STATE OF MINNESOTA
IN COURT OF APPEALS
A11-869

State of Minnesota,
Appellant,

vs.

Alexandria Sophia Lorraine Vujnovich,
Respondent.

Filed March 26, 2012
Writ granted; reversed and remanded
Collins, Judge[*]

Sherburne County District Court
File No. 71-CR-10-1592

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

Kathleen A. Heaney, Sherburne County Attorney, Kevin Chuan Lin, Timothy A. Sime, Assistant County Attorneys, Monticello, Minnesota (for appellant)

Lee R. Martie, Martie Law Firm, LLC, Monticello, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Collins, 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.

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

COLLINS, Judge

Appellant State of Minnesota argues that the district court erred when it sentenced respondent Alexandria Vujnovich on a misdemeanor underage drinking and driving offense and dismissed two misdemeanor driving under the influence (DWI) offenses arising from a single incident, after the jury found Vujnovich guilty of all three offenses. The state asserts the right to appeal this issue under Minn. R. Crim. P. 28.04, subd. 1, or, alternatively, that this court should consider this appeal as a request for an extraordinary writ. The state contends that the underage drinking and driving offense was the least serious of the three offenses and should have not been the offense for which Vujnovich was sentenced. We grant a writ of mandamus, and because we conclude that the DWI offenses are more serious than the underage drinking offense, we reverse Vujnovich's sentence and remand for reinstatement of the DWI guilty verdicts and adjudication of a conviction and sentencing on one of the DWI offenses.

FACTS

On July 31, 2010, a Sherburne County Sheriff's deputy responded to a complaint at a rural residence. As he approached the location, the deputy observed a vehicle that was apparently leaving the residence swerving on the road. He stopped the vehicle, which was driven by 17-year-old Vujnovich. After noticing indicia of intoxication, the deputy had Vujnovich perform field sobriety tests, which she failed. Vujnovich was arrested, and subsequent testing revealed that her alcohol concentration was .08.

The state initially cited Vujnovich for two misdemeanor DWI offenses: (1) driving under the influence of alcohol, Minn. Stat. § 169A.20, subd. 1(1) (2008), and (2) driving with an alcohol concentration of .08 or more, Minn. Stat. § 169A.20, subd. 1(5) (2008); and a misdemeanor seat-belt violation, Minn. Stat. § 169.686, subd. 1(a) (2008). The citation was twice amended to include a misdemeanor offense of giving a false name or birth date to a peace officer, Minn. Stat. § 609.506, subd. 1 (2008), and a misdemeanor underage drinking and driving offense, Minn. Stat. § 169A.33, subd. 2 (2008). The state dismissed the seat belt violation.

The case was tried on March 28-29, 2011. The jury found Vujnovich guilty of the two DWI offenses and the underage drinking and driving offense, and acquitted her of giving a false name or birth date to a peace officer.

Following a sentencing hearing, the district court imposed and stayed a 90-day sentence, and placed Vujnovich on two-years' probation, stating that she was "found guilty of underage drink and drive and fourth degree driving while under the influence." Vujnovich's attorney asked for clarification, and the following exchange occurred:

> [Defense attorney]: Your Honor, I just want to confirm that she's being sentenced on the underage minor consume and drive and the other two will merge?
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> [Prosecutor]: Your Honor, I guess that's not –
>
> The Court: I heard nothing from either side on that. It's my understanding that we can only enter one conviction.
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> [Prosecutor]: The conviction is supposed to be DWI, correct?
>
> The Court: No; underage drink and drive.

> [Prosecutor]: The State is opposed to that. We would ask for the DWI conviction, Your Honor.
>
> [Defense attorney]: It's already been ordered, Your Honor.

On the same day that it imposed sentence on the underage drinking and driving offense, the district court also entered an order dismissing the two DWI offenses.

The prosecutor sent the district court a letter on May 2, 2011, asking the court to provide a clear basis for its sentencing decision, either by holding a hearing on the matter or by issuing a written order specifying the grounds for its dismissal of the DWI offenses. In the letter, the prosecutor asserted that, consistent with Minn. Stat. § 609.035 (2008), Vujnovich should have been convicted and sentenced on one of the DWI offenses rather than being sentenced on the underage drinking and driving offense, because the DWI offenses are the most serious offenses of which Vujnovich was found guilty.

The district court issued an order on May 3, 2011, denying the state's request for a hearing. Noting that at sentencing "neither party addressed the issue of multiple convictions arising from a single incident," and that Minn. Stat. § 609.035 required Vujnovich to be sentenced on the most serious offense of which the jury found her guilty, the district court's order states:

> If the offenses carry the same maximum sentence, the offense which forms the essence of the behavioral incident is the most serious. [*State v.*] *Kebaso*, 713 N.W.2d [317,] 323 [(Minn. 2006)]. Here, [Vujnovich's] convictions arose from the same act: driving after consuming alcohol. Each conviction is defined as a misdemeanor and thus carries the same maximum penalty. *See id*; *see also* Minn. Stat. § 609.02, subd. 3 (providing the maximum sentence for a misdemeanor). Furthermore, none of [Vujnovich's] driving offenses involved a crime against a person; rather, the single

> act of driving after consuming alcohol is the essence of [the] behavioral incident. *See Kebaso*, 713 N.W.2d at 323. Because none of the factors approved by the appellate courts in determining the "most serious offense" is applicable here, the Court cannot find that one offense is more serious than the other.[1] Therefore, the Court imposed sentence on that count it deemed the most appropriate given the facts and circumstances of this case.

The state challenges the district court's (1) decision to sentence Vujnovich on the underage drinking and driving offense, and (2) dismissal of the DWI offenses, rather than to adjudicate a conviction and impose sentence on one of the DWI offenses. The state asserts the right to appeal by virtue of Minn. R. Crim. P. 28.04, subd. 1, or, alternatively seeks an extraordinary writ from this court.

D E C I S I O N

Issuance of Writ.

The state's right to appeal is limited in criminal cases; such right "is contrary to common law and must be expressly conferred by statute or must arise by necessary implication." *State v. Barrett*, 694 N.W.2d 783, 787 (Minn. 2005) (quotation omitted). "There must be a statute or court rule that permits the appeal, or the issue must arise by necessary implication from an issue where the State's right to appeal is expressly provided." *State v. Hannibal*, 786 N.W.2d 314, 316 (Minn. App. 2010) (quotation omitted); *see Arizona v. Manypenny*, 451 U.S. 232, 245, 101 S. Ct. 1657, 1666 (1981)

[1] We note that the district court imposed a sentence that was not authorized by law when it imposed a two-year probationary term for the underage drinking and driving offense. Whereas the maximum term of probation for misdemeanor DWI is *two* years, the maximum term of probation for underage drinking and driving is limited to *one* year. This misconstruction likely contributed to the district court equating the seriousness of the offenses.

(stating that "the Government may take an appeal from an adverse decision in a criminal case only if expressly authorized by statute to do so"). This court strictly construes the rules governing the state's right to appeal in criminal cases. *Hannibal*, 786 N.W.2d at 316.

The state asserts the right to appeal the district court's sentencing decision by virtue of Minn. R. Crim. P. 28.04, subd. 1. That rule provides:

> The prosecutor may appeal as of right to the Court of Appeals:
>
> (1) in any case, from any pretrial order, including probable cause dismissal orders based on questions of law. But a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable cause premised solely on a factual determination, or if the court dismissed a complaint under Minn. Stat. § 631.21;
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> (2) in felony cases, from any sentence imposed or stayed by the district court;
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> (3) in any case, from an order granting postconviction relief under Minn. Stat. ch. 590;
>
> (4) in any case, from an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at trial. An order for a stay of adjudication to which the prosecutor did not object is not appealable;
>
> (5) in any case, from a judgment of acquittal by the district court entered after the jury returns a verdict of guilty under Rule 26.03, subd. 18(2) or (3);
>
> (6) in any case, from an order of the district court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 3;
>
> (7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if

> the district court expressly stated in its order or in an accompanying memorandum that it based its order exclusively on a question of law that, in the opinion of the district court, is so important or doubtful that the appellate courts should decide it. However, an order for a new trial cannot be appealed if based on the interests of justice.

The state concedes that subsections four through six of the rule do not "neatly" apply, and its primary argument is that its right to appeal from the district court order dismissing the DWI offenses "is similar in nature to an appeal from an order of dismissal or acquitting a defendant of charges following a jury verdict of guilty, . . . and the [s]tate's right to appeal arises by necessary implication." Vujnovich argues that rule 28.04 does not address the state's right to appeal from a district court order dismissing particular misdemeanor offenses upon which a jury found the defendant guilty while sentencing the defendant on another misdemeanor offense. The state argues that in this instance the district court's decision impermissibly nullified the prosecutor's charging decision and the jury's verdicts on the DWI offenses.

Many of the provisions of the rule plainly do not apply here, including: subsections one (pretrial orders), two (felony cases), three (postconviction relief), four (stays of adjudication), five (judgments of acquittal),[2] and seven (orders for new trial). Arguably, the district court's dismissal of the DWI offenses is similar to subsection six, but that subsection applies specifically to orders vacating a judgment and dismissal *upon the motion of the defendant*, if either the charge is legally insufficient or if the district

[2] Subsection five applies to judgments of acquittal that either follow a motion for judgment of acquittal or based on insufficient evidence to support an aggravated sentence.

court lacked jurisdiction over the offense. Thus, by its plain terms, subsection six does not apply. Further, although the state argues that the facts here are functionally equivalent to other situations in which the state is permitted the right of appeal, that argument is, by implication, contradicted by subsection two, which permits the state the right to appeal a sentence only in felony cases. Minn. R. Crim. P. 28.04, subd. 1(2); *see State v. Thoma*, 569 N.W.2d 205, 207 (Minn. App. 1997) ("The state may appeal a sentence only in a felony case."). Giving strict construction to rule 28.04, subdivision 1, we conclude that the rule does not provide the state with a right of appeal in this case. *See State v. Loyd*, 627 N.W.2d 653, 655 (Minn. App. 2001) (stating that Minn. R. Crim. P. 28.04, subd. 1 may not "give[] the state greater rights for appeal than those stated in the rule").

Alternatively, the state seeks a writ from this court to compel the district court to adjudicate a conviction and sentence Vujnovich in accordance with the law. The state did not file a petition for mandamus. But we have the authority to treat the notice of appeal as a petition for mandamus. *See State v. Pflepsen*, 590 N.W.2d 759, 764 (Minn. 1999) (permitting appellate court to suspend procedural requirements for issuance of extraordinary writ when good cause to do so exists). A writ of mandamus is permitted by statute "to compel the performance of an act which the law specially enjoins as a duty resulting from an office. . . . [The writ] may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion." Minn. Stat. § 586.01 (2010). Before an appellate court will issue a writ of mandamus, it "must first conclude that the law specifically requires [the district court] to

perform a judicial duty," but the writ will not issue if there is another adequate legal remedy. *State v. Hoelzel*, 639 N.W.2d 605, 610 (Minn. 2002). "The two primary purposes of mandamus are, first, to compel the performance of an official duty clearly imposed by law or, second, to compel the exercise of discretion when the exercise of discretion is required by law." *In re Welfare of Child of S.L.J.*, 772 N.W.2d 833, 837-38 (Minn. App. 2009), *aff'd* 782 N.W.2d 549 (Minn. 2010).

The supreme court has approved issuance of a writ of mandamus in circumstances involving an otherwise improper appeal by the state in a criminal-sentencing case. *See Hoelzel*, 639 N.W.2d at 609 (treating notice of appeal as petition for mandamus and issuing writ to compel a district court to make a disposition on a burglary count after finding a defendant guilty). Because we conclude that the district court improperly sentenced Vujnovich on the underage drinking and driving offense and is duty-bound to adjudicate a conviction and impose sentence on one of the DWI offenses, we grant the writ to redress this error.

Conviction and sentencing.

The state challenges two aspects of the district court's sentencing order. Essentially, the state contends that the district court erred by (1) sentencing Vujnovich on the underage drinking and driving offense, and (2) dismissing both of the DWI offenses, rather than adjudicating a conviction on one of DWI offenses in addition to the underage drinking and driving offense, and sentencing Vujnovich on only the selected DWI offense.

This court reviews the legality of a district court's sentencing decision de novo. *State v. Jeter*, 558 N.W.2d 505, 506 (Minn. App. 1997). With certain exceptions, "if a person's conduct constitutes more than one offense . . ., the person may be punished for only one of the offenses[.]" Minn. Stat. § 609.035, subd. 1 (2010). "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Franks*, 765 N.W.2d 68, 77 (Minn. 2009) (quotation omitted); *Kebaso*, 713 N.W.2d at 322; *see State v. Tildahl*, 540 N.W.2d 514, 515 (Minn. 1995) (reversing and remanding for vacation of one sentence when the district court sentenced the defendant on both an aggravated driving offense and an open bottle offense that arose out of the same behavioral incident).

To determine which offense is the most serious, the district court initially considers the duration of the sentences. *Kebaso*, 713 N.W.2d at 322. If the sentences for two offenses are the same, "it is proper for a court to look to the nature of the offenses to determine which offense is the most serious." *Id.* at 323. If the statutory maximum sentences for two offenses are the same, crimes against the person rank higher than "other sorts of crimes." *Id.* If these aspects are the same, "the offense that formed the essence of the behavioral incident is the most serious offense for purposes of section 609.035." *Id.*

The district court endeavored to apply *Kebaso* in determining the relative seriousness of the offenses. The court considered that under Minn. Stat. § 609.02, subd.

3 (2010), the maximum jail terms for the three misdemeanor offenses on which Vujnovich was found guilty are the same. The court also noted that none of the offenses involved a crime against the person, which was the distinguishing difference in the seriousness of the offenses at issue in *Kebaso*. Concluding that it could not find one offense more serious than the others, limited to the factors enumerated in *Kebaso*, the district court "imposed sentence on that count it deemed the most appropriate given the facts and circumstances of this case."

In its application of *Kebaso*, the district court overlooked an additional objective element of sentencing supporting the conclusion that as between DWI and underage drinking and driving, DWI is the more serious offense for purposes of section 609.035. While both are misdemeanor offenses having the same statutory maximum jail terms, the maximum terms of probation differ: the statutory maximum term of probation for misdemeanor DWI is two years, Minn. Stat. § 609.135, subd. 2(d) (2008), whereas the statutory maximum term of probation for underage drinking and driving is limited to one year. Minn. Stat. § 609.135, subd. 2(e) (2008). Consistent with the overarching rationale of *Kebaso*, we therefore hold that the district court erred by concluding, for purposes of section 609.035, that it "cannot find that one offense is more serious than the other." *See* Minn. Stat. § 609.02, subd. 15 (2008) (defining "probation" as a sanction imposed, in part, to "punish the offender").

As to the dismissal of both of the DWI offenses, the state also argues that the district court erred as a matter of law. We agree. Under Minn. Stat. § 609.04 (2008), a

defendant may be "convicted[3] of either the crime charged or an included offense, but not both." Among the possible definitions of "included offense" is "[a] lesser degree of the same crime" or "[a] crime necessarily proved if the crime charged were proved." *Id.* at subd. 1(1), (4). Thus, section 609.04 prohibits a criminal defendant who is found guilty of a single offense "from also being convicted of any included offenses." *Pflepsen*, 590 N.W.2d at 765. A defendant also may not be convicted of violating multiple provisions of a single statute by committing a single act. *State v. Spears*, 560 N.W.2d 723, 726 (Minn. App. 1997), *review denied* (Minn. May 28, 1997). However, section 609.04 is not implicated when, as here, the offenses to be compared are misdemeanor DWI and underage drinking and driving. Neither of these is a lesser-included of the other, and one offense is not necessarily proved if the other offense is proved, because the underage offense includes an element that applies only to drivers under the age of 21 while DWI offenses apply to all drivers. And underage drinking and driving is not a violation of Minn. Stat. § 169A.20, the DWI statute. For these reasons, we conclude that the district court erred as a matter of law by dismissing both DWI offenses after it determined to sentence Vujnovich on the underage drinking and driving offense.

Because the state has demonstrated that the district court failed to perform a judicial duty in the disposition of this case, mandamus is appropriate. Because the district court improperly imposed sentence on the underage drinking and driving offense

[3] "We have long recognized that the 'conviction' prohibited by this statute is not a guilty verdict, but is rather a formal adjudication of guilt. In other words, a conviction occurs only after the district court accepts, records, and adjudicates the jury's guilty verdict." *Pierson v. State*, 715 N.W.2d 923, 925 (Minn. 2006) (quotation omitted).

and erred by then dismissing both DWI offenses, we reverse Vujnovich's sentence (leaving the underage drinking and driving conviction in place), and remand for reinstatement of the guilty verdicts on the DWI offenses. On remand, the district court shall adjudicate a conviction and sentence Vujnovich on one of the DWI offenses (leaving the other DWI verdict in place). Minn. Stat. § 609.04; *State v. Clark*, 486 N.W.2d 166, 171 (Minn. App. 1992) (holding that section 609.04 prohibits multiple DWI convictions "under different sections . . . for acts committed during a single behavioral incident").

Writ granted; reversed and remanded.