STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2151

State of Minnesota,
Appellant,

vs.

Victor Martinez-Mendoza,
Respondent.

Filed May 4, 2010
Reversed and remanded
Harten, Judge*

Ramsey County District Court
File No. 62-CR-09-14689

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HARTEN, Judge

Appellant challenges the district court's determination that it lacked authority to allow the state to withdraw from a guilty plea. Because the record demonstrates that the district court and attorneys for both parties agreed that the plea was the result of a mutual mistake, we reverse the decision not to allow the state to withdraw from the guilty plea and remand for further proceedings.[1]

FACTS

In August 2009, a complaint charged respondent Victor Martinez-Mendoza with two counts of criminal sexual conduct in relation to the sexual abuse of his eight-year-old stepdaughter over a three-year period, beginning when she was five. Count 1 charged first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), which prohibits sexual contact with a person under 13. Sexual contact with a person under 13 includes intentional touching with sexual intent, by a defendant more than 36 months older than the person, of the person's uncovered genitals by the defendant's uncovered genitals. Minn. Stat. § 609.341, subd. 11(c) (2008). It is a level A offense with a presumptive sentence of 144 months, executed, and a range of 144-173 months. Minn. Sent. Guidelines IV. Count 2 charged second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2008), which prohibits sexual contact, defined to include intentional touching of the clothing covering the immediate area of the intimate parts of a person under 13 by a defendant more than 36 months older

[1] Both parties are represented by different attorneys on appeal.

than the person. Minn. Stat. § 609.341, subd. 11(a)(iv) (defining sexual contact). It is a level D offense with a presumptive sentence of 36 months, stayed.[2] Minn. Sent. Guidelines IV.

After negotiation with the prosecutor, respondent's attorney filled out a petition for respondent to plead guilty. The petition says that: (1) respondent has been charged with "CSC 1° & CSC 2°" and is talking about "count 2 - CSC 2°"; (2) the "substance of [the] agreement" is "Dismiss count I [at] sentencing" and "middle of the box or 90 months commit to prison on count II"; and (3), if the plea is withdrawn, respondent will stand trial on "CSC 1° and CSC 2°." Thus, the plea petition provides a sentence for Count 2—90 months executed or "middle of the box"--that lacks any relationship to the sentence appropriate for Count 2 as written on the complaint—36 months stayed, no box range given.

At the 30 September 2009 hearing, respondent was questioned to provide the factual background appropriate for a charge of violating Minn. Stat. § 609.343, subd. 1(h)(iii) (2008), which prohibits sexual contact by a defendant who has a significant relationship to a complainant under 16 that involves multiple acts over an extended period of time. Respondent testified that (1) he lived with his wife and four children, among them his stepdaughter, who was then eight years old; (2) he was sometimes alone with the children; (3) he touched his stepdaughter with his hands in her vaginal area on

[2] The case also involved a co-defendant, who was charged with the same counts as respondent, pled guilty, and received a sentence of 36 months, executed.

top of her clothing on two occasions, around January 2006 and in August 2009; and (4) he had a sexual intent when he touched her.

A violation of Minn. Stat. § 609.343, subd. 1(h)(iii), is a level B offense with the presumptive 90-month, executed sentence specified on the plea petition; the box gives a range of 90-108 months. Minn. Sent. Guidelines IV. The parties' attorneys, respondent, and the district court agreed that respondent would plead guilty to count 2 and receive a middle-of-the-box sentence. But the count 2 actually listed on the complaint, a violation of Minn. Stat. § 609.343, subd. 1(a), could not have a middle-of-the-box sentence because it has no box and its presumptive sentence is 36 months, stayed, not 90 months, executed.

On 13 October 2009, the state filed an amended complaint, which retained count 1 but changed count 2 to a violation of Minn. Stat. § 609.343, subd. 1(h)(iii). The district court did not address the amended complaint.

On 27 October 2009, another hearing was held to address the issues arising from the conflict between the complaint and the plea petition and from the proceedings at the first hearing.

At this second hearing, the district court noted that, "It was contemplated at the time of the plea that the sentence for this offense in [respondent's] case was a 90-month commit to prison." Respondent's attorney agreed:

> [T]he state is correct. It was contemplated that this would be a 90-month commit. . . . That is not disputed and, in fact, 90 months is written in the plea petition. It is, however, written with an ["]or["]. It says middle of the box or 90 months commit . . . on count two. . . .

> The mistake that [wa]s made was that count two is charged under a severity level D, which calls for a 36-month stayed sentence. At the time the plea petition was put in it was assumed, at least by the state and in part by me, that this would be a severity level B, which calls for a 90-month commit. . . . In fact, there was a mistake made and this is a 36-month stayed sentence.
>
> Now at this point, it is our belief and position that this mistake is a benefit to [respondent] and [respondent] should get the benefit of a mistake that's made in his favor. The state has wanted to amend the complaint, but it is our position it is too late for that because my client pled guilty as charged. . . . Understanding that people thought it was 90, this mistake benefits [respondent] and [respondent] should get the benefit at this time.[3]

The prosecutor responded that, after he learned that respondent would consider pleading guilty to count 2, he discussed the case with the attorney prosecuting respondent's co-defendant, who told him the guideline sentence on the count 2 charged in the complaint "would be a 90-month commit."

The district court asked if the prosecutor had looked up the sentence, and he answered, "No." The district court then questioned respondent's attorney, who said he had wondered at the time if the offense was a level B or a level D, that is, if it had a sentence of 90 months, executed, or 36 months, stayed, but he "understood the state was adamant that they thought it was 90 [months, executed], and that's why I wrote 90 on the plea petition."

The prosecutor testified further that, before the plea hearing, he and respondent's attorney had informed the district court of their proposed agreement "to [plead guilty] to criminal sexual conduct in the second degree and that that would accomplish a 90-month

[3] Respondent's attorney also said that he would offer as a compromise pleading guilty to count II in exchange for the 36-month, executed, sentence that his co-defendant had received on the same charge.

commit" and that, the day after the plea hearing, he had discovered that respondent's attorney said "it was now a 36-month sentence." He testified:

> I had never discussed with [respondent's attorney] a 36-month sentence. To my recollection, [he] never discussed with the Court the possibility of either a departure or the fact that a 36-month sentence would be entertained. . . . All we discussed was criminal sexual conduct in the second degree and the possibility of a guideline sentence of 90 months. . . .
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> . . . It is clear that the understanding by the state was that we were entertaining a plea agreement that would call for a lesser prison commit [than] the higher charge, count one, . . . would carry, which is at least 144 months. It is clear we sought to have a lesser sentence of 90 months . . . and that's why the Court was [so] informed . . . . That's why I presume [respondent's attorney] put that in the plea petition.

The district court also had not looked up the sentence for count two and said:

> I was told that [respondent] was entering . . . a plea to count two, a 90-month commit. . . . My recollection is that a plea was made to count two because it was a 90-month commit, 54 months less than what he was facing on a conviction for count one. That now we know, based on the complaint, was a mistake.

The district court then asked the attorneys to state what remedies they sought. The prosecutor asked that the state be allowed to withdraw from the plea agreement and return to the pre-plea agreement status of having respondent charged with and tried on counts one and two of the complaint. Respondent's attorney asked that the plea agreement be enforced, and that respondent receive the 36-month, stayed, sentence appropriate for count 2 as written on the complaint. The district court said it would decide this matter before deciding whether to allow the state to amend the complaint.

On 10 November 2009, the district court ordered the parties to review and submit memoranda on *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (the remedy for district court's failure to state reasons for sentencing departure was remand for imposition

of presumptive sentence, not for after-the-fact statement of reasons); *State v. Spraggins*, 742 N.W.2d 1, 6 (Minn. App. 2007) (the district court may not, sua sponte, vacate a defendant's guilty plea over his objections); and *State v. Rannow*, 703 N.W.2d 575, 579 (Minn. App. 2005) (rejecting argument that entering into plea agreement waives right to application of sentencing guidelines and reiterating *Geller* holding).[4] None of these cases concerns a plea agreement inconsistent with the attorneys' and the district court's intention.

On 24 November 2009, the sentencing hearing was held.[5] The prosecutor argued that "[t]here is no valid plea agreement" because the plea petition, read in conjunction with the complaint, was inherently inconsistent: it prescribed a sentence of 90 months or "the middle of the box" for a violation of Minn. Stat. § 609.343, subd. 1(a), which had a sentence of 36 months stayed and no box. He asked the district court either to allow the state to withdraw from the plea agreement and prosecute count 1 or to delay sentencing until after the state's appeal to this court.

Respondent's attorney argued that "the state made a mistake" and "should be required to live with [its] mistake" and that the district court had no authority to allow the

[4] The district court also requested briefing on an unpublished decision, *State v. Hackbarth*, No. A08-0743, (Minn. App. 9 June 2009). Because it is of no precedential value, we do not address it. *See* Minn. Stat. § 480A.08, subd. 3 (2008). In any event, as the district court noted at the sentencing hearing, *Hackbarth* "doesn't address the Court's position in accepting or honoring [a plea] agreement that [it] normally would not have [accepted]; and really, that's the issue in [respondent's] case."

[5] The pre-sentence investigation was based on the presumptive 36-month sentence for count 2 of the complaint.

state to withdraw from the plea. He asked the court to sentence respondent immediately on count 2 of the complaint to 36 months, stayed.

The district court said:

> A mistake was made clearly by [the prosecutor], by [respondent's attorney], and by the Court. I never read the statute.
> . . . .
> . . . We make mistakes. When the mistakes are in favor of the state, the defendant lives with those mistakes unless there are grounds for a defendant to withdraw [his] plea, manifest injustice. . . . I do not think that I have the authority to vacate [respondent's] plea.
> . . . I think in this case, [respondent] is entitled to the benefit of the agreement that was reached in this case and that is for the guidelines disposition.
> . . . I will tell you for this record, the Court of Appeals needs to know this, if I had known that this called for a 36-month stayed sentence, one, I don't know if I would have taken the plea or two, I may have qualified the plea . . . . I don't think I would have accepted this deal, this agreement. . . . 36-month commit, I may have accepted it; but not a 36-month stay.

The district court then sentenced respondent, explaining that, "[I]t would benefit all involved to have some finality. . . . Let the Court of Appeals sort through this. Under [Minn. R. Crim. P.] 28.04, there is no detriment to the state in appealing whether or not I sentence." Respondent was sentenced to 36 months, stayed.

After filing its notice of appeal, the state filed a petition with this court for a writ of prohibition to prevent the district court from enforcing its order adjudicating respondent guilty of count 2 and dismissing count 1 and for a writ of mandamus compelling the district court to grant the state's motion to stay district court proceedings so the state could pursue this appeal. An order, *In re State v. Martinez-Mendoza*, No. A09-2165 (Minn. App. 15 Dec. 2009), denied the petition for a writ of prohibition, granted the petition for a writ of mandamus, and stayed district court proceedings

pending this appeal. On appeal, respondent challenges this court's jurisdiction; the state challenges the district court's refusal to allow the state to withdraw from the plea agreement.

D E C I S I O N

1. Jurisdiction

This court reviews issues of subject-matter jurisdiction de novo. *State v. Davis*, 773 N.W.2d 66, 68 (Minn. 2009).

"The prosecutor may appeal as of right to the Court of Appeals: (1) in any case, from any pretrial order . . . ." Minn. R. Crim. P. 28.04, subd. 1. "Upon oral notice that the prosecutor intends to appeal a pretrial order, the district court must stay the proceedings for 5 days to allow time to perfect the appeal." Minn. R. Crim. P. 28.04, subd. 2(1). But "[n]o appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached." Minn. R. Crim. P. 28.04, subd. 2(8). Here, the district court did not stay the proceedings; it proceeded with sentencing.[6]

The state argues that the district court's orders refusing to vacate the guilty plea or to reinstate count I are appealable as pretrial orders; respondent argues that they are not appealable because jeopardy has attached.[7] *See In re Welfare of J.L.P.*, 709 N.W.2d 289,

[6] The district court apparently believed that sentencing would not affect the state's right to appeal.

[7] Respondent acquiesced, or at any rate did not object, when the district court replied to the state's request for a stay of sentencing by saying, "I'm going to sentence [respondent], then you can appeal." A party may not change position on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But, in any event, parties may not confer jurisdiction on this court. *Rieman v. Joubert*, 361 N.W.2d 909, 911 (Minn. App. 1985), *aff'd*, 376 N.W.2d 681 (Minn. 1985). Thus, while the transcript clearly reflects that, at

292 (Minn. App. 2006) ("When a defendant pleads guilty, jeopardy attaches, at the latest, when sentencing occurs.") (citing *State v. Shellito*, 456 N.W.2d 470, 472 (Minn. App. 1990), *review denied* (Minn. 23 August 1990)).

Minnesota has no caselaw governing the appealability of a district court's denial of the state's request to withdraw from a guilty plea after a defendant has been sentenced.[8] But "the state may appeal, as 'pretrial orders,' stays of adjudication in nonfelony cases." *State v. Thoma*, 569 N.W.2d 205, 208 (Minn. App.), *aff'd mem.*, 571 N.W.2d 773 (Minn. 1997). In *Thoma*, a consolidation of nonfelony cases, the state argued that stays of adjudication were appealable as pretrial orders under Minn. R. Crim. P. 28.04, subd. 1(1); the respondents argued that stays of adjudication were sentences and were not appealable in nonfelony cases. *See* Minn. R. Crim. P. 28.04, subd. 1(2) (the state may appeal "in felony cases from any sentence imposed or stayed by the district court"). "A stay of adjudication is intended to avoid the necessity of trial. The state, however, may appeal, as 'pretrial orders,' various orders that would avoid trial by dismissing the prosecution." *Thoma*, 569 N.W.2d at 207; *see also State v. Favre*, 428 N.W.2d 828, 830-31 (Minn. App. 1988) (reversing, on state's appeal after sentencing,

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the sentencing hearing, the district court and both parties anticipated this court's assumption of jurisdiction, that fact is irrelevant to jurisdiction. *See id.*

[8] The situation is normally precluded by Minn. R. Civ. P 28.04, subd. 2(1) (requiring the district court to stay proceedings as soon as the prosecutor provides notice of intent to appeal). Here, this court granted the state's petition for mandamus and required that the district court proceedings be stayed. This occurred after the court had sentenced respondent. But the district court's denial of the mandatory stay does not defeat the state's right to appeal. *See State v. Stroud*, 459 N.W.2d 332, 335-36 (Minn. App. 1990) (holding denial of continuance should have been stayed to allow state to appeal).

district court's acceptance of defendant's plea to a lesser offense and its refusal to permit state to amend complaint, but not addressing jurisdictional issue).

In light of the *Thoma* holding that the state can appeal a stay of adjudication, imposed after acceptance of a guilty plea as a pretrial order and the *Favre* assumption of jurisdiction over the state's appeal from a guilty plea to a lesser offense, we conclude that we have jurisdiction over this appeal.

2. Plea Agreement

The interpretation and enforcement of plea agreements present issues of law subject to de novo review. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). "[P]rinciples of contract law are applied to determine the terms and enforcement of plea agreements." *Spraggins*, 742 N.W.2d at 3-4. "Whether there is ambiguity in a contract is a legal determination." *In re Ashman*, 608 N.W.2d 853, 858 (Minn. 2000).

The plea petition document here presents an inherent inconsistency: it provides both that respondent will plead guilty to count 2 of the complaint, for which the guideline sentence is 36 months, stayed, and that he will receive a sentence of 90 months, or middle of the box. A departure from the sentencing guidelines "must be supported by something more substantial and compelling than the plea agreement alone." *State v. Lewis*, 656 N.W.2d 535, 537 (Minn. 2003) (citing *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002)). Appellant could not plead guilty to a charge for which the sentence is 36 months, stayed, and be sentenced to at least 90 months, executed, solely on the basis of his plea agreement; absent "substantial and compelling circumstances," he could either be

sentenced for count 2 of the complaint or be sentenced to a minimum of 90 months, executed, but not both. Thus, the plea petition is ambiguous.

When a contract is ambiguous, extrinsic evidence may be considered in its construction. *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. 18 Apr. 1991). The extrinsic evidence available here is the transcripts of the hearings, which indicate that: (1) prior to the plea hearing, the attorneys for both parties told the court they agreed to a sentence of 90 months, executed, for count 2, and dismissal of count 1, and the district court said it would accept this agreement; (2) at the plea hearing, respondent provided factual information indicating that he committed a form of second-degree criminal sexual conduct for which the minimum guideline sentence was 90 months, executed, and the range was 90-108 months; (3) an amended complaint was filed, changing count 2 to correspond to respondent's admissions and to the sentence described on the plea petition; (4) each party's attorney and the district court agreed at the October hearing that 90 months, executed, was the sentence all three of them contemplated at the plea hearing; (5) through the attorneys' and the district court's mistakes, respondent had pled guilty to an offense for which the sentence was 36 months, stayed; and (6) the district court would not have agreed to a plea bargain providing a 36-month stayed sentence.

The extrinsic evidence indicates that the intent of all parties was to have respondent plead guilty to a charge for which the sentence specified on the petition was appropriate. In light of the extrinsic evidence, the plea petition should be construed to

refer to a charge of violating Minn. Stat. § 609.343, subd. 1(h)(iii), a level B offense with the presumptive 90-month, executed sentence.

Here, as in *Lewis*, the sentence imposed by the plea agreement was significantly greater than the guideline sentence for the charged offense. Lewis successfully challenged his sentence; this court reversed it and remanded to the district court for resentencing pursuant to the guidelines. *Lewis*, 656 N.W.2d at 537 (citing *State v. Lewis*, No. C7-01-1788, 2002 WL 1275790 at *2 (Minn. App. 11 June 2002)). But the supreme court rejected this court's view that a defendant could challenge a plea-bargain sentence without withdrawing from the plea agreement and standing trial on all the original charges. *Id*. at 538. "We agree with the state's argument that these two components [conviction and sentence] are interrelated and that the district court should be free to consider the effect that changes in the sentence have on the entire plea agreement." *Id*. at 539. "We hold that where the district court finds no compelling or substantial circumstances supporting an upward departure in the sentence that was agreed upon in a plea agreement, it may consider motions to vacate the conviction and the plea agreement." *Id*.; *see also Spraggins*, 742 N.W.2d at 6 (noting that, under *Lewis*, "the district court may consider . . . whether a sentence modification changes such an integral part of the plea 'contract' that the conviction itself should also be overturned").

Lewis thus refutes both the district court's assertion that it lacked authority to allow the state to withdraw from the plea agreement when it imposed a sentence other than the agreed-on sentence and respondent's argument that he is entitled to benefit from the attorneys' and the district court's mistakes.

The state has a right to withdraw from a plea agreement while it is still executory. *State v. Brown*, 709 N.W.2d 313, 317 (Minn. App. 2006). When it was apparent that the district court intended to enforce the sentence error included in the plea agreement, the state had a right to withdraw from it.

Mutual mistake justifies permitting withdrawal of a plea. *See State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988) ("[T]he court of appeals' ultimate decision to let defendant withdraw his plea is independently justifiable on the ground of mutual mistake."). Withdrawal is analogous to the contractual remedy of rescission, also appropriate for mutual mistake. "Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake." *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, ___N.W.2d ___, ___, 2010 WL 935372, *7 (Minn. App. 16 March 2010) (citation and quotation omitted).

In light of the attorneys' and the district court's undisputed admission that, through a mutual mistake, the plea read in conjunction with the complaint was not consistent with their agreement, the state's request to withdraw the plea should be granted.

We reverse the district court's denial of the state's request to withdraw the plea and remand for further proceedings.

Reversed and remanded.