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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-139**

State of Minnesota,
Respondent,

vs.

Andrei Russell,
Appellant.

**Filed November 23, 2010
Reversed and remanded
Klaphake, Judge**

Clay County District Court
File No. 14-CR-09-1313

Lori Swanson, Attorney General, Tabor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Following a stipulated facts trial that was held in accordance with Minn. R. Crim. P. 26.01, subd. 4, appellant Andrei Russell challenges his convictions of second-degree burglary, Minn. Stat. § 609.582, subd. 2(a)(1) (2008), and fleeing a police officer, Minn. Stat. § 609.487, subd. 6 (2008). Appellant claims that his convictions should be reversed because he did not validly waive his constitutional trial rights as required by Minn. R. Crim. P. 26.01, subd. 4. We agree and therefore reverse and remand for further proceedings.

DECISION

“The interpretation of the rules of criminal procedure is a question of law subject to de novo review.” *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (quotation omitted). Before a district court may receive a defendant’s stipulation to the prosecution’s case for the purpose of obtaining appellate review of a pretrial suppression issue, the defendant must be informed of and expressly waive specific constitutional protections, including the rights to a jury trial, to testify at trial, to confront witnesses against him, and to subpoena witness. *State v. Knoll*, 739 N.W.2d 919, 920-21 (Minn. App. 2007); Minn. R. Crim. P. 26.01, subd. 4. Rule 26.01, subd. 4(d) states that “[t]he defendant, after an opportunity to consult with counsel, must waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and must also waive the rights specified in Rule 26.01, subdivision 3(a).” The rule also requires the defendant to “acknowledge that appellate review will be of the pretrial issue, but not of the defendant’s guilt, or of other

issues that could arise at a contested trial.” Minn. R. Crim. P. 26.01, subd. 4(f). Subdivision 3(a), which applies to all trials on stipulated facts, requires the following waivers:

[T]he defendant must acknowledge and personally waive the rights to:

- (1) testify at trial;
- (2) have the prosecution witnesses testify in open court in the defendant’s presence;
- (3) question those prosecution witnesses; and
- (4) require any favorable witnesses to testify for the defense in court.

A defendant may waive these rights, but “the waiver must be in writing or be placed on the record.” Minn. R. Crim. P. 26.01, subd. 3(b). *See* Minn. R. Crim. P. 26.01, subd. 4(g) (requiring defendant and prosecutor to make acknowledgements required by the rule “personally, in writing or on the record”).

This court has consistently ruled that a defendant’s invalid waiver of trial rights under Minn. R. Crim. P. 26.01, subd. 4, necessitates reversal and remand for further proceedings. *Antrim*, 764 N.W.2d at 70-71 (requiring reversal when record of stipulated facts trial under Minn. R. Crim. P. 26.01, subd. 4, did not include valid waiver of the right to require favorable witnesses to testify for the defense); *Knoll*, 739 N.W.2d at 921-22 (requiring reversal when record of stipulated facts trial under Minn. R. Crim. P. 26.01, subd. 4, failed to include express waiver of defendant’s rights to testify at trial, to confront witnesses against him, and to subpoena favorable witnesses); *see also State v. Ehmke*, 752 N.W.2d 117, 122-23 (Minn. App. 2008) (applying express waiver requirement to stipulated facts trial under Minn. R. Crim. P. 26.01, subd. 3); *State v.*

Halseth, 653 N.W.2d 782, 786 (Minn. App. 2002) (requiring new trial when record did not show defendant waived right to testify).

In *Ehmke*, this court rejected an argument that waiver could be implied by extensive questioning of the defendant by both court and counsel, noting that *Knoll* had rejected a similar argument and that rule 26.01 requires strict adherence to the waiver requirements. *Ehmke*, 752 N.W.2d at 123. In *State v. Fluker*, 781 N.W.2d 397, 401-02 (Minn. App. 2010), a case applying the harmless error rule to a defendant's invalid waiver of his right to a jury trial on two stipulated elements of his charged offense, this court noted in dicta that in the stipulated facts trials at issue in *Antrim*, *Knoll*, *Halseth*, and *Ehmke*, appellate courts required strict compliance with rule 26.01, because stipulated facts trials involve waivers of fundamental rights.

Here, the parties agreed that appellant did not validly waive his constitutional trial rights as required by Minn. R. Crim. P. 26.01, subd. 4. Appellant did not waive the right to testify, the right to have the prosecution's witnesses testify in open court in his presence, or the right to cross-examine the witnesses against him. Further, affirmatively answering the prosecutor's question, "Do you understand if you went to trial, those witnesses if they didn't want to come, you could use the Court's subpoena power to make them attend?" did not constitute a valid waiver of appellant's right to compel favorable witness testimony. The question does not indicate that "those" witnesses are defense witnesses or that appellant could make them testify via subpoena, rather than merely "attend" trial. Further, appellant did not acknowledge that appellate review would be limited to the pretrial suppression issue. Under these circumstances, we reverse

appellant's convictions and remand for further proceedings because appellant did not validly waive his constitutional trial rights.¹

Reversed and remanded.

¹ Despite the fact that appellant made an invalid waiver of his constitutional trial rights, respondent argues that this court should address, in the interests of judicial economy, an evidentiary suppression issue raised by appellant. In *State v. Rasmussen*, 749 N.W.2d 423, 428 (Minn. App. 2008), this court rejected the defendant's request that we reach her pretrial suppression issue after concluding that defendant had made an invalid waiver of trial rights in a Minn. R. Crim. P. 26.01, subd. 4. There, we stated that appellate review of the suppression issue was "inappropriate at this time" because the defendant had not "agreed to one of the necessary conditions of accelerated appellate review of the suppression issue." *Id.* Likewise here, we decline to consider appellant's suppression issue at this time.