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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1137**

State of Minnesota,
Respondent,

vs.

Stacy Fernando Washington,
Appellant.

**Filed June 9, 2009
Reversed and remanded
Klaphake, Judge**

Stearns County District Court
File No. 73-CR-07-9080

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

Laura L. Gray, Assistant St. Cloud City Attorney, City of St. Cloud, 400 Second Street S., St. Cloud, MN 56301 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora K. Gaitas, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Stacy Washington challenges his conviction of two counts of gross misdemeanor driving while impaired (DWI), Minn. Stat. § 169A.25, subd. 1 (2006), claiming that the evidence offered by the state was insufficient to support his conviction because the state failed to include evidence of his prior driving offenses to support an aggravated charge. Although the record at appellant's stipulated facts trial under Minn. R. Crim. P. 26.01, subd. 4,¹ included information on the aggravated aspect of the offense, we reverse his conviction and remand because appellant did not stipulate to any evidence that would establish the elements of the offense, and the district court did not make findings to support an aggravated offense, as required by the rule.

DECISION

“Due process requires that every element of the offense charged must be proven beyond a reasonable doubt by the prosecution.” *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998); *see In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970). A person is guilty of gross misdemeanor DWI if “two or more aggravating factors were present when the violation was committed.” Minn. Stat. § 169A.25, subds. 1(a), 2.

¹ The parties and the district court refer to the proceeding as a “*Lothenbach* hearing” pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). By amendment effective April 1, 2007, a stipulation to the prosecution's case to obtain review of a pretrial ruling is controlled by Minn. R. Crim. P. 26.01, subd. 4. *See State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (noting that *Lothenbach* reference has been superseded by Minn. R. Crim. P. 26.01, Subd. 4, which refers to a proceeding to preserve the right to appeal a pretrial ruling as a stipulated facts trial). Following such a trial, appellate review is limited to “the pretrial issue,” and a defendant may not challenge his “guilt,” or “other issues that could arise at a contested trial.” Minn. R. Crim. P. 26.01, subd. 4.

Here, the record included both appellant's driving record showing references to his prior DWIs, and references made by appellant and his attorney to the prior DWIs. However, the state did not specifically refer to documentary evidence of appellant's driving record in its recitation of stipulated evidence to support the charge. When a defendant proceeds under rule 26.01, subd. 4, for the purpose of obtaining review of a pretrial ruling, the defendant "shall . . . stipulate to the prosecution's evidence[.]" The state did not ask appellant to stipulate to the state's evidence or to the aggravated facts to support a second-degree DWI charge.² Further, the district court's decision did not include any factual findings to support an aggravated conviction. *Id.* (requiring the district court to make oral or written findings of fact on each element of the offense). These deficiencies are fatal to a proceeding under rule 26.01, subd. 4, because they undermine the very basis for allowing a proceeding on *stipulated* facts. *See State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005) ("The *Lothenbach* proceeding is a concession that the state's facts are accurate, with the primary purpose of permitting the defendant to appeal a pretrial ruling, while avoiding a trial for reasons of judicial economy"), *review denied* (Minn. Oct. 26, 2005); *State v. Halseth*, 653 N.W.2d 782, 786 n.2 (Minn. App. 2002) ("A true *Lothenbach* stipulation . . . is intended only to preserve the defendant's right of appeal while avoiding an unnecessary jury trial"); *see also State v. Davidson*, 351 N.W.2d 8, 11-12 (Minn. 1984) (noting that when a defendant stipulates to a prior conviction as an element of an offense, the stipulation removes the prior-

² When asked initially by the court if he understood the purpose of a *Lothenbach* proceeding, appellant answered, "No, sir."

convictions element and any evidence of it from consideration by a jury). The factual basis to support a conviction is of utmost concern in a proceeding that waives many of appellant's constitutional rights, abbreviates the trial process, and places limitations on appellate review, including the defendant's right to challenge the sufficiency of the evidence.

We have mandated "strict compliance" with the requirements of rule 26.01, subd. 4, to uphold a defendant's waiver of constitutional trial rights. *Antrim*, 764 N.W.2d at 70; *State v. Knoll*, 739 N.W.2d 919, 921-22 (Minn. App. 2007); see *Mahr*, 701 N.W.2d at 291 (noting that a defendant's waiver of fundamental constitutional rights "reflects that appellant made a knowing and intelligent decision to use a *Lothenbach* proceeding"). "[S]trict compliance [with rule 26.01] is required in order to assure that the waiver is voluntarily and intelligently made." *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986); see *State v. Ulland*, 357 N.W.2d 346, 347 (Minn. App. 1984) (concluding that defendant's attempt to waive a jury trial was invalid when defendant did not comply with rule 26.01 by merely informing a court clerk "that he did not want a jury trial"). We observe no reason to stray from that rule of strict compliance when it concerns a defendant's stipulation to the facts supporting a criminal offense. Thus, because appellant did not stipulate to the facts that would support an aggravated DWI offense and because the district court did not make factual findings to support an aggravated offense as required by Minn. R. Crim. P. 26.01, subd. 4, we must reverse appellant's conviction and remand for further proceedings.

Finally, we note that the district court, at best, elicited a simplified version of appellant's waiver of fundamental constitutional rights. *See* Minn. R. Crim. P. 26.01, subd. 3, 4 (requiring waiver on the record of a defendant's fundamental constitutional rights). At sentencing, the district court attempted to elicit more precise waivers on several of appellant's constitutional rights. Waivers of constitutional rights must be made before trial, not after a verdict has been entered.

Reversed and remanded.