STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0357

State of Minnesota,
Respondent,

vs.

Don Edward Schroeder, Jr.,
Appellant.

Filed April 14, 2009
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Fillmore County District Court
File No. K1-05-441

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

Brett Corson, Fillmore County Attorney, Kelly M. Wagner, Acting Fillmore County Attorney, 101 Fillmore Street, Box 307, Preston, MN 55965 (for respondent)

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

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

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

HALBROOKS, Judge

Appellant challenges his conviction on the ground that he did not waive the required rights for a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3 (2005). He also challenges the district court's order requiring him to reimburse the public defender in the amount of $500. Because appellant's trial was not a stipulated-facts trial requiring waiver of the rights contained in Minn. R. Crim. P. 26.01, subd. 3, we affirm appellant's conviction. But because the district court did not make findings regarding appellant's ability to pay the $500 reimbursement, we reverse that order and remand to the district court.

FACTS

On May 13, 2004, an Iowa court issued an order for protection (OFP) prohibiting appellant Don Edward Schroeder, Jr. from having any contact with S.S. On September 20, 2004, following modification of the OFP, appellant pleaded guilty in Iowa to violation of the OFP. On August 4, 2005, appellant was charged in Minnesota with a gross-misdemeanor violation of an OFP, which required proof of a "previous qualified domestic violence-related offense conviction." Minn. Stat. § 518B.01, subd. 14(c) (2004). The state later amended the complaint to add a charge of misdemeanor violation of an OFP, which did not require proof of a prior conviction. *Id.*, subd. 14(b) (2004).

On the morning of trial, appellant's counsel advised the district court that in order to avoid any prejudice that might result from the introduction of a predicate offense,

appellant wanted to stipulate that the district court would determine that particular element of the crime. The district court summarized the proposal:

> [T]he stipulation was that [the state] would be submitting [its] evidence to the Court of the . . . alleged prior conviction, and if the Court determines that it meets the requirements, that the conviction meets the requirements of Minnesota Statutes, that that element would be determined by the Court and not go to the jury.

A discussion was then had about the potential evidence to be submitted to the district court. The district court stated that the evidence "would be based upon Minnesota Statutes and the four corners of the exhibit that [the state] submits or is there more evidence than the document you proposed to submit?" The prosecutor responded: "I would expect probably the witness, the victim, is going to talk about the conviction, you know, the prior incident and the conviction." Appellant's attorney objected to this potential testimony, stating:

> I am trying to avoid whatever collateral damage that might occur if the jury is told about something that happened previously. And if I am willing to stipulate that that is not an issue for the jury to determine or if my client is willing to allow the Court to determine that in the absence of the jury determining, then it seems to me that we don't need any testimony about that unless the testimony is brought in outside the presence of the jury, which I guess would be another way to handle the problem if [the prosecutor] feels that somehow he is being hamstrung by this stipulation in some way or another.

The district court concurred: "That's what I suggested. If there was testimony needed to supplement it, it could be testimony to the Court."

The record contains the following exchange between appellant and his attorney concerning the waiver of appellant's right to have the jury determine whether he had a prior qualified domestic-violence-related conviction:

> Attorney: I have explained to [appellant] that he has an absolute right to have the jury determine each and every element of this offense and that he also has the right to waive that or give up that right to have the jury determine certain elements of the offense if he chooses. But that he—if he does in fact agree to this, then he will basically put in the hands of the Court alone and not the jury the question of whether or not any violation that the jury may find has been committed is enhanceable by virtue of a prior violation in the State of Iowa.
>
> So, [appellant], you and I did talk about that, did we not?
>
> Appellant: Yes, we did.
>
> Attorney: You understand that you are giving up the right to have the six jurors unanimously make that decision that you have in fact committed a predicate offense that would enhance the penalty in this particular case?
>
> Appellant: Yes.
>
> Attorney: And you understand if you allow [the district court] to make that decision that you are giving up the right to have the jury determine that and that only [the district court] and not any other person will make that decision?
>
> Appellant: Yes.
>
> Attorney: But you are willing based on your conversation to tell the Judge that you are willing to give up that right to have a jury make that call in this particular case?
>
> Appellant: Yes, I am.

Before trial, the prosecutor admitted without objection Exhibit 3, a copy of appellant's 2004 Iowa judgment of conviction of violation of an OFP. By agreement of

counsel, this exhibit was for the district court only. During trial, the original and modified OFPs were admitted. Following the presentation of the state's case, appellant waived his right to testify and declined to present any evidence.

The jury found appellant guilty. The district court subsequently filed an order that determined the element of the prior qualified conviction. The document began with the following description:

> The [appellant] having stipulated to submitting to the Court's determination, and waiving jury determination of the issue, the element of the gross misdemeanor offense of violation of an order of protection that enhances the offense to a gross misdemeanor by virtue of a prior predicate offense; now, therefore, upon evidence received, the Court makes the following . . . .

The district court found "that the enhancement element has been proven beyond a reasonable doubt by the State of Minnesota." In making this determination, the district court relied on the exhibits of the original OFP, the modified OFP, and Exhibit 3, the document showing appellant's 2004 Iowa conviction of violation of an OFP.

At sentencing, the district court ordered appellant to reimburse the public defender $500 for the cost of representation. In making this order, the following exchange occurred:

> THE COURT: And, [appellant's attorney], how much time do you have in this matter?
> APPELLANT'S ATTORNEY: Well, we had a trial, so I guess it is about ten hours.
> THE COURT: The Court also requires that [appellant] reimburse the State of—this is not a condition of the stay of execution but I order that you reimburse the State of Minnesota Public Defender System the sum of $500 as and

> for a very small portion of the cost that it took to have an attorney represent you in this matter.

No other discussion of the reimbursement occurred.

This appeal follows.

D E C I S I O N

I.

Appellant argues that the element of the charged offense occurring within five years of a previous qualifying domestic-violence-related offense was tried to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3, and because he never waived the rights associated with this rule, he should be given a new trial or his conviction should be reduced to a misdemeanor.[1] "This court must treat the construction of a rule of criminal procedure as an issue of law subject to de novo review." *State v. Halseth*, 653 N.W.2d 782, 784 (Minn. App. 2002). We also strictly construe Minn. R. Crim. P. 26.01. *Id.*

A criminal defendant has the right to a jury trial. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1(1). A defendant may, with agreement by the state, submit the issue of guilt to "the court based on stipulated facts." Minn. R. Crim. P. 26.01, subd. 3. To make this stipulation, a defendant must "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." *Id.*; *see also*

[1] Appellant has not challenged the sufficiency of the evidence regarding either the 2004 or the current conviction.

Halseth, 653 N.W.2d at 787 (reversing and remanding for a new trial because the defendant did not acknowledge and waive the rights enumerated in Minn. R. Crim. P. 26.01, subd. 3).

Minn. R. Crim. P. 26.01, subd. 3, entitled "Trial on Stipulated Facts," provides:

> By agreement of the defendant and the prosecuting attorney, a case may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the 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.

Here, appellant did not submit the issue of his guilt to the district court "based on stipulated facts," nor was this a determination of a factor to support an aggravated sentence. Based on our review of the pretrial portion of the transcript, appellant's agreement to allow the district court to determine one element of the crime—whether the charged offense occurred within five years of a previous qualifying domestic-violence-related offense—was a considered decision of trial strategy.

Appellant's attorney stated, "[I]f [appellant] does in fact agree to this, then he will basically put in the hands of the Court alone and not the jury the question of whether or not any violation that the jury may find has been committed is enhanceable by virtue of a prior violation." When the prosecutor suggested that appellant could stipulate to the fact of the prior conviction, both the district court and appellant's attorney corrected him that a fact stipulation was not being contemplated. Instead, the district court explained that "[the state] would be submitting [its] evidence to the Court of the alleged prior order . . .

and if the Court determines that . . . the conviction meets the requirements of Minnesota Statutes, that that element would be determined by the Court and not go to the jury." The district court, the prosecutor, and appellant's attorney all agreed that no particular fact or evidence was being stipulated to. Appellant's attorney made clear the possibility of additional evidence:

> [I]f my client is willing to allow the Court to determine that in the absence of the jury determining, then it seems to me that we don't need any testimony [from the victim] unless the testimony is brought in outside the presence of the jury, which I guess would be another way to handle the problem.

Finally, the district court's order made no mention of any fact stipulation and relied on exhibits admitted both prior to and during the trial. Based on this record, we conclude that this was not a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3. We therefore affirm appellant's conviction.

II.

Appellant contends that the district court erred when it ordered appellant to reimburse the public defender without making any inquiry or findings regarding his ability to pay. We review an order to reimburse the costs expended by a public defender for abuse of discretion. *See State v. Mozeley*, 450 N.W.2d 149, 152 (Minn. App. 1990).

Minnesota law provides:

> Any person who is represented by a public defender or appointive counsel shall, if financially able to pay, reimburse the governmental unit chargeable with the compensation of such public defender or appointive counsel for the actual costs to the governmental unit in providing the services of the public defender or appointive counsel. The court in hearing such matter shall ascertain the amount of such costs to be

> charged to the defendant and shall direct reimbursement over a period of not to exceed six months, unless the court for good cause shown shall extend the period of reimbursement.

Minn. Stat. § 611.35, subd. 1 (2004). When a district court makes this award, "[t]he proper procedure for obtaining reimbursement for public defender services requires the court to conduct a hearing on the defendant's financial ability to pay." *Foster v. State*, 416 N.W.2d 835, 837 (Minn. App. 1987) ("Since the record does not indicate how the court determined the $500 amount in attorney fees assessed against Foster and it does not indicate whether the court made findings on Foster's ability to pay attorney fees, we remand for a hearing and further findings.").

Although the district court asked the public defender how much time he had expended in appellant's defense and the district court had the presentence investigation report that briefly detailed some of appellant's work history, the district court had no on-the-record discussion to demonstrate the bases for its ruling and made no written findings. We therefore conclude that the district court abused its discretion when it ordered appellant to reimburse the public defender $500 in attorney fees. We reverse and remand to allow the district court to make an inquiry into appellant's ability to pay.

Affirmed in part, reversed in part, and remanded.