STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1880

State of Minnesota,
Respondent,

vs.

Lucas Jon Koster,
Appellant.

Filed April 27, 2010
Affirmed as modified
Stoneburner, Judge

Benton County District Court
File No. 05CR061858

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Public Defender, Marie Wolf, Sara L. Martin, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

In his second appeal from sentencing involving his conviction of felony driving while impaired (DWI), appellant argues that the 64-month sentence imposed to run consecutively to a prior sentence must be reversed because: (1) he was denied the right to

counsel at resentencing; (2) the district court failed to announce on the record that the sentence was to be consecutive to the prior sentence; (3) if the consecutive sentencing is affirmed, the district court erred by failing to calculate the sentence based on a criminal history score of zero; and (4) the district court erred by imposing a greater sentence on remand. We conclude that, in this case, failure to obtain appellant's waiver of counsel is not reversible error. But because the district court was without the authority to sentence appellant consecutively on his DWI conviction, appellant's sentence for DWI must be modified to a concurrent sentence. We, therefore, affirm as modified.

FACTS

The district court imposed concurrent sentences for appellant Lucas Jon Koster's Benton County convictions of felony DWI, test refusal, driving after cancellation, and fleeing a police officer on foot. The district court sentenced Koster to a total of 66 months: 54 months for DWI, 66 months for test refusal, 365 days for driving after cancellation, and 90 days for fleeing on foot. On the record, the district court announced that these concurrent sentences would be consecutive to a prior DWI sentence imposed in Stearns County. That 42-month Stearns County DWI sentence was imposed concurrent to a 13-month sentence for an escape-from-custody offense.

On appeal, this court, concluding that the Benton County DWI and test refusal stemmed from a single behavioral incident, reversed sentences imposed for those convictions and remanded to the district court for resentencing on one of the two convictions. *State v. Koster*, No. A08-615, 2009 WL 2148214, at *6 (Minn. App. July 21, 2009).

Koster, who had previously been represented by private counsel, appeared without counsel at the resentencing hearing. The district court made no inquiry about his representation. After stating that the purpose of the hearing was to resentence Koster for either DWI or test refusal, the district court asked the state and Koster if they had anything to say. The state requested a 54-month sentence for the DWI conviction. Koster said that he had nothing to say. The district court then sentenced Koster to 64 months for the DWI. The district court did not state on the record that the sentence would be consecutive to the Stearns County sentence, but made the sentences consecutive in the written warrant of commitment. In this appeal, Koster raises several challenges to the sentence imposed on remand.[1]

D E C I S I O N

Appellate courts will not interfere with the district court's exercise of discretion in sentencing if the sentence imposed is authorized by law. *State v. Eaton*, 292 N.W.2d 260, 267 (Minn. 1980); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (discussing the broad discretion accorded to the district court in sentencing).

I. Failure to elicit a valid waiver of counsel is not reversible error where no resulting prejudice is shown.

Failure to object to an alleged error in the district court generally constitutes waiver of the right to raise the issue on appeal, but an appellate court may still consider a waived issue if it is (1) error, (2) that is plain, and (3) the error affects the defendant's

[1] In its brief on appeal, the state argues that Koster may have received unauthorized jail credit, requiring remand for resentencing. But the state did not file a notice of review, and that issue is not before this court.

substantial rights. *State v. Roberts*, 651 N.W.2d 198, 201 (Minn. App. 2002) (applying plain-error analysis to a challenge to the adequacy of waiver of the right to a 12-person jury, raised for the first time on appeal), *review denied* (Minn. Dec. 17, 2002). We, therefore, review Koster's challenge that his waiver of counsel was invalid under plain-error analysis.

We begin by noting the lack of authority defining the degree of formality required when a district court corrects a sentence. In the context of imposing a mandatory conditional release to correct a sentence, the supreme court has left the determination of whether a defendant should have a hearing to the discretion of the sentencing court. *State v. Calmes*, 632 N.W.2d 641, 650 (Minn. 2001). And in *State v. Sanders*, this court noted that a district court granting an unopposed motion to correct a sentence could correct the sentence without a formal hearing. 644 N.W.2d 483, 488 (Minn. App. 2002) (holding that because the state opposed the defendant's motion to correct a sentence, each party had the absolute right to a formal hearing to argue the issue on its merits), *review denied* (Minn. July 16, 2002).

In Koster's case, this court remanded for resentencing, and it was appropriate for the district court to conduct a resentencing hearing to allow input from the parties concerning the new sentence. Koster was entitled to representation at that hearing.[2] And, although a criminal defendant may waive his right to assistance of counsel, such waiver

[2] The federal and state constitutions provide every criminal defendant with the right to legal representation at every stage of a criminal proceeding where the substantial rights of the defendant may be affected. *See* U.S. Const. amends. VI, XIV, § 1; Minn. Const. art. I, § 6; *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 257 (1967) (determining that right to counsel exists at sentencing).

must be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981); *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

Minn. R. Crim. P. 5.02, subd. 1(4), details the procedure that the district court must follow to fulfill its duty to be satisfied and to make a record that a waiver of counsel is knowing, voluntary, and intelligent. *See State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997); *State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990). In this case, the absence of any discussion about representation constitutes error that is plain.

But Koster does not assert or argue that the error affected his substantial rights. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (stating that on third prong of plain-error analysis, a defendant bears a "heavy burden" of persuasion to show "the error was prejudicial and affected the outcome of the [proceeding]"). Absent a showing that sentencing in the absence of counsel or a valid waiver of counsel was prejudicial, we conclude that Koster has waived his right to review of this issue under a plain-error analysis. And even if we were to reach the merits, Koster's failure to allege and establish prejudice precludes the relief sought by Koster. *See State v. Gallagher*, 275 N.W.2d 803, 808 (Minn. 1979) (declining to address claim that sentencing in absence of counsel violated due process because no claim of prejudice was advanced and the district court was informed orally that defendant chose to appear without counsel for personal reasons).

II. In this case, the district court erred by imposing consecutive sentences.

Where multiple sentences are involved, Minnesota law provides that the district court imposing the later sentence shall specify whether the sentences shall run concurrently or consecutively. Minn. Stat. § 609.15, subd. 1 (2006). If the district court

does not so specify, the sentences shall run concurrently. *Id*. The district court is required to "state the precise terms of the sentence" at the time sentence is imposed. *State v. Rasinski*, 527 N.W.2d 593, 594–95 (Minn. App. 1995) (quoting Minn. R. Crim. P. 27.03, subd. 4(A)). "[P]recise terms of the sentence" includes whether multiple sentences are to run concurrently or consecutively. *State v. Wakefield*, 263 N.W.2d 76, 78 (Minn. 1978). The district court's formal, on-the-record pronouncement of sentence is controlling for purposes of Minn. Stat. § 609.15, subd. 1. *Rasinski*, 527 N.W.2d at 595.

In this case, the district court announced at the original sentencing hearing that the concurrent Benton County sentences imposed would be consecutive to the Stearns County DWI sentence. But at the resentencing hearing, the district court failed to state on the record that the new DWI sentence imposed was to be consecutive to the Stearns County DWI sentence. As noted above, not all of the formalities of original sentencing are mandated by statute, rule, or caselaw in resentencing; so there is no clear authority stating that failure to re-announce consecutive sentencing at resentencing of some but not all of the sentences imposed is fatal to consecutive sentencing. But in this case, we do not have to reach that issue because the state concedes that the district court was not authorized to impose the Benton County DWI sentence consecutive to the Stearns County DWI sentence.

The parties agree that consecutive sentencing is not presumptive under Minn. Stat. § 169A.28, subd. 1(a)(1) (2006) (directing imposition of consecutive sentences when a person is sentenced for DWI arising out of separate courses of conduct), because subdivision 1(b) of the statute states that the requirement for consecutive sentencing does

not apply if the person is being sentenced to an executed prison term for first-degree DWI. And the state correctly notes that felony-level DWI is not listed as eligible for permissive consecutive sentencing in Minn. Stat. § 169A.28, subd. 2(e) (2006). Likewise, Minn. Sent. Guidelines II.F (2006) does not authorize permissive consecutive sentencing for Koster's DWI convictions: it provides for permissive consecutive sentencing for felony DWI only when the presumptive disposition for the prior offense is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. It is not disputed that the presumptive sentence for Koster's Stearns County DWI was a stayed sentence. Koster was only committed to the Commissioner of Corrections for that offense after he demanded execution of the sentence. Consequently, the district court could not, without departing from the guidelines, sentence Koster's Benton County DWI consecutive to his Stearns County DWI.

The state correctly notes that Koster's Stearns County sentence also encompassed his sentence for escape from custody and argues that the district court could have permissively sentenced Koster's Benton County DWI conviction consecutively to that 13-month sentence. The state urges this court to affirm consecutive sentencing of the Benton County DWI to the Stearns County escape-from-custody offense. Because the state further concedes that the consecutive sentence for the Benton County DWI must be calculated using a criminal-history score of zero, resulting in a presumptive sentence of 36 months, Koster's total sentence would then be 49 months. This result was plainly not intended by the district court, and we decline to amend the announced sentence sua

sponte as urged by the state. Because consecutive sentencing for the DWI convictions is not authorized, we modify the Benton County DWI sentence to be concurrent to the Stearns County sentence.

III. The district court did not err by imposing a 64-month sentence for felony DWI on resentencing.

To prevent a defendant from being punished for exercising his right to appeal from his sentence, appellate courts do not permit, on resentencing, the imposition of a *total sentence* in excess of that originally imposed. *State v. Wallace*, 327 N.W.2d 85, 88 (Minn. 1982). For example, in *State v. Rohda*, the district court had sentenced the defendant to 76 months, consecutive to a previously imposed sentence of 15 months. 358 N.W.2d 39, 40 (Minn. 1984). But because the guidelines did not authorize consecutive sentences absent aggravating circumstances, the supreme court remanded for resentencing and authorized the district court to depart by imposing a concurrent sentence of up to, but not more than, 91 months—Rohda's original *total sentence*. *Id.* at 41 (citing *Wallace*, 327 N.W.2d at 88).

On remand in this case, the district court imposed a 64-month sentence, which is a 10-month increase from Koster's original 54-month DWI sentence. Koster argues that the district court erred by resentencing him to a more severe sentence than was originally imposed. But, as the state points out, Koster's *total sentence* after remand was actually two months shorter than the original total sentence imposed. The original sentence for the Benton County offenses totaled 66 months; after resentencing, the total is 64 months.

Because the district court did not increase Koster's total sentence for the Benton County offenses, it did not err by increasing the DWI sentence to 64 months.

Affirmed as modified.