STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1737

Kevin Patrick Plantin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 15, 2010
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-02-030925

Kevin Patrick Plantin, Moose Lake, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Halbrooks, Judge.

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

LANSING, Judge

Following remand on Kevin Plantin's second postconviction appeal, the district court concluded that a records administrator had, contrary to the remand instructions, vacated Plantin's count-four conviction for kidnapping rather than his count-three conviction for kidnapping. Plantin appeals from the district court's order correcting the entry. Because the correction order properly implemented the remand instructions and did not violate Plantin's constitutional protections, we affirm.

F A C T S

A jury found Kevin Plantin guilty in 2002 of attempted first-degree murder, burglary, second-degree assault, and two counts of kidnapping. The two kidnapping counts were designated in the criminal complaint as counts three and four. Count three was charged under Minn. Stat. § 609.25, subd. 1(2) (2002) (confining person without consent for purpose of facilitating felony) and count four was charged under Minn. Stat. § 609.25, subd. 1(3) (2002) (confining person without consent for purpose of committing great bodily harm).

The district court entered convictions on both kidnapping counts but sentenced Plantin only on count four, specifically stating, "I'm going to sentence you first on the kidnapping . . . to 86 months. . . [t]hat's [c]ount [f]our of the . . . complaint." Consistent with the stated sentence, the commitment warrant provided that the kidnapping sentence was for the count-four conviction.

Plantin's 86-month sentence on the count-four conviction took into account the enhanced sentencing provision in Minn. Stat. § 609.25, subd. 2(2) (2002), for circumstances in which the victim suffers great bodily harm and is not released in a safe place. The jury's verdict included specific findings that supported the Minn. Stat. § 609.25, subd. 2(2) enhancement. The 86-month kidnapping sentence was consecutive to Plantin's 180-month sentence on his conviction for attempted first-degree murder.

In a direct appeal, Plantin raised six claims of trial error. We affirmed his convictions, and the supreme court denied review. *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004) (*Plantin I*), *review denied* (Minn. Sept. 29, 2004). In May 2005 Plantin filed his first postconviction-relief petition, raising sentencing issues on his kidnapping and attempted-first-degree-murder convictions. *See Plantin v. State*, No. A05-1750, 2006 WL 1229672 (Minn. App. May 9, 2006) (*Plantin II*) (discussing claims in first postconviction petition), *review denied* (Minn. July 19, 2006). We concluded that the district court had acted within its discretion by imposing sentences for both attempted-first-degree murder and kidnapping, and by imposing the enhanced sentence for the more serious kidnapping conduct. *Id.* at *1-2. Although the criminal complaint did not cite the Minn. Stat. § 609.25, subd. 2(2) sentencing enhancement in either count three or count four of the kidnapping charges, we concluded that the complaint was constructively amended through the trial process to include subdivision 2(2). *Id.* at *2.

In April 2007 Plantin filed his second petition for postconviction relief, raising constitutional and statutory issues. For the first time, Plantin claimed that one of his kidnapping convictions was a lesser-included offense of his other kidnapping conviction

and must be vacated. *See Plantin v. State*, No. A07-1997, 2008 WL 4646240, at *3 (Minn. App. Oct. 21, 2008) (*Plantin III*) (discussing claims in second postconviction petition). The *Plantin III* court recognized that Plantin's claim could be barred under *Knaffla* but considered Plantin's request for relief in the "interests of fairness and justice." *Id.*; *see State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (barring consideration of claims previously raised or known but not raised in direct appeal).

Relying on the fairness-and-justice exception, the *Plantin III* court concluded that the provisions of Minn. Stat. § 609.251 (2002), which exempt the crime of kidnapping from the multiple-conviction prohibition in Minn. Stat. § 609.04 (2002), do not permit conviction of two counts of kidnapping for the same behavioral incident. 2008 WL 4646240, at *3. Accordingly, the *Plantin III* court ordered that "the conviction under [the sentencing provision] Minn. Stat. § 609.25, subd. 2(2) (2002), . . . must stand while the additional kidnapping conviction under Minn. Stat. § 609.25, subd. 1(2) (2002), must be vacated." *Id.* *Plantin III* reversed and remanded to the district court for the purpose of vacating "the kidnapping conviction under Minn. Stat. § 609.251, subd. 1(2)." *Id.* The charge under Minn. Stat. § 609.251, subd. 1(2), was designated as count three in the criminal complaint.

Following remand, Plantin wrote a letter to the district court requesting a hearing on the remaining kidnapping conviction under subdivision 1(2), which he understood was the conviction that should have been vacated. A district court records administrator responded to his letter with a copy of Plantin's register of actions that showed that count

four, instead of count three, had been dismissed in the amended disposition following remand on *Plantin III*. In response to the administrator's letter, Plantin requested, with a copy to the county attorney, an amended warrant of commitment that would show that count four had been vacated. The county attorney, in a letter to the district court, explained that Plantin's sentence was "not affected by the dismissal of the kidnapping conviction under Minn. Stat. § 609.25, subd. 1(2)." The district court then sent a letter to Plantin, explaining that the commitment warrant did not need to be amended because Plantin's sentence was "not affected by the vacated count."

On the ground that his kidnapping sentence was for his conviction on count four, which was now vacated, Plantin moved to amend his sentence by eliminating the 86-month commitment for kidnapping. In response to Plantin's motion, the district court reviewed Plantin's entire file. Following that review, the district court made procedural and factual findings and concluded that "the administrative vacation and dismissal of [c]ount 4 was a clerical error." The district court stated that "the [c]ourt [a]dministrator mistakenly vacated and dismissed the wrong count of kidnapping." To correct the clerical error the district court ordered the court administrator for the criminal division to "reinstate [Plantin's] kidnapping conviction under [c]ount 4" and to "vacate [c]ount 3." Plantin appeals the district court's order correcting the administrative error and denying his motion to amend his sentence.

D E C I S I O N

In this appeal, Plantin argues that the district court misapplied the *Plantin III* remand instructions, lacked the authority to reinstate the conviction on count four, and

violated both his protection against double jeopardy and his due process rights. Absent an abuse of sentencing discretion or the imposition of a sentence that is not authorized by law, a district court's sentence will not be reevaluated on appeal. *Fritz v. State*, 284 N.W.2d 377, 386 (Minn. 1979); *see also State v. Stutelberg*, 435 N.W.2d 632, 633-34 (Minn. App. 1989) (analogizing standards of review for motions brought under Minn. R. Crim. P. 27.03, subd. 9, to motions brought under its federal counterpart, Fed. R. Crim. P. 35).

I

We first address Plantin's contention that the district court improperly applied the remand instructions in *Plantin III*. The remand instructions in *Plantin III* state that "the additional kidnapping conviction under Minn. Stat. § 609.25, subd. 1(2) (2002), must be vacated." 2008 WL 4646240, at *3. Only count three of the complaint was charged under Minn. Stat. § 609.25, subd. 1(2). Count three is therefore the "conviction under Minn. Stat. § 609.25, subd. 1(2)," that *Plantin III* ordered the district court to vacate. The district court's order applying *Plantin III* complies with the specific requirements to vacate count three and to reinstate count four.

The district court's order is also consistent with the clearly expressed intent in *Plantin III* that vacating the subd. 1(2) kidnapping conviction would not affect Plantin's sentence. *Id.* The subd. 1(2) kidnapping conviction was addressed and affirmed in *Plantin II*. 2006 WL 1229672, at *2-3. The *Plantin III* court expressly incorporated this affirmance into its holding. Therefore, when *Plantin III* ordered that the "conviction under Minn. Stat. § 609.25, subd. 2(2) (2002), . . . must stand," it was referring to count

four, the kidnapping count on which Plantin was sentenced. 2008 WL 4646240, at *3. The district court's order to reinstate count four complies with the remand instructions. We find no support for Plantin's argument that count four was a lesser-included offense of count three. The complaint charged two different provisions of the same statute and neither provision is a lesser-included offense of the other. *See* Minn. Stat. § 609.25, subd. 1(1)-(5) (enumerating four alternative provisions to satisfy intent element of kidnapping statute); *see also State v. Pendleton*, 725 N.W.2d 717, 730 n.8 (Minn. 2007) (stating that enumerated alternatives each satisfy single intent element of kidnapping charge).

The district court properly applied the remand instructions of *Plantin III* when it corrected the administrative error and ordered the criminal division court administrator to "reinstate [Plantin's] kidnapping conviction under [c]ount 4" and to "vacate [c]ount 3."

II

Plantin's second argument is that the district court lacked authority to reinstate count four. The district court relied on its authority under Minn. R. Crim. P. 27.03, subd. 8, to correct clerical errors. "Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Minn. R. Crim. P. 27.03, subd. 8. Plantin contends that it was a judicial act, not a clerical error that vacated count four and, therefore, the vacated conviction became final after the time for appeal expired.

The district court's conclusion that count four was "administratively vacated" as a result of a clerical error is supported by the record. Following remand in *Plantin III*, an amended disposition was entered on the register of actions for Plantin's case. This amendment occurred without any judicial proceedings or district court judicial order. The letters that Plantin received from the district court administrator stated that vacating count four "was accomplished administratively by the [c]riminal [f]iling office." The record therefore reflects clerical, not judicial, action. *See Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322, 323 (1930) (holding that clerical error is one "which cannot reasonably be attributed to the exercise of judicial consideration or discretion"); *compare State v. Pflepsen*, 590 N.W.2d 759, 768 n.4 (Minn. 1999) (citing *Wilson* and stating that absence of restitution could not be corrected as clerical error because it reflected district court's discretionary decision).

The clerical nature of the administrative action is confirmed by the procedural history of Plantin's appeal. Plantin could not appeal directly from the amendment to the register of actions. *See* Minn. R. Crim. P. 28.02, subds. 1 & 2 (stating that defendant can obtain review of orders and rulings only as permitted by rules, which do not include amendments to register of actions among appealable district court actions). Plantin's appeal is from the district court's order denying Plantin's motion to amend his sentence. The entry in the register therefore did not become "final" when the deadline for appeal passed.

Because count four was administratively vacated as a result of clerical error, the district court had the authority to correct a "clerical mistake in judgments, orders, or other

parts of the record" at any time. Minn. R. Crim. P. 27.03, subd. 8. The register of actions is part of the "official records of the clerk of the [d]istrict [c]ourt." *State ex rel. Craig v. Tahash*, 263 Minn. 158, 162, 116 N.W.2d 657, 660 (1962) (taking judicial notice of indications in register of actions that defendant was represented by counsel). The register therefore is a part of the record, and the district court had authority to correct a clerical error. The district court acted within its discretion to direct the criminal division court administrator to reinstate Plantin's kidnapping conviction under count four and to vacate Plantin's kidnapping conviction under count three.

III

Plantin's final argument is that the district court's action to correct the error violated the double jeopardy and due process clauses of the state and federal constitutions. We review constitutional questions de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

First, Plantin argues that the district court's reinstatement of the count four conviction amounted to putting him twice "in jeopardy" for the same offense. The double jeopardy clauses of the United States and Minnesota Constitutions protect criminal defendants from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Hankerson v. State*, 723 N.W.2d 232, 236-37 (Minn. 2006). When a charge is reinstated after dismissal, however, jeopardy is not implicated if the dismissal "does not depend on factual guilt or innocence." *State v.*

Large, 607 N.W.2d 774, 779 (Minn. 2000). In addressing this question, courts look to the substance of the dismissal rather than its form. *Id.* at 780.

We conclude that because the substance of the district court's action was the correction of a clerical error, double jeopardy is not implicated. Plantin's current kidnapping conviction and his sentence are based on the original prosecution and jury verdict in 2002. After the district court's correction order, Plantin was left with one fewer conviction and the same sentence. He was not subjected to a new prosecution, a new conviction, or a new sentence. A second jeopardy did not arise.

Additionally, the administrator's incorrect amendment to the register of actions was not an "acquittal." When the district court filing office dismissed count four in the register, it did not reflect factual innocence. The filing office left intact Plantin's other kidnapping conviction, based on the same facts and the same victim. The substance of this action was to maintain the jury's verdict and the district court's sentence on a kidnapping count. The fact that the administrator dismissed the wrong count affected only the form of the action, not its substance. It was not an acquittal, and double jeopardy is not implicated. *See In re Welfare of K.J.K.*, 357 N.W.2d 117, 120-21 (Minn. App. 1984) (stating that jeopardy did not attach when clerical error caused entry of adjudication because "[t]here was no consideration of the substantive charge").

Second, Plantin argues that the district court violated his due process right because it interfered with his expectation of finality in his sentence. He relies on *State v. Calmes,* in which the supreme court defined a limited constitutional constraint on a court's authority to modify a person's sentence to correct errors. 632 N.W.2d 641, 647-49

(Minn. 2001). The constraint identified in *Calmes* does not apply to the facts of this case, however, because Plantin has not shown that his sentence was modified by the district court. For a brief period of time the register of actions showed that the *conviction* for count four had been vacated. But neither the opinion in *Plantin III* nor the filing office's amendment to the register of actions affected Plantin's *sentence*. The district court's communication with Plantin specifically stated that his sentence had not been affected and that the sentence could only be changed if he filed a motion to amend it. Plantin's motion requesting the modification establishes that he knew that his sentence had not been changed, and the district court's denial of Plantin's motion left Plantin's sentence unaltered. The absence of any sentence modification defeats Plantin's claim under *Calmes* that he was denied due process.

Affirmed.