STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1668

State of Minnesota,
Respondent,

vs.

James Matthew McCarty,
Appellant.

Filed November 4, 2008
Affirmed
Ross, Judge

Dakota County District Court
File Nos. K2-06-3413, K5-06-2661, K5-06-2899, K7-06-4282

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

James McCarty appeals from his sentence following his conviction upon pleading guilty to felony issuance of dishonored checks and two other crimes. He argues that because the district court did not ask him all questions listed in Minnesota Rule of Criminal Procedure 15.01, subdivision 2, his waiver of his right to a sentencing jury regarding the crime of issuance of dishonored checks was defective. Our review of the record leads us to conclude that the district court's failure to comply with rule 15.01, subdivision 2, was harmless error, and we affirm.

FACTS

James McCarty pleaded guilty to possession of counterfeit checks, unauthorized use of a motor vehicle, and felony issuance of dishonored checks. McCarty testified at his plea hearing, but the district court did not ask McCarty all questions listed in rule 15.01, subdivision 2. Based on McCarty's testimony, the district court sentenced him as a career offender to three concurrent 60-month terms of incarceration, to be served consecutive to the sentence for which he was already on supervised release. McCarty appeals and argues that because the district court did not question him in compliance with the recent amendments to the rules of criminal procedure, his waiver of a sentencing jury was defective.

D E C I S I O N

McCarty's appeal requires us to decide whether a waiver of *Blakely* rights to a sentencing jury is defective if the district court does not strictly comply with Minnesota

Rule of Criminal Procedure 15.01, subdivision 2, when confirming the waiver. We review issues involving waiver of *Blakely* rights de novo, *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004), and we consider *Blakely* errors under a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006); *accord Washington v. Recuenco*, 548 U.S. 212, 221, 126 S. Ct. 2546, 2553 (2006). An error is harmless if there is no reasonable doubt that the result would have been the same if the error had not occurred. *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006). We conclude that the district court's error was harmless.

The Minnesota Rules of Criminal Procedure were amended in 2006. These amendments "govern all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006." Promulgation of Amendments to the Rules of Criminal Procedure, No. C1-84-2137 (Minn. Aug. 17, 2006). On October 31, 2006, the state charged McCarty with felony issuance of dishonored checks. This offense is therefore governed by the rule as amended. McCarty's other two guilty pleas relate to crimes charged before the amendments took effect, and he does not challenge his sentences for those crimes.

The rule now requires the district court to ask the defendant multiple questions regarding waiver of *Blakely* rights. *See* Minn. R. Crim. P. 15.01, subd. 2(1)–(11). The district court did not ask McCarty the questions listed in the rule. But we conclude that this error is harmless in this case and does not require that we remand for resentencing.

A defendant's waiver of the right to a jury determination of aggravating factors must be made knowingly, voluntarily, and intelligently. *State v. Dettman*, 719 N.W.2d

644, 650–51 (Minn. 2006); *see Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The same standard applies whether a defendant waives the right to a jury trial on the elements of the offense or waives the right to a jury trial on aggravating factors. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). "A waiver made in compliance with Rule 26.01, subdivision 1(2)(a), meets the knowing, voluntary, and intelligent requirement." *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). Whether a defendant is subject to an enhanced sentence because he is a career offender is an aggravating factor for the jury to determine. *State v. Henderson*, 706 N.W.2d 758, 762 (Minn. 2005) (holding that enhanced sentencing under the career offender statute requires a jury's finding).

Rule 26.01, subdivision 1(2)(a), governs waiver of the right to jury trial on the elements of the offense, and subdivision 1(2)(b), nearly identical to subdivision 1(2)(a), governs waiver of the right to a sentencing jury. A defendant may "waive [a] jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(b).

At the plea hearing, McCarty testified that he had discussed his case with his counsel; had discussed the four-page plea agreement with his counsel; understood he was waiving his legal and constitutional rights; understood the presumptive sentence and its relationship to his criminal history score; and understood that because of his previous convictions, the state could seek to have him sentenced as a career offender. McCarty also answered more than a dozen other questions relating to his understanding of the

case, his preparation for court, the rights he was waiving, and whether he was coerced into pleading guilty. McCarty waived his rights personally on the record after being advised by his attorney of his right to a jury trial and after having the opportunity to consult with counsel. Because his waiver complied with rule 26.01, subdivision 1(2)(b), it was knowing, voluntary, and intelligent. *See Thompson*, 720 N.W.2d at 827–28 (explaining that waiver of jury trial on elements of the offense is knowing, voluntary, and intelligent if it complies with rule 26.01); *Barker*, 705 N.W.2d at 773 (stating that standard for waiver of jury trial on sentencing factors is same as that for elements of the offense). McCarty attempts to distinguish *Thompson* by noting that Thompson waived fewer rights than McCarty waived. But this difference does not substantively distinguish *Thompson*, whose holding did not rest on the number of rights at issue but on whether the defendant's colloquy with the court indicated that she understood the rights she was waiving. *Thompson*, 720 N.W.2d at 827–28.

McCarty is correct that the district court did not follow the template of rule 15.01, subdivision 2, and we do not suggest that a district court may overlook the particulars of the rule. But the harmlessness of the omission in this case is apparent. We have no reason to doubt that McCarty's waiver of his *Blakely* rights was knowing, intelligent, and voluntary, and that had the district court asked the other questions listed in rule 15.01, subdivision 2, McCarty would have given answers that supported the waiver. At sentencing, the state reminded the court that McCarty had earlier waived his *Blakely* rights in this case and McCarty did not object to this statement. Although the state's post-plea assertion is not sufficient to cure the district court's failure to comply with rule

15.01, McCarty's failure to object to or qualify the statement supports our conclusion that the error was harmless. And, as the state points out, it is completely implausible that a jury on remand would not find McCarty to be a career offender after he had previously been found to be a career offender and was determined to be a career offender regarding two unchallenged sentences that were issued the same day as the challenged sentence.

McCarty does not challenge his *Blakely* waiver on the other two crimes for which he was concurrently sentenced. It also appears that even were McCarty to prevail on this appeal and then be sentenced to less time on remand for the offense at issue, he would still face the same 60 months in prison; the only difference is that he would serve the period under two concurrent sentences rather than three. There is no reasonable doubt as to whether the result would have been different if the error had not occurred. *See DeRosier*, 719 N.W.2d at 904.

McCarty has more than a passing familiarity with the criminal justice system. Before his conviction in this case, he had 14 felony convictions, three gross-misdemeanor convictions, and seven misdemeanor convictions, and his criminal history score is 11. This also supports our decision to affirm. *Cf. State v. Doughman*, 340 N.W.2d 348, 353 (Minn. App. 1983) ("[A]ppellant's criminal history makes it unlikely that he was unaware of the consequences of a guilty plea."), *review denied* (Minn. Mar. 15, 1984). The district court's noncompliance with the recently effective rule 15.01, subdivision 2, was harmless error.

Affirmed.