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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2335**

State of Minnesota,
Respondent,

vs.

Mark McKissic,
Appellant.

**Filed March 17, 2009
Reversed and remanded
Hudson, Judge**

Ramsey County District Court
File No. K9-06-3296

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Poritsky, Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from his conviction of failure to register as a predatory offender, appellant argues that the district court erred when it failed to follow the proper procedure for a *Lothenbach* trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. We reverse and remand.

FACTS

On January 11, 1994, appellant Mark Edward McKissic was convicted of third-degree criminal sexual conduct. He was required to register as a predatory offender from February 15, 1994 to February 14, 2004. On February 15, 1994, appellant signed a sex-offender notification form, which apprised him of his obligation to register with a corrections agent and register all changes of address. On the same date, appellant also signed a sex-offender registration form.

In February 2006, respondent Ramsey County (the state) charged appellant with failure to register as a sex offender based on the state's belief that a 2003 conviction for interference with a 911 call extended appellant's original period of registration. Appellant was similarly charged in Hennepin County. The Hennepin County district court dismissed the case for lack of venue. The state filed an amended complaint (in Ramsey County district court) alleging that appellant failed to register for the time period of March 19, 2002 to February 14, 2004. Appellant discharged his public defender and chose to appear pro se. The district court appointed stand-by counsel.

On June 4, 2007, appellant moved to dismiss the charge against him on the basis that the charge was previously dismissed by Hennepin County. The district court denied the motion. On June 25, 2007, appellant again moved to dismiss the charge. Appellant had two bases for this motion: (1) lack of jurisdiction, and (2) discovery violations by the state. The district court denied the motion on both bases, and the matter was continued for a jury trial.

At trial, appellant planned to introduce into evidence documents concerning the dismissal of his Hennepin County case; the state brought motions in limine to prohibit the introduction of this evidence. The district court ruled that those documents were inadmissible because they were irrelevant to the current charges.

On July 30, 2007, appellant signed a waiver of his right to a jury trial. The district court referred to the proceeding as a “stipulated-facts *Lothenbach* proceeding.” The district court verified that it was appellant’s signature on the waiver and stated:

You understand that you do have a right to a jury trial and that only you can waive that right You have the right to testify at trial, have the right to have the prosecution have witnesses testify in open court, and the right to confront and cross-examine those witnesses. You also have the right to require any witnesses you so choose to testify on your own behalf in court.

Appellant indicated that he understood these rights. The district court then stated that it had received two waivers from appellant but would “go with the waiver of jury trial pursuant to Rule 26.01, subd. 3.” Appellant requested to introduce into evidence documents pertaining to his past refusal to sign registration forms, but because the court had previously ruled them inadmissible, it “receiv[ed] them for purposes of the record so

that if and when [appellant] appeals the decisions that this Court has made with regard to the motions in limine and other motions, that those will be seen by the Appellate Court.” The district court then admitted into evidence documents pertinent to appellant’s previous motions to dismiss, namely, the Hennepin County district court decision. The district court pointed out that these documents were inadmissible for the purpose of determining guilt or innocence, and were “going to the specific issue of the *Lothenbach* trial” But the district court later stated that it was “not receiving [appellant’s] documents for purposes of the *Lothenbach*. They are received for purposes of the appeal only.”

The district court ruled that appellant had violated the predatory-offender registration law because appellant had previously acknowledged his duty to register as a convicted sex offender by signing sex-offender notification and change-of-information forms and because appellant had moved without notifying the BCA.

At sentencing, appellant moved to withdraw his jury-trial waiver and agreement to a stipulated-facts trial and requested a jury trial. The district court denied appellant’s motion and stated that appellant was “found guilty by a stipulated-court trial.” The district court sentenced appellant to one year and one day and stayed execution of the sentence. Before the end of proceedings, the district court once more clarified that appellant had entered into a stipulated-facts trial and had been found guilty. This appeal follows.

DECISION

Appellant argues that the district court failed to follow the proper procedure for a *Lothenbach* trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. Whether a statute has

been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). The rule at issue here, Minn. R. Crim. P. 26.01, is strictly construed. *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986).

Under Minn. R. Crim. P. 26.01, subd. 3 (the stipulated-facts trial rule):

[T]he defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court pursuant to subdivision 2 of this rule. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

Alternatively, Minn. R. Crim. P. 26.01, subd. 4 (the *Lothenbach* trial rule) states:

When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case . . . the following procedure shall be used to preserve the issue for appellate review. The defendant shall maintain the plea of not guilty. The defendant and the prosecuting attorney shall acknowledge that the pretrial issue is dispositive, or that a trial will otherwise be unnecessary if the defendant prevails on appeal. The defendant, after an opportunity to consult with counsel, shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3. The defendant shall stipulate to the prosecution's evidence in a trial to the court, and acknowledge that the court will consider the prosecution's evidence and may find the defendant guilty based on that evidence. The defendant shall also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial. The defendant and the prosecuting attorney must make the foregoing acknowledgments personally, in writing or orally on the

record. The court after consideration of the stipulated evidence shall make an appropriate finding, and if that finding is guilty, the court shall also make findings of fact, orally on the record or in writing, as to each element of the offense(s).

In *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980), the supreme court concluded that a defendant does not waive the right to appeal pretrial issues despite stipulating to facts. “In essence, when submitting his case under *Lothenbach*, a defendant concedes the truth of the facts that the state presents to the district court.” *State v. Riley*, 667 N.W.2d 153, 157 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003) (citation omitted). Minn. R. Crim. P. 26.01, subd. 4, codifies *Lothenbach* and provides that the defendant in a *Lothenbach* proceeding “shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3.” The same rule provides that if the court finds the defendant guilty, the court “shall [] make findings of fact, orally on the record or in writing, as to each element of the offense(s).” *Id.*

This court has distinguished between a *Lothenbach* proceeding and a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, stating that “the rule [26.01, subd. 3] permits the defendant to raise issues on appeal as from any trial to the court, whereas the *Lothenbach* procedure is intended merely to preserve pretrial issues when the facts are basically undisputed.” *State v. Mahr*, 701 N.W.2d 286, 291 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

Here, the district court excluded the evidence of the Hennepin County dismissal and also allowed the state to introduce the certified copies of the signed registration

notification documents. This evidence may have been dispositive of the outcome, in which case a *Lothenbach* hearing would have been appropriate.

But at times, the district court appeared to follow the applicable rules of criminal procedure for a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3, while simultaneously referring to the proceeding as a *Lothenbach* proceeding. For instance, when appellant signed a waiver of his right to a jury trial, the district court referred to the proceeding as a “stipulated-facts *Lothenbach* proceeding.” But then the district court proceeded to question appellant under the procedure in Minn. R. Crim. P. 26.01, subd. 3. This is somewhat confirmed by the district court’s statement that it had received two waivers from appellant but would “go with the waiver of jury trial pursuant to rule 26.01, subd. 3.”

Appellant indicated his desire to introduce into evidence documents pertaining to his past refusal to sign registration forms, but because the court had previously ruled them inadmissible, it “receiv[ed] them for purposes of the record so that if and when [appellant] appeals the decisions that this Court has made with regard to the motions in limine and other motions, that those will be seen by the Appellate Court.” This seemed to indicate that a *Lothenbach* proceeding was underway, since the motions in limine and the evidence of the Hennepin County decision may have been dispositive of the case. The district court then admitted into evidence documents pertaining to the Hennepin County district court decision. The district court pointed out that these documents were inadmissible for the purpose of determining guilt or innocence and were “going to the specific issue of the *Lothenbach* trial” But inexplicably, the district court later stated

that it was “not receiving [appellant’s] documents for purposes of the *Lothenbach*. They are received for purposes of appeal only.”

It appears that the district court conflated subdivision 3 and subdivision 4 of Minn. R. Crim. P. 26.01. The pretrial issues of the admissibility of the Hennepin County documents and the signed consent forms may have been dispositive, and if so, the district court should have held a *Lothenbach* trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. Alternatively, if the pretrial issues were not dispositive, the district court should have held a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3. On this record, it is not clear which type of trial the district court held.

We also note that if the district court intended to hold a *Lothenbach* trial pursuant to Minn. R. Crim. P. 26.01, subd. 4, the court was not in compliance with the rule because: (1) appellant and the prosecuting attorney did not acknowledge that the pretrial issue was dispositive or that a trial would otherwise be unnecessary if appellant prevailed on appeal; (2) appellant did not stipulate to the prosecution’s evidence (he, in fact, openly refused to stipulate to it in the pretrial hearing), nor did he acknowledge that the court would consider the prosecution’s evidence and could find him guilty based on that evidence; and (3) appellant did not acknowledge that appellate review would be of the pretrial issue. Even though the district court made a finding of guilt and also made findings of fact orally on the record as to the elements of the offense, without the foregoing acknowledgments by appellant and the prosecuting attorney, the purported *Lothenbach* trial was procedurally flawed.

If the district court intended to hold a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3, it is unclear why the district court expressly and impliedly referred to the proceedings as a *Lothenbach* trial, i.e., “[the documents are] going to the specific issue of the *Lothenbach* trial . . .” and, “[the documents are received] for purposes of the record so that if and when [appellant] appeals the decisions that this Court has made with regard to the motions in limine and other motions, that those will be seen by the Appellate Court.”

Under *Sandmoen*, rule 26.01 must be strictly construed, and here, compliance with the rule was not accomplished. Appellant was entitled to either a stipulated facts trial, or a *Lothenbach* trial, but he received an amalgamation of both. Accordingly, we reverse and remand for a new trial.¹

Reversed and remanded.

¹ Appellant raises two issues in his pro se supplemental brief: that he was not notified at trial in 1994 of his duty to register and that his case was previously dismissed by Hennepin County. First, appellant has not provided a transcript to prove that his duty to register was “no[t] mention[ed]” at trial and the notification forms he signed prove to the contrary. Second, the dismissal of his Hennepin County case is already being addressed in this appeal.