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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0709**

Marcus A. Brown, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 31, 2009
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-05-009930

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Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Poritsky, Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

In this appeal from the denial of his petition for postconviction relief seeking correction of his 2005 sentence, appellant argues that his *Blakely* waiver was not knowing and intelligent. Because our review of the record leads us to conclude that appellant's waiver is valid, we affirm.

FACTS

On August 19, 2004, appellant Marcus A. Brown was at his Minneapolis home when he heard an altercation outside. He went out to investigate and saw a large group of people arguing and pushing each other in the street. As the altercation progressed, someone handed Brown a gun, and he fired it several times, killing one man and injuring others. As a result of this incident, Brown was indicted on one count of murder in the first degree and two counts of attempted murder in the first degree.

Before trial, Brown and the state reached a plea agreement, the terms of which were set forth at a plea hearing on September 12, 2005, and in a petition to plead guilty and a stipulation, both of which were signed by Brown on September 12. Under the agreement, Brown agreed to plead guilty to the amended charge of second-degree intentional murder and to be sentenced to an executed term of 432 months, an upward durational departure from the presumptive guidelines sentence of 306 months. In exchange, the state agreed to dismiss the counts of first-degree attempted murder and agreed not to charge Brown with another, earlier murder unless new evidence came to light.

At the September 12 plea hearing, Brown pleaded guilty to second-degree intentional murder. During the plea colloquy, Brown acknowledged that his attorney had discussed *Blakely* with him and had explained to him his right to “require a jury, after hearing the evidence to make a decision if [an upward departure] would be an appropriate sentence.” Brown also acknowledged that he was “waiving [his] rights for a jury determination of aggravating factors” and that he had signed and dated a stipulation to that effect.

In the stipulation, Brown not only waived his right to a jury determination of the aggravating factors, but he also agreed that several aggravating factors existed and supported the upward departure in sentencing. Those factors were:

the offense involved multiple victims, the offense was committed under circumstances of greater than normal danger given the presence of many other persons in the area, there was particular cruelty involved in the nature of the shooting as evidenced by the [appellant] shooting the deceased in the back while he was incapacitated on the ground, by the [appellant] shooting the deceased in front of his father and by the [appellant’s] failure to seek medical life saving treatment for the deceased.

After the stipulation was received by the court at the plea hearing, Brown and his attorney discussed his guilty-plea petition and his waiver of his right to a jury trial, including his right to a trial, his right to be presumed innocent, his right to an attorney, his right to cross-examine witnesses, his right to challenge the introduction of evidence, his right to call witnesses on his own behalf, and his right to testify or not testify. In the plea petition, Brown similarly waived his right to challenge certain evidence, his right to a jury trial, his right to be presumed innocent, his right to have the state’s witnesses testify

in open court, his right to cross-examine those witnesses, and his right to call favorable witnesses. The petition also explained the plea agreement and referenced the upward departure of 432 months and stated that Brown “waives any *Blakely* appeal right.”

Brown provided a factual basis for the offense, as well as admissions to the aggravated sentencing factors in the signed stipulation. The matter was continued for sentencing.

Prior to sentencing, Brown sent a letter to the court expressing his concerns regarding his guilty plea and his intention to move for a withdrawal of that plea. Brown appeared at a sentencing hearing in October, but sentencing was continued to allow for preparation of the plea-hearing transcript and for a formal motion for plea withdrawal.

Nearly two months later, the parties re-appeared for sentencing. At that time, Brown told the court that he no longer wished to withdraw his guilty plea and that he wanted to proceed with sentencing. The district court discussed the existence of the aggravating sentencing factors with Brown. Brown chose to maintain the guilty plea and his stipulation to the aggravating factors. The district court then imposed the agreed-upon sentence of 432 months.

Subsequently, Brown filed a pro se motion to correct his sentence, arguing that the upward departure violated his rights under *Blakely*. The district court treated Brown’s motion as a petition for postconviction relief, and, by order dated February 29, 2008, denied the request for sentence modification, concluding that Brown had waived his *Blakely* rights through his signed stipulation and the oral acknowledgment at the plea hearing. This appeal follows.

DECISION

I

We review the decisions of a postconviction court for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Review of factual issues “is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *Cuypers v. State*, 711 N.W.2d 100, 103 (Minn. 2006) (quotation omitted). But legal issues are reviewed de novo. *Id.* A postconviction court abuses its discretion if it misapplies the law. *State v. Jedlicka*, 747 N.W.2d 580, 582 (Minn. App. 2008). A waiver of the right to a jury trial on sentence-enhancement factors established by *Blakely* presents a legal question, which we review de novo. *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

On appeal, Brown challenges the validity of his *Blakely* waiver and asks this court to reverse his sentence and remand for re-sentencing. To be valid, a defendant’s waiver of his right to a jury determination of aggravating factors must be knowing, voluntary, and intelligent. *State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006). Brown contends that his *Blakely* waiver was not knowing or intelligent because it did not include an express enumeration and forfeiture of each of his jury-trial rights, such as the right to have the jury unanimously agree on its decision on the aggravating factors, the right to the presumption that the aggravating factors were not present, the right to call witnesses on his own behalf, and the right to cross-examine the state’s witnesses. He admits, however, that he waived these rights—the right to a unanimous jury verdict, the right to the presumption of innocence, and the right to call and cross-examine witnesses—as part

of his guilty plea to the offense itself, and he admits that he waived his right to a jury determination of the *existence* of the aggravating factors.

In *State v. Thompson*, the Minnesota Supreme Court held that a *Blakely* waiver that followed a plea of guilty did not have to include a waiver of the individual rights being forfeited by the defendant in agreeing to a bench trial of the sentencing issue. 720 N.W.2d 820, 826–28 (Minn. 2006). In *Thompson*, the defendant pleaded guilty to nine counts of theft by swindle but did not reach an agreement with the state on sentencing. *Id.* at 823–24. The state requested an upward durational departure, which the defendant opposed. The sentencing hearing occurred the day after the United States Supreme Court’s decision in *Blakely*, and at the sentencing hearing, the defendant agreed to waive her right to a jury trial on the existence of aggravating facts and agreed to allow the court to determine whether there was a factual basis for an aggravated sentence. *Id.* at 824–25. The district court concluded that aggravating factors existed and imposed a sentence, which was an upward departure. *Id.* at 825.

On appeal, the Minnesota Court of Appeals held that the defendant had not knowingly, voluntarily, and intelligently waived her right to a jury trial on aggravating factors, because she had not explicitly acknowledged and waived her right to testify, to cross-examine witnesses, to have witnesses testify in open court in her presence, and to call her own witnesses. *State v. Thompson*, 694 N.W.2d 117, 123 (Minn. App. 2005), *rev’d*, 720 N.W.2d 820 (Minn. 2006). This court reasoned that the acknowledgment and forfeiture of such rights was required by Minn. R. Crim. P. 26.01, subd. 3, which governs the waiver of a jury trial on stipulated facts. *Id.* at 122. Even though she had waived the

right to a jury trial, the defendant had not waived these specific rights, and therefore this court concluded that her waiver was invalid. *Id.* at 123.

But the Minnesota Supreme Court granted review and reversed this court's decision. *Thompson*, 720 N.W.2d at 820. The supreme court held that the defendant's waiver was governed by Minn. R. Crim. P. 26.01, subd. 1(2)(a), which allows a defendant to waive a jury trial on the issue of guilt if the defendant does so personally in writing or orally upon the record in open court after being advised by the court of the right to a trial by jury and after having an opportunity to consult with counsel. *Id.* at 826–27. In reaching this conclusion, the court explained that the defendant had requested that the district court, not a jury, determine whether there was a factual basis for a sentencing departure—she did not merely stipulate to facts for the purpose of determining those factors. *Id.* at 827. Because the district court engaged in judicial factfinding to determine whether the aggravating factors were present, the supreme court concluded that the procedure was “more akin to a bench trial regarding the elements of an offense than to a trial based on stipulated facts.” *Id.* The court went on to conclude that the defendant's waiver complied with the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a), and was, therefore, valid. *Id.* at 827–28.

Relying on *Thompson*, Brown argues that any given *Blakely* waiver is valid only if it is commensurate with what is required for a similarly situated defendant seeking to waive a jury trial on an element of the substantive offense. Brown also argues that any trial rights that are not being retained by the defendant as a result of the waiver must be separately acknowledged and forfeited to constitute a valid waiver. He notes that recent

changes to the rules of criminal procedure lend support to his contention,¹ but he admits, and the state agrees, that these rule changes do not apply to him.

Because the situation here is most similar to a guilty plea for a substantive offense, as opposed to a waiver of a jury trial or a waiver of a contested evidentiary hearing, Brown asserts that, to be valid, his *Blakely* waiver must have conformed to the guilty-plea procedure set forth in Minn. R. Crim. P. 15.01, subd. 1.

But even if we agreed that Brown's *Blakely* waiver should have conformed to the procedure in subdivision 1 of rule 15.01, we would still conclude that Brown's waiver was knowing, intelligent, and voluntary. As the comment to the rule recognizes, a plea may be validly entered without strict compliance with rule 15.01. Minn. R. Crim. P. 15.01 cmt. ("Although a failure to include all of the interrogation set forth in Rule 15.01 will not in and of itself invalidate a plea of guilty, a complete inquiry as provided for by the rule will in most cases assure and provide a record for a valid plea."); *State v.*

¹ Specifically, Brown points out that Minn. R. Crim. P. 26.01, subd. 1(2)(b), now provides that

the defendant, with the approval of the court, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 3, now provides that if a trial on stipulated facts is used to determine the defendant's guilt and the existence of facts to support an upward departure, there is a separate waiver for each issue of the defendant's various rights. In addition, Minn. R. Crim. P. 15.01, which governs the requirements for entry of a guilty plea, has changed. Rule 15.01, subd. 2, now provides for a separate inquiry for the waiver of sentencing rights.

Christopherson, 644 N.W.2d 507, 511 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). Here, even if the inquiry was not as complete as it might have been, the record still establishes a knowing, intelligent, and voluntary waiver of Brown's *Blakely* rights.

At the plea hearing, Brown stated that he and his attorney had discussed the *Blakely* decision "at length," and his attorney asked Brown about his rights under *Blakely*.

DEFENSE COUNSEL: Now, Mr. Brown, I want to talk to you briefly about a case that you and I have had lengthy discussions about. And it revolves around whether or not this court has the right to sentence you over and above the sentencing guidelines, in other words give you an upward departure; do you understand that?

BROWN: Yes.

DEFENSE COUNSEL: Can you tell the court the name?

BROWN: The *Blakely* case.

DEFENSE COUNSEL: *Blakely v. Washington*; is that correct?

BROWN: Yes, sir.

DEFENSE COUNSEL: And you and I discussed that at length; is that true?

BROWN: Yes.

DEFENSE COUNSEL: And I explained to you under the law and under that case that if we were to go to try to have a guilty plea without an agreement that you would waive your right to upward the departure, the court would not be able to sentence you to an upward departure; you understand that?

BROWN: Yes.

DEFENSE COUNSEL: It would require a jury, after hearing the evidence to make a decision if that would be an appropriate sentence, correct?

BROWN: Yes.

DEFENSE COUNSEL: And I also explained to you that in order for any judge or jury to deem that an upward departure is appropriate, there has to be certain elements or certain criteria that the judge would use in determining [] that or a jury would use in determining that; is that correct?

BROWN: Yes.

From this exchange, it is clear that Brown was not only aware of his right to have the jury determine the existence of the aggravating factors, but he was also aware of his right to a jury trial on the issue where the jury would, “after hearing the evidence[,] . . . make a decision [about] an appropriate sentence.”

In addition, the plea petition enumerates each of Brown’s rights, including the right to be presumed innocent, the right to testify, the right to cross-examine witnesses, and the right to call his own witnesses. Brown’s attorney reviewed this petition with him during the plea hearing and secured his waiver to each of these rights. And the plea petition specifically referenced his *Blakely* rights, stating that Brown “waive[d] any *Blakely* appeal right.”

Before he was sentenced, Brown re-affirmed his decision to waive his right to a sentencing jury. At the sentencing hearing, Brown’s attorney asked him if he understood that it was a jury’s decision:

DEFENSE COUNSEL: You also understand that in order for the Court to sentence beyond the recommended sentencing guidelines as we discussed at the time of the guilty plea, the Court has to determine there were aggravating factors to a jury making the decision beyond a reasonable doubt?

BROWN: Right.

DEFENSE COUNSEL: You understand it’s a jury’s decision?

BROWN: Yes.

Brown, nonetheless, argues that he was not aware of his rights, because at the plea hearing, there was a *separate* discussion regarding his *Blakely* rights and that that discussion preceded his jury-trial waiver. Brown’s portrayal of the sequence is accurate:

At the plea hearing, Brown’s attorney first discussed with him the right to have a “jury, after hearing the evidence . . . make a decision [on] an appropriate sentence.” Brown’s counsel then reviewed the stipulation where Brown waived his right to a jury determination on aggravating factors. The two then discussed Brown’s waiver of a trial, including his right to be presumed innocent unless he was proven guilty beyond a reasonable doubt, his right to an attorney, his right to cross-examine witnesses, his right to call his own witnesses, and his right to testify or not testify. Finally, Brown’s counsel established a factual basis for the pleaded-to offense, including admissions to establish the aggravating factors. Regardless of the sequence of events, Brown’s argument is simply not persuasive given that Brown agreed he was waiving his right to have the jury make the determination “after hearing the evidence” and in light of the fact that the plea petition enumerated all of Brown’s rights.

Finally, we note that even if we were to conclude that the failure to follow the procedure set forth for guilty pleas in Minn. R. Crim. P. 15.01, subd. 1, was error, we would conclude that the error in this case was harmless. We consider *Blakely* errors under a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (citing *Washington v. Recuenco*, 548 U.S. 212, 221, 126 S. Ct. 2546, 2553 (2006)). An error is harmless if there is no reasonable doubt that the result would have been the same if the error had not occurred. *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006). On this record, as described above, there is no reason to conclude that two separate waivers—one for each of the rights associated with the sentencing determination and one

for each of the rights associated with the jury trial on the substantive offense—would have led to a different result.

II

In his pro se supplemental brief, Brown again challenges the *Blakely* waiver, arguing that the aggravating factors were not proven beyond a reasonable doubt. In support of his claim, Brown notes that if a defendant “waive[s] the right to a jury determination of whether factors exist that would justify an aggravated sentence,” the district court is required to determine, beyond a reasonable doubt, whether such facts exist. Minn. Stat. § 244.10, subd. 7 (2008).

Here, Brown validly waived his right to a jury determination of the aggravating factors and agreed that several specific aggravating factors existed. He also admitted to facts supporting these factors at both the plea and sentencing hearings. *Cf. Dettman*, 719 N.W.2d at 652 (explaining that a defendant’s statement made after a valid waiver of his right to a jury trial “constitutes an admission that dispenses with the state’s burden of proving offense elements to a jury”).

Brown cites no authority to explain why his stipulation to the existence of the aggravating factors and admissions at the plea hearing and sentencing hearing, when combined with the valid jury-trial waiver, is insufficient to dispense with the state’s burden of proof on the aggravating factors. Therefore, we conclude that Brown’s pro se argument has no merit.

Affirmed.