STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1275

State of Minnesota,
Respondent,

vs.

Chad William Kessler,
Appellant.

Filed July 28, 2009
Affirmed as modified in part, reversed in part, and remanded;
motion to strike granted
Stauber, Judge

Dakota County District Court
File No. 19T807031971

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

David B. Gates, David S. Kendall, Assistant City of South St. Paul Attorneys, Levander, Gillen & Miller, P.A., Suite 400, 633 South Concord Street, South St. Paul, MN 55075 (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Toussaint, Chief Judge; and

Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his convictions of driving while under the influence (DWI), driving after suspension, and failure to yield for a stop sign, appellant argues (1) the district court erred by accepting his stipulation to an element of the DWI offense without also securing a waiver of his right to a jury trial on that element; (2) the evidence was insufficient to support the driving after suspension conviction because the state did not introduce any evidence that appellant knew or should have known that his license had been suspended and appellant did not stipulate to that element; and (3) the stop-sign violation must be amended to a petty misdemeanor because the jury did not find that appellant's actions endangered people or property. We affirm appellant's DWI and failure-to-stop convictions as modified, reverse the driving-after-suspension conviction, and remand for resentencing.

FACTS

On December 16, 2008, at 9:03 p.m., police officer Brian Wicke was patrolling an area of South Saint Paul when he observed a vehicle make an unsignaled turn. Officer Wicke followed the vehicle and noticed that its rear license plate light was not functioning. He activated his emergency lights to stop the vehicle. The vehicle did not stop, and Officer Wicke activated his siren and gave chase. The driver proceeded for a short distance, driving through a stop sign and making a right-hand turn at a high rate of speed, before coming to a stop. After the vehicle stopped, Officer Wicke noticed two people in the vehicle, the driver and a passenger in the back seat. The driver identified

himself as appellant Chad William Kessler. Appellant told the officer that the passenger was his six-year-old daughter. Appellant claimed that he "had no idea" that Officer Wicke was signaling him to stop. Officer Wicke observed that appellant was holding a water bottle in one hand, a wad of cash in the other, and had a lighter tucked between his legs. During the conversation, appellant began "talking really fast" and fidgeting with the items in his hands.

Officer Wicke suspected that appellant had recently ingested some form of stimulant and had appellant perform a field sobriety test. Appellant had difficulty performing the test. Officer Wicke arrested him and brought him to the police station for further testing. At the police station, a drug recognition expert evaluated appellant for impairment through a series of tests. Appellant again exhibited indicia of recent stimulant use. Police also obtained a urine sample from appellant. Lab testing of the sample revealed the presence of amphetamines and methamphetamines in Kessler's system. Both are Schedule II controlled substances. *See* Minn. Stat. § 152.02, subd. 3(3)(a), (b) (2006).

The state charged appellant with third-degree DWI in violation of Minn. Stat. §§ 169A.03, subd. 3(3), .20, subd. 1(7), .26, subd. 1 (2006), a gross misdemeanor, and fourth-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(7), .27 (2006), a misdemeanor. The offenses are identical, except that third-degree DWI requires an "aggravating factor." *See* Minn. Stat. § 169A.26, subd. 1. The aggravating factor was the presence of appellant's six-year-old daughter in the vehicle. *See* Minn. Stat. § 169A.03, subd. 3(3) ("[H]aving a child under the age of 16 in the motor vehicle at the

time of the offense if the child is more than 36 months younger than the offender" is an aggravating factor.)

Appellant was also charged with driving after suspension in violation of Minn. Stat. § 171.24, subd. 1 (2006), and misdemeanor failure to stop for a stop sign in violation of Minn. Stat. §§ 169.20, subd. 3, .89, subd. 1(1) (2006). The stop sign violation was charged as a misdemeanor, rather than a petty misdemeanor, because the state believed that appellant's failure to stop endangered or was likely to endanger a person or property. *See* Minn. Stat. § 169.89, subd. 1 (2006) (enhancing offense to a misdemeanor where the failure to stop endangered or was likely to endanger person or property).

Before trial, appellant informed the court that he would stipulate "to the fact that his nearly six-year-old daughter . . . was a passenger in the car." The district court did not require appellant to waive his right to a jury trial on this element before accepting the stipulation. With respect to the driving-after-suspension charge, appellant stipulated that his driving privileges had been suspended prior to the stop of his vehicle.

After the close of evidence, the district court instructed the jury on only one count of DWI under Minn. Stat. § 169A.20, subd. 1(7), because appellant had stipulated to the aggravating factor. With respect to the driving-after-suspension offense, the court informed the jury that appellant "ha[d] stipulated that his driver's license was under suspension on [the date of the offense] *and he was aware that it was suspended*." (Emphasis added.) When the court instructed the jury on the misdemeanor failure-to-stop offense, it did not include the element of endangerment to person or property. The jury

found appellant guilty of all three counts. Based on appellant's stipulation to the aggravating factor, the court adjudicated him guilty of third-degree DWI and sentenced him to one year in jail for the offense. The court also imposed a 90-day concurrent sentence for the driving-after-suspension conviction and a $100 fine for the stop sign violation. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court erred by accepting his stipulation to the "aggravating factor" element of third-degree DWI without first obtaining a waiver of his right to a jury trial on the element. Because he did not explicitly waive the right to a jury trial on this element, appellant argues that he is entitled to either a new trial or a reduction of his conviction to misdemeanor fourth-degree DWI.

An accused is guaranteed the right to a jury trial in a criminal case under the United States and Minnesota constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1(1). "A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). A defendant may waive this right by personally agreeing to stipulate to an element of an offense. *Id.*; Minn. R. Crim. P. 26.01, subd. 1(2)(a). In order for a stipulation to be valid, the defendant must personally waive the right to a jury trial on the element, either orally or in writing. *Wright*, 679 N.W.2d at 191; Minn. R. Crim. P. 26.01, subd. 1(2)(a).

The presence of an aggravating factor is an essential element of third-degree DWI. *See* Minn. Stat. § 169A.26, subd. 1. Therefore, appellant has a constitutional right to a jury determination of the issue, and he must personally waive his jury-trial right when stipulating to the element. *Wright*, 679 N.W.2d at 191. Appellant, however, did not waive his right to a jury determination of the aggravating factor either in writing or on the record. Accordingly, the district court erred by accepting his stipulation to an element of the charged crime without his personal waiver.

The state contends that the erroneous acceptance of a stipulation without a valid jury-trial waiver must be considered under a harmless-error standard. *See id.* at 191; *State v. Hinton*, 702 N.W.2d 271, 281-82 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005) (applying harmless-error test where a court erroneously accepted a stipulation of guilt without a valid waiver of the right to a jury trial). We disagree. Since *Wright* and *Hinton* were decided, we have emphasized that the rights listed in Minn. R. Crim. P. 26.01, are fundamental, and the defendant's waiver must be "'personal, explicit, and in accordance with rule 26.01.'" *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (quoting *State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002)). In *Antrim*, a recent decision of this court, we reversed and remanded a conviction without applying a harmless-error test where the record did not reflect a full waiver of rights as required by Minn. R. Crim. P. 26.01. The defendant in *Antrim* agreed to stipulate to the state's case in order to obtain review of a pretrial ruling under Minn. R. Crim. P. 26.01, subd. 4. 764 N.W.2d at 69. The defendant was not advised of nor asked to waive her right to compel

favorable witnesses to testify for the defense before stipulating to the state's case as required by rule 26.01. *Id.*

Like the right to present favorable witnesses discussed in *Antrim*, the right to a jury trial on every element of a charged offense is guaranteed in the state and federal constitutions and is a fundamental right that requires a personal waiver in writing or orally on the record. *See State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2006) (stating that right to a jury trial is a fundamental right); *Antrim*, 764 N.W.2d at 70 (stating that right to present favorable witnesses is a fundamental right); Minn. R. Crim. P. 26.01 subds. 1(2)(a), 4 (requiring personal waiver of right to jury trial and right to present witnesses). Therefore, it was essential for the district court to ensure that appellant made a personal waiver of the jury-trial right before accepting the stipulation.

In urging us to apply a harmless-error standard, the state emphasizes that appellant tactically elected to stipulate to the aggravating factor element in order to avoid the prejudicial effect of allowing the jury to consider the presence of his daughter in the vehicle. We agree that appellant's stipulation was likely a tactical decision. But the state's focus on appellant's motivation for entering into the stipulation is misplaced. Regardless of the purpose of a stipulation, it is not valid until the accused is informed of and explicitly waives the right to a jury trial on that element, either in writing or orally on the record. Because appellant's rights were not vindicated, his conviction of third-degree DWI cannot stand. But because appellant does not dispute the sufficiency of the evidence offered to prove the elements of the lesser-included offense of fourth-degree DWI, we reduce his conviction to fourth-degree DWI and remand for resentencing.

Minn. R. Crim. P. 28.02, subd. 12 (allowing this court to reduce a conviction to a lesser-included offense and remand for sentencing if it reverses the judgment).

II.

Next, appellant argues that the evidence was insufficient to support his conviction of driving after suspension because the state did not offer any evidence that appellant knew or should have known that his license had been suspended and appellant did not stipulate to the element. *See* Minn. Stat. § 171.24, subd. 1 (requiring the state to prove that the defendant "has been given notice of or reasonably should know of the suspension" in order to convict the defendant of driving after suspension). The state agrees with appellant's assertions and agrees that his conviction should be reversed. Without any evidence of this essential element, we reverse appellant's conviction.

III.

Appellant also argues that his misdemeanor stop sign conviction must be reduced to a petty misdemeanor because the jury did not find that the offense was committed in a manner that endangered or was likely to endanger persons or property. *See* Minn. Stat. § 169.89, subd. 1 (providing that a conviction of misdemeanor failure to stop requires a finding that the failure to stop endangered or was likely to endanger persons or property). We agree. The jury instruction provided by the district court did not require the jury to find endangerment. Without such a finding, the conviction constitutes only a petty misdemeanor. *See Id.* Therefore, we reduce appellant's conviction to a petty misdemeanor and remand for resentencing. Minn. R. Crim. P. 28.02, subd. 12 (allowing

this court to reduce a conviction to a lesser-included offense and remand for sentencing if it reverses the judgment).

IV.

Finally, appellant moves to strike a portion of the state's brief because it contains a document outside the record on appeal. Because the document in question was not part of the district court record, it is not properly before this court. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal). Therefore, we grant appellant's motion to strike.

Affirmed as modified in part, reversed in part, and remanded; motion to strike granted