, initiated and led plea negotiations throughout. The district court judge made "offers" of 75 months and 63 months, to be served concurrently with a yet-to-be-imposed sentence on other charges. In light of the applicable caselaw, the district court judge's actions were improper.

The question remains whether the district court judge's improper plea negotiations warrant a new trial. Ancel urges us to adopt a per se rule that any conviction following such plea negotiations must be reversed, regardless whether the defendant chose to plead guilty or to proceed to trial. As stated above, a conviction obtained by a guilty plea is per se invalid if the district court improperly injected itself into plea negotiations. *Moe*, 479 N.W.2d at 429-30; *Anyanwu*, 681 N.W.2d at 415. This per se rule is justified by the danger that a defendant will be unduly pressured to plead guilty by the district court judge's involvement as well as the concern that the district court judge will be unable to maintain his or her role as an independent examiner of the validity of the plea. *See Johnson*, 279 Minn. at 215-16, 156 N.W.2d at 223; *Anyanwu*, 681 N.W.2d at 414-15; *Moe*, 479 N.W.2d at 429.

The procedural posture of this case is different from *Moe* and *Anyanwu*. Ancel did not plead guilty but, instead, rejected the district court judge's plea offer. Ancel resisted the pressure applied by the district court judge and decided to proceed to trial. As a result, there is no concern that a guilty plea may have been entered due to undue pressure, and there was no need for the district court judge to serve as an independent examiner of the validity of a plea. Thus, the per se rule of *Johnson*, *Moe*, and *Anyanwu* is inapplicable, and we do not perceive any justification for extending the per se rule to this type of situation.

As an alternative argument, Ancel urges us to order a new trial on the ground that the district court judge was biased. As a defendant in a criminal trial, Ancel had a constitutional right to a fair trial. *See* U.S. Const. amends. V, XIV; Minn. Const. art. I,

§ 7. The right to a fair trial includes the right to an impartial judge. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997)). "There is the presumption that a judge has discharged his or her judicial duties properly," *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006), so a defendant must assert allegations of impropriety sufficient to overcome this presumption, *see McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Once a defendant submits to trial before a judge without objecting to the judge on the basis of bias, reversal of a defendant's conviction is warranted only if the defendant can show actual bias in the proceedings. *State v. Moss*, 269 N.W.2d 732, 734-35 (Minn. 1978); *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). We believe it is fair to say that the district court judge's pre-trial comments had "personal overtones" that do not "reflect[] the restraints of conventional judicial demeanor." *Offutt v. United States*, 348 U.S. 11, 12, 75 S. Ct. 11, 12 (1954). In addition, the district court judge offered his comments repeatedly and without provocation. In light of our disposition in part I, however, it is unnecessary to decide whether the district court judge's pre-trial comments evidence an unconstitutional lack of impartiality.

Reversed and remanded.