STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0932

State of Minnesota,
Respondent,

vs.

Albert Brown Lurks, Jr.,
Appellant.

Filed April 21, 2009
Affirmed in part, reversed in part,
and remanded in part
Hudson, Judge

Olmsted County District Court
File No. 55-CR-06-1080

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

Mark A. Ostrem, Olmsted County Attorney, Laurie L. Anderson, Assistant County Attorney, 151 Fourth Street Southeast, Rochester, Minnesota 55904 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

HUDSON, Judge

Appellant was convicted pursuant to the terms of a plea agreement. He now challenges his conviction and argues that the district court erred when it (1) imposed a sentence in its written order that was three months greater than the sentence orally pronounced at the hearing; and (2) ordered restitution two weeks after appellant's plea and sentencing. Because appellant had sufficient notice of the imposition of restitution, we affirm the district court's determination on restitution. But because an orally pronounced sentence controls over a judgment and commitment order when the two conflict, we reverse and remand for correction of the sentencing order.

FACTS

On November 10, 2005, while playing basketball at the Olmsted County Adult Detention Center, appellant Albert Brown Lurks, Jr. allegedly assaulted another detainee. On March 6, 2008, a plea and sentencing hearing was held by the district court. The court read the following plea agreement to appellant, "I will plead guilty to the count of assault in the third degree under [*Alford*], the State will agree to an executed sentence concurrent with . . . the sentence I am currently serving." Appellant agreed. The district court then stated:

> It looks like the longest sentence that could be imposed here would be a 36 month sentence. Any place inside that sentencing grid box is going to be a sentence that you'll be doing inside of and at the same time of a much lengthier sentence you're currently serving, correct? In other words, this won't change your [release] date from DOC incarceration, right?

Appellant agreed.

On appellant's guilty-plea petition, the substance of the agreement was hand-written: "1. I will plead guilty to the Count of Assault in the 3rd degree under *North Carolina v. Alford*. 2. The State will agree to an executed sentence concurrent with the sentences I am already serving. 3. The State will dismiss all *Blakely* motions." The petition was signed by appellant. A "post-it" note was stuck to a page of the petition with the words, "8 Points . . . 33 Mos. . . . Rest." During the sentencing portion of the hearing, counsel for the state suggested, "there is a pre-plea worksheet which indicates eight points, seven points plus a custody status point. I would ask the Court to impose an executed term of 33 months . . . 30 month duration plus the custody status enhancement, for a total of 33. I would ask the Court to leave restitution open."[1] Counsel for the state clarified that the victim's treatment may have been paid for by the county, but there was no restitution affidavit in the file. In response to the state's request, counsel for appellant stated, "[w]e would agree with that, Your Honor."

The district court orally sentenced appellant to 33 months, 22 of which were required to be served in prison. The sentence was to be served concurrently with any other sentence appellant was currently serving. The district court then stated, "I'll leave open . . . the restitution issue . . . if restitution is requested, the Court will be ordering that restitution be paid . . . ." No objection was made by appellant's counsel. On March 7,

[1] Minn. Sent. Guidelines II.B.2 (2005) imposes an additional three months to the presumptive sentence duration if a custody status point is assigned to an offender's criminal history score and the total score is six or more.

2008, a sentencing order was filed in Olmsted County. Based on the Minnesota Sentencing Guidelines Commission recommended sentence, the court ordered appellant committed to the commissioner of corrections for 33 months plus a 3-month custody enhancement for a total of 36 months. The court reserved the issue of restitution for 60 days. On March 21, 2008, an order for restitution in the amount of $1,324 was filed in Olmsted County. This appeal follows.

D E C I S I O N

I

Appellant argues that his guilty plea was not intelligently entered because the district court added restitution to his sentence two weeks after the plea and sentencing hearing without first affording appellant an opportunity to withdraw his plea or to ratify the inclusion of restitution. Challenges to the validity of a plea agreement present questions of law entitled to de novo review. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). Although the district court has broad discretion to order restitution, the record must provide a factual basis for the restitution ordered and must establish the nature and amount of the victim's losses with reasonable specificity. *State v. Keehn*, 554 N.W.2d 405, 408 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). A defendant does not have an absolute right to withdraw a guilty plea once it is entered, *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007), but a defendant is allowed to withdraw a guilty plea "to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists where a guilty plea is invalid because it was not accurate, voluntary, and intelligent. *Theis*, 742 N.W.2d at 646.

Appellant argues that the district court's order of restitution was improper because he had no notice of it, restitution was not included in his plea agreement, and at the time of sentencing there was insufficient evidence on which to base an award of restitution. Appellant argues that he is entitled to either withdraw his guilty plea or have his sentence vacated and the matter remanded for a further hearing because his plea was not voluntary.

In *State v. Anderson*, this court held that the defendant had ample notice that the victims might seek (and the district court might order) restitution because, prior to sentencing, the defendant received: a presentence investigation report that recommended restitution; the victim-impact statement; and the victim's affidavit itemizing her losses. 507 N.W.2d 245, 247 (Minn. App. 1993), *review denied* (Minn. Dec. 22, 1993). This court further held that the defendant's failure to object to restitution during sentencing constituted a waiver of his right to challenge restitution on the ground that it was not contemplated by the plea agreement. *Id*. Here, appellant correctly notes that the record contains no presentence investigation report and appellant's written guilty plea petition contains no mention of restitution (except for a "post-it" note, the origins of which are unclear).[2] But the possibility of restitution was addressed during the sentencing hearing and the reason for restitution was explained on the record. In addition, the state requested that the record be left open to later address the issue of restitution. Appellant's counsel was given an opportunity to respond, and did so, stating, "[w]e would agree with that,

[2] The state characterizes the post-it note as "handwritten" evidence that restitution was discussed at the plea hearing. But appellant cannot be held to have had notice of a possible restitution obligation simply because someone, at some point, attached a post-it note to his guilty plea petition.

Your Honor." *See Anderson*, 507 N.W.2d at 247 (holding that defendant's failure to object to restitution constitutes waiver of argument that restitution violates terms of plea agreement).

Moreover, appellant's reliance on *State v. Noreen*, 354 N.W.2d 77 (Minn. App. 1984), and *State v. Chapman*, 362 N.W.2d 401 (Minn. App. 1985), *review denied* (Minn. May 1, 1985), is misplaced. In neither case was the defendant challenging restitution in its entirety; rather, both cases concerned only whether the defendant was required to pay for certain items that were not normally compensable through restitution. *Noreen*, 354 N.W.2d at 78–79; *Chapman*, 362 N.W.2d at 404.

Even if we were to hold that appellant lacked sufficient notice, the amount of restitution ordered—$1,324—was not of the magnitude which would necessarily entitle appellant to reversal. *See United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979) (holding that restitution of a large amount should be part of a plea bargain, or the possibility of its inclusion as a condition of probation made known and agreed to by the bargainers), *cert. denied*, 444 U.S. 1015 (1980). Here, even without notice, the small amount of restitution ordered would be acceptable "because it would not necessarily materially alter the expectations of the parties to the bargain." *Id.* Moreover, appellant could have challenged the amount of restitution under Minn. Stat. § 611A.045, subd. 3(b) (2006); he failed to do so when he did not request a hearing within 30 days of receiving notice of the final order.

The state argues that restitution is "akin to a collateral consequence" and under *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998), only direct consequences require the

kind of notice that, when lacking, would permit withdrawal of a guilty plea. We disagree. The state cites to no authority to support the proposition that restitution is a collateral consequence. To the contrary, restitution is precisely the type of "fine" that is contemplated as a direct consequence—because it flows definitely, immediately, and automatically from a guilty plea.

Nevertheless, we conclude that appellant is not entitled to withdraw his guilty plea because he had sufficient notice that restitution would be imposed as a part of his sentence. Therefore, his guilty plea was accurate, voluntary, and intelligent.

II

Appellant argues that the district court erred when it imposed a written sentence of 36 months, 3 months greater than the 33-month sentence it orally pronounced at the plea and sentencing hearing. The interpretation of a rule of criminal procedure is a question of law subject to de novo review. *State v. Nerz*, 587 N.W.2d 23, 24–25 (Minn. 1998). "It is a 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. This rule is recognized in virtually every circuit." *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002) (citing *United States v. Villano*, 816 F.2d 1448, 1450–52 (10th Cir. 1987)). *See also State v. Rasinski*, 527 N.W.2d 593, 595 (Minn. App. 1995) (holding that oral pronouncement rather than written commitment order determines sentence imposed). If there is a discrepancy between the oral and written sentences that is attributable to a clerical error, the district court may correct it "at any time." *See* Minn. R. Crim. P. 27.03, subd. 9.

Here, it is not clear whether the written sentence was attributable to clerical error, but the state concedes that appellant is entitled to an amended sentencing order reflecting an executed sentence of 33 months. Appellant argues that, because of the error, the sentence should be vacated, but we conclude that the more reasonable and appropriate action is to reverse and remand this issue for correction of the sentencing order.

Affirmed in part, reversed in part, and remanded in part.