STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0601

State of Minnesota,
Respondent,

vs.

Kraig Daniel Pettee,
Appellant.

Filed June 17, 2008
Affirmed
Halbrooks, Judge

Washington County District Court
File No. K8-03-6563

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

Doug Johnson, Washington County Attorney, Robert Molstad, Assistant County Attorney, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Benjamin S. Houge, Benjamin S. Houge Law Office, 13481 North 60th Street, Suite 201, Oak Park Heights, MN 55082 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant Kraig Pettee challenges his sentence on the ground that the district court's correction of a clerical error in the sentencing order is an impermissible increase in the length of his sentence. We affirm.

FACTS

Appellant pleaded guilty to one count of a pattern of harassing conduct in violation of Minn. Stat. § 609.749, subd. 5(a), (b) (2002). The plea was accepted by the district court on October 6, 2004. With appellant and his counsel present, the district court sentenced appellant on the record to supervised probation "for a period not to exceed ten years." But appellant's written sentencing order contained a clerical error. With respect to the duration of the term of supervised probation, the number "10" is filled in with the word "months" rather than "years" circled.

A restitution hearing was held on December 14, 2004; appellant and his counsel were present. Following the hearing, the district court issued a restitution order that included the statement that appellant's "sentencing order is amended to include the following: [appellant] is placed on probation with conditions: 10 years of supervision," as opposed to the "typographical error that specified [appellant] was to be placed on probation for 10 months." The order was served on both the county attorney and appellant's attorney.

Appellant subsequently admitted to violating the terms of his probation by failing to abstain from mood-altering chemicals. The district court imposed a stayed felony-

level commitment to the Commissioner of Corrections for 23 months in addition to a 30-day jail sentence. When appellant admitted to a second probation violation for failing to abstain from mood altering chemicals, the district court sentenced him to 120 days in jail and reinstated appellant's probation and the stay of execution of his felony-level sentence. Following appellant's third admitted violation of his probation, the district court revoked the stay of execution and imposed a 23-month felony commitment to the Commissioner of Corrections. This appeal follows.

D E C I S I O N

Appellant makes multiple arguments in support of his assertion that the district court's correction of his probation term is void. In a challenge to a criminal sentence, an exercise of the district court's sentencing authority is reviewed for an abuse of discretion. *State v. Kelly*, 504 N.W.2d 513, 519 (Minn. App. 1993), *rev'd on other grounds*, 519 N.W.2d 202 (Minn. 1994). On review of a sentencing order, an appellate court is to

> determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the sentencing court. . . . The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct.

Minn. R. Crim. P. 28.05, subd. 2.

When there is a conflict between the written sentencing described in the judgment and the oral sentence on the record, the oral sentence pronounced by the district court controls. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002) (applying the "firmly established and settled principle of federal criminal law that an orally pronounced

sentence controls over a judgment and commitment order when the two conflict." (quotation omitted)). When the oral sentence pronounced by the district court is not ambiguous, an appellate court does not need to consider the written sentence to assist in determining what sentence was imposed by the district court. *Id.*

Here the district court very clearly announced on the record a sentence "placing [appellant] on probation . . . for a period not to exceed ten years" at the sentencing hearing in 2004. Appellant was present when this sentence was pronounced, and he signed a probation agreement on October 6, 2004, that included the ten-year term. Appellant's counsel challenged the district court's correction of appellant's probation term at his probation-revocation hearing in 2006. But the district court made the following finding in its order imposing appellant's 23-month commitment to the Commissioner of Corrections.[1]

> At the time I sentenced [appellant], I sentenced him exactly consistent with the recommendations of Community Corrections, and with what I do with all felony probationers, and the period. The period that is recommended is governed by the crime itself and the maximum sentence that can be imposed, and his crime qualified him for ten years of probation. I pronounced the sentence as ten years of probation; I meant it then, I mean it now. A clerical error by the clerk in the courtroom circling months instead of years, words that were right next to each other, resulted in [appellant] finding something to argue about with his probation officer, and to say glory be, lucky me, I'm only on probation for ten months. And it came to the [district] [c]ourt's attention because of the way he was presenting it to his probation officer, gleefully saying I can now rely on this.

[1] The district court judge who presided over appellant's 2006 revocation hearing is the same district court judge who presided over appellant's sentencing and restitution hearings.

. . . .

> His desire here is to rely on a mistake, and then to bootstrap that into a motion to discharge him from probation because, as we can see, he is unsuccessful on probation. The unfairness to him of the impact of a mistake is not seen by [the district] [c]ourt.

The district court has the ability to correct a clerical error in the sentencing order "at any time." Minn. R. Crim. P. 27.03, subd. 8. Based on the district court's clear oral statement of appellant's sentence, there is no merit to appellant's assertions. The written order contained a clerical error that the district court properly corrected in the restitution order.

Appellant next argues that the ten-year probation term is void because it was not incorporated into a sentencing order as required by Minn. R. Crim. P. 27.03, subd. 6(B). The probation term was included in the sentencing order, albeit with a clerical error. Appellant's argument conflicts with Minn. R. Crim. P. 27.03, subd. 8, which allows a district court to correct a clerical error "at any time." Further, Minn. R. Crim. P. 27.03, subd. 8, does not require notice when a district court corrects a clerical error. *See* Minn. R. Crim. P. 27.03. Appellant's argument lacks merit.

Appellant argues that the ten-year probation term is void because he was not present when it was imposed. Minn. R. Crim. P. 27.03, subd. 3, requires a district court to give "the prosecutor, the victim, and defense counsel an opportunity to make a statement . . . and ask if the defendant wishes to make a statement in the defendant's own behalf . . . before sentenc[ing]." Appellant suggests that the district court should be required to go through these same steps to correct a clerical error. But like appellant's

previous argument, this would render the "at any time" language of Minn. R. Crim. P. 27.03, subd. 8, meaningless. Appellant characterizes the clerical correction as a "modification" that was based on off-the-record communication in violation of Minn. R. Crim. P. 27.03, subd. 3. This argument lacks merit.

Appellant also asserts a due-process argument, stating that he was not given an opportunity to be heard before the district court corrected the error. But appellant had an opportunity to be heard when he was sentenced. There is no due-process violation in the district court's correction of a clerical error.

Appellant attempts to import civil-contract principles by arguing that he had reason to rely on the terms of the sentencing agreement and that the district court's unilateral modification should be void. Other than in plea agreements, contract principles do not apply to criminal matters, and we will not apply them here. *See In re Ashman*, 608 N.W.2d 853, 858 (Minn. 2000); *State v. Spaeth*, 552 N.W.2d 187, 194 (Minn. 1996).

Appellant's final argument is that the district court's correction amounts to an increase in his sentence after the time for appeal has expired. There has been no increase here—only a correction of a clerical error. Appellant was present when he was sentenced and signed a document acknowledging his ten-year probation term. Because there is no modification of his sentence, appellant's arguments lack merit.

Affirmed.