STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1914

State of Minnesota,
Respondent,

vs.

Jacquet Deon Munn,
Appellant.

Filed November 25, 2008
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 05081906

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 80 South Eighth Street, Minneapolis, MN 55487 (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, 875 Summit Avenue, Room 254, St. Paul, MN 55105 (for appellant)

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

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant challenges the revocation of his probation, arguing that the district court (1) erred by failing to apply the exclusionary rule to probation revocation hearings and (2) violated his constitutional right to represent himself at the probation revocation hearing. In his supplemental pro se brief, appellant argues that because his tape-recorded confession was coerced, the district court improperly considered it. We affirm.

FACTS

On June 2, 2006, appellant Jacquet Munn received a stayed sentence of 39 months' imprisonment for his conviction of third-degree assault and was placed on probation for five years. A condition of Munn's probation required him to be law-abiding.

Later that month, Munn was a passenger in a car that was stopped by police. The police officer observed suspicious behavior and ordered Munn out of the vehicle. An ensuing search revealed ecstacy pills in Munn's pocket. Munn was arrested and sought to avoid being charged by offering to assist police in identifying and prosecuting three drug dealers. Munn then admitted to possessing ecstasy with the intent to distribute.

After eliciting Munn's confession and learning that he was on probation, police spoke with Munn's probation officer. It was determined that Munn's information was not reliable, and the case was referred for prosecution. On January 3, 2007, Munn was charged with fifth-degree possession of a controlled substance.

Based on the controlled-substance charge, a probation revocation (*Morrissey*) hearing was held on March 16, 2007, in the present case. Testimony was presented regarding Munn's arrest and the discovery of the ecstacy pills in his possession. The district court also received as evidence the *Scales* recording of Munn's confession to possessing the controlled substance with intent to distribute. At Munn's request, the district court reserved ruling on the probation revocation pending the resolution of the controlled-substance charge.

Following a *Rasmussen* hearing, the district court assigned to the controlled-substance case dismissed the charge after concluding that the evidence was obtained illegally. Nonetheless, on July 9, 2007, three days after Munn's controlled-substance charge was dismissed, in the present case the district court revoked Munn's probation and executed the 39-month sentence. The district court denied Munn's petition for reconsideration, and this appeal followed.

D E C I S I O N

I.

Munn argues that because probation revocation hearings are significantly different from parole revocation hearings and there is more than a minimal deterrent effect in applying the exclusionary rule to probation revocation hearings, the district court committed reversible error by failing to apply the exclusionary rule to suppress the evidence presented at Munn's probation revocation hearing. To prevail on this argument, Munn necessarily would have us reverse this court's decision in *State v. Martin*, 595 N.W.2d 214 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999).

"A reviewing court need not defer to the district court's application of the law when the material facts are not in dispute." *Engler v. Wehmas*, 633 N.W.2d 868, 872 (Minn. App. 2001) (citing *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989)), *review granted* (Minn. Dec. 19, 2001), *appeal dism'd* (Minn. Apr. 5, 2002). But "the task of extending existing law falls to the supreme court or the legislature, it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The exclusionary rule requires that evidence obtained by an illegal search cannot be used in criminal prosecutions. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961). However, fruits of an illegal search may be used for purposes that do not contravene the policies underlying the exclusionary rule. *State v. Earnest*, 293 N.W.2d 365, 370 (Minn. 1980) (Rogosheske, J., concurring). For example, in *Pa. Bd. of Prob. & Parole v. Scott*, the United States Supreme Court held that the exclusionary rule is inapplicable to *parole* revocation proceedings. 524 U.S. 357, 364, 118 S. Ct. 2014, 2020 (1998). In doing so, the Supreme Court balanced the costs of excluding reliable, probative evidence in *parole* revocation proceedings against the benefits of deterring illegal search and seizures, and concluded that illegally seized evidence would be barred only where such benefits outweigh the costs. *Id.* at 365, 118 S. Ct. at 2020.

In *State v. Martin*, after finding that "there is . . . no material distinction between the probation and parole systems," we extended the holding in *Scott* to probation

revocation proceedings. 595 N.W.2d at 216. There, Martin received a stayed sentence after pleading guilty to third-degree possession of a controlled substance. *Id.* at 215. As a condition of probation, Martin was prohibited from possessing nonprescription narcotics. *Id.* One year later, during a search incident to a traffic stop, Martin was found to possess crack cocaine. *Id.* Martin moved to suppress the crack cocaine as fruit of an illegal search, and the district court dismissed the drug charge. *Id.* at 215-16. However, the suppressed evidence was admitted during Martin's probation revocation hearing, and his probation was revoked. *Id.* at 216.

Martin appealed to this court, arguing that the crack-cocaine evidence was inadmissible in the probation revocation proceeding because it was illegally obtained. *Id.* Relying on *Scott*, we concluded that there is no material difference between probation revocation proceedings and parole revocation proceedings and that illegally seized evidence can be introduced in probation revocation proceedings. *Id.* at 216-17. In reaching this result, we reasoned that when evidence is illegally seized by officers who are unaware of the accused's probationary status, the exclusionary rule is applied to suppress the evidence in the underlying criminal proceeding, and there is a minimal deterrent effect in excluding the illegally seized evidence in the probation revocation proceeding. *Id.* at 218-19.

Here, Munn contends that, because a probationer is entitled to a more formal hearing before the court in which he has a constitutional "right to counsel, to have the State prove its allegations by clear and convincing evidence, to discovery, to offer evidence, to present arguments, to subpoena witnesses, to confrontation, and to present

mitigating circumstances . . . ," probation revocation hearings are significantly different from parole revocation hearings. We have expressly rejected this argument. As discussed above, in *Martin*, this court held that "there is . . . no material distinction between the probation and parole systems." *Martin*, 595 N.W.2d at 216.

Munn also argues that, because both police officers and probation officers are "peace officers" that "often work with each other," there is more than a minimal deterrent effect in applying the exclusionary rule to probation revocation proceedings. Courts examining the exclusionary rule under both the United States and Minnesota constitutions have held that the primary purpose of the exclusionary rule is to deter unconscionable invasions of privacy by the police. *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291 (1985); *State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998); *State, City of Minneapolis v. Cook*, 498 N.W.2d 17, 20 (Minn. 1993); *State v. Conaway*, 319 N.W.2d 35, 41 (Minn. 1982). But we have held that, when there is no allegation that police conducted the search knowing the probationer's status, the exclusionary rule has little or no deterrent effect. *Martin*, 595 N.W.2d at 219. In such cases, the dismissal of the underlying charge provides the intended deterrent effect on police misconduct. *Id.*

Just as in *Martin*, Munn does not allege that at the time of the search the officer was aware of his probationary status.[1] Moreover, there is nothing in the record to support such an allegation. Munn makes no attempt to distinguish this case from *Martin*. While the supreme court's denial of a petition for further review is not an expression of

[1] This issue was raised and rejected by the district court in Munn's motion to reconsider, but because it was not raised or briefed on appeal, the argument is waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

opinion on the merits, *Murphy v. Milbank Mut. Ins. Co.*, 388 N.W.2d 732, 739 (Minn. 1986), it makes this court's opinion binding on the district court, *Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988). Based on the evidence before us, there is no reason to distinguish *Martin*, and we decline to overrule it. Accordingly, the district court did not err by considering the illegally obtained evidence at Munn's probation revocation hearing.

II.

Munn next argues that the district court committed reversible error by declining his request to represent himself during his probation revocation hearing. The Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 6 and 7, of the Minnesota Constitution guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV, § 1; Minn. Const. art. I, §§ 6, 7. A criminal defendant also has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2540-41 (1975); *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). Upon proper request, a defendant must be allowed to represent himself despite a lack of knowledge or legal ability to conduct a good defense. *State v. Thornblad*, 513 N.W.2d 260, 262 (Minn. App. 1994). A defendant's right to self-representation is so fundamental that deprivation of that right is not subject to a harmless error analysis. *Richards*, 456 N.W.2d at 263. This court applies the clearly erroneous standard in reviewing the district court's denial of a request to represent oneself. *State v. Christian*, 657 N.W.2d 186, 190 (Minn. 2003).

As a predicate to waiving the right to counsel, the Minnesota Supreme Court has adopted a two-pronged inquiry. *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997). First, if the district court has reason to doubt the defendant's competency, the district court must find "that the defendant is competent to stand trial." *Id.* (quotation omitted). Second, a defendant's request for self-representation must be "clear, unequivocal, and timely," as well as knowing and intelligent. *Richards*, 456 N.W.2d at 263.

The legal standard for mental competency to waive the assistance of counsel is similar to that for competence to stand trial. *Camacho*, 561 N.W.2d at 171. In Minnesota, a defendant is not competent to stand trial if the defendant "(1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel; or (2) is mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in the defense." Minn. R. Crim. P. 20.01, subd. 1.

Here, neither party challenges Munn's competency. Moreover, there is no evidence in the record to support such a claim. Therefore, the district court had no reason to doubt Munn's competence, and it will not be considered here.

Once the district court determines that the defendant is competent to waive counsel, the defendant's waiver must be clear, unequivocal, and timely. *Richards*, 456 N.W.2d at 263. A waiver is clear if it is free from doubt or unambiguous. *Black's Law Dictionary* 244 (7th ed. 1999). The defendant's motion for self-representation is not equivocal when it is an alternative or fallback position in the event the district court does not grant the defendant's request for substitute counsel. *State v. Blom*, 682 N.W.2d 578,

613 (Minn. 2004); *see also Black's Law Dictionary* 1529 (7th ed. 1999) (defining unequivocal as "[u]nambiguous; clear; free from uncertainty"). A request is untimely if it is likely or calculated to cause delay. *Blom*, 682 N.W.2d at 613 (upholding denial of request for self-representation made near end of long trial). The district court must balance the defendant's right to self-representation with the possibility of a disruption or the undue delay of a proceeding. *Christian*, 657 N.W.2d at 191.

Based on our careful examination of the record, we hold that Munn's request to represent himself at the probation revocation hearing was not clear, unequivocal, or timely. During the hearing, Munn requested that the record reflect that he had been "denied access to the law" and that the record include his written requests for access to the law. While explaining his position, Munn stated that he "can't even get no type of material that can tell [him] what is going on in the court," and that he "can't fairly prepare [himself] to defend [himself]." In attempting to clarify Munn's request, the following exchange occurred:

> THE COURT: It sounds like what you are saying is that – and I am not sure if you want – I mean, you are not saying you want to represent yourself. I mean, clearly you want a lawyer.
> [MUNN]: Yeah, if that would be available, *I would like to be able to* represent myself. *I would like to have* a paralegal and a private investigator.
> THE COURT: [Your lawyer] represents you and he's represented you all along and he is going to represent you at this hearing too. If you feel you need more time to talk with him. I mean, that is another issue.

(Emphasis added.) The district court went on to state:

> I mean, [your lawyer] has been a lawyer longer than I can remember and you know, he is the one who knows the law, knows how to represent you and knows what the issues are here and what the procedures are and that is why we are here is to go forward on this – on the hearing.
>
> I mean, if you want to put in the record that you have requested books from the library and the library says they can't give them to you, I understand that but, at the same time, you have got a very [competent] lawyer here representing you and who is prepared to go forward defending you against the allegation that you violated the conditions of your probation. I mean, that is the purpose of the hearing here.

And Munn stated: "Well, if I could, I would like to have a couple minutes to refer to my lawyer because there are things about this case . . . I don't know if he is aware of. I want him aware of some things."

The district court granted Munn and his attorney the opportunity to confer. Thereafter, Munn's attorney stated that they were "prepared to proceed" and that Munn's questions had been answered. Munn did not object. Nor did Munn subsequently raise the issue of self-representation. Munn's attorney continued to represent him for the duration of the probation revocation hearing.

Having reviewed the record, including the exchange between Munn and the district court, we conclude that Munn did not make a clear and unequivocal request to represent himself.

Nor would Munn's request to represent himself have been timely. Munn stated several times throughout the proceeding that he was unprepared and unable to represent himself. For example, Munn testified that he could not "read what a Morrisey hearing" was because there is no law library at the Hennepin County jail. Munn also admitted

that, because of his limited access to materials, he could not "fairly prepare myself to defend myself." Finally, Munn told the district court that in preparing his defense he would "like to have a paralegal and a private investigator."

It is clear that, because Munn would need time to prepare to represent himself, permitting him to do so would cause a delay in the proceedings. Based on the testimony before the district court and after balancing the right of the defendant to represent himself with the potential for an undue delay in the proceedings, Munn's purported request was untimely.

When a district court determines that a clear, unequivocal, and timely request for self-representation is made, the waiver of counsel also must be "knowing and voluntary." *Richards*, 456 N.W.2d at 263; Minn. R. Crim. P. 20.01, subd. 1. Because we have determined that the district court did not err in finding that Munn failed to make a clear, unequivocal, and timely request for self-representation, the district court did not err by failing to inquire into whether his waiver was knowing and intelligent.

III.

In his supplemental pro se brief, Munn argues that, because his confession was coerced, the district court improperly considered his tape-recorded confession in revoking his probation. The state must establish by a preponderance of the evidence the voluntariness of a confession. *State v. Jones, III*, 566 N.W.2d 317, 326 (Minn. 1997). This court reviews de novo the voluntariness of a confession "as a question of law based on all factual findings that are not clearly erroneous." *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999) (quotation omitted).

A statement is involuntary if, after examining all the relevant factors, police interrogations were so coercive, manipulative, or overpowering that the defendant was unable to "make an unconstrained and wholly autonomous decision to speak as he did." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). Examining the relevant factors is a subjective, factual inquiry into all the circumstances surrounding the confession. *State v. Moorman*, 505 N.W.2d 593, 600 (Minn. 1993) (holding that telling accused that evidence links him to murder when it does not, does not render confession involuntary). Relevant factors a district court may consider include the defendant's age; maturity; intelligence; education; experience, including experience within the criminal-justice system; and the nature and length of interrogation. *Id.*; *Ritt*, 599 N.W.2d at 808; *State v. Thaggard*, 527 N.W.2d 804, 808 (Minn. 1995). Police cannot use deception to elicit a confession. *State v. Garner*, 294 N.W.2d 725, 727 (Minn. 1980) (holding that confession elicited from an intoxicated accused who had been intentionally lied to, threatened with excess criminal charges, and physically approached in an intimidating way was involuntary). However, the use of trickery and deception does not render a confession per se involuntary. *Thaggard*, 527 N.W.2d at 810 (stating that "the use of trickery and deception is to be considered along with all the other relevant factors in determining if a confession was involuntary . . . .").

Munn was arrested on June 27, 2006, and voluntarily returned the following day for questioning, which lasted less than 15 minutes. Munn was almost 35 years old and had prior experience with the criminal-justice system. *See Moorman*, 505 N.W.2d at 600 (finding that prior experience with criminal justice-system is significant factor in

concluding that confession was voluntary). Prior to any questioning, Munn was given a *Miranda* warning. In addition, because Munn had a lengthy criminal record, he also had received *Miranda* warnings on prior occasions.

Moreover, there is no evidentiary support for Munn's claim that police intentionally lied to elicit a confession. An officer testified that Munn approached the police and asked if he could "work off" the charges by cooperating with them, and Munn was advised that the police needed to check with Munn's probation officer before an agreement could be reached. Munn testified that he began cooperating with police knowing that the police had yet to contact his probation officer. Because of Munn's prior history with the criminal-justice system, such statements by police are not sufficient to hinder Munn from making "an unconstrained and wholly autonomous decision to speak as he did." *Pilcher*, 472 N.W.2d at 333. Based on the record before us, we determine that the district court did not err by considering Munn's confession.

Affirmed.