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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1631

State of Minnesota,
Respondent,

vs.

Noe Pliego Casique,
Appellant.

Filed September 4, 2012
Affirmed in part, reversed in part, and remanded
Wright, Judge

Carver County District Court
File No. 10-CR-10-429

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

Mark Metz, Carver County Attorney, Colin Haley, Assistant Carver County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of conspiracy to commit first-degree sale of a controlled substance, arguing that the district court erred by amending the aiding-and-

abetting charge to conspiracy and incorrectly instructing the jury. Appellant also contends that the district court's amendment of his sentence was erroneous, and he raises several additional arguments in his pro se supplemental brief. For the reasons addressed below, we conclude that the district court did not err when it amended the charge before trial, and the district court's erroneous jury instructions do not affect appellant's substantial rights. We, therefore, affirm appellant's conviction. But because appellant's original sentence was authorized by law, we reverse the amended sentence imposed by the district court and remand for imposition of the original sentence.

FACTS

On July 1, 2010, a confidential informant (CI) who had provided reliable information to law enforcement officers in the past, called Detective Douglas Schmidtke and informed him that appellant Noe Pliego Casique could "sell any amount of cocaine and he could do it really soon." Det. Schmidtke and the CI agreed to arrange a monitored drug sale between the CI and Casique. Accompanied by two passengers, Casique picked up the CI and drove to the location where Casique had agreed to deliver the cocaine. From Casique's vehicle, the CI sent Det. Schmidtke a text message stating: "The dope is here." After Casique parked and at least three occupants exited the vehicle, Det. Schmidtke and his team stopped them and searched the occupants. The officers recovered approximately 42 grams of a white chunky substance containing cocaine from one occupant of the vehicle and 0.9 grams of a white powder containing cocaine from Casique.

Casique was charged by complaint with the following offenses: aiding and abetting first-degree sale of a controlled substance, Minn. Stat. §§ 152.021, subds. 1(1), 3(a), 609.05, subd. 1 (2008); aiding and abetting first-degree possession of a controlled substance,[1] Minn. Stat. §§ 152.021, subds. 2(1), 3(a), 609.05, subd. 1 (2008); and fifth-degree possession of a controlled substance, Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009). After a contested omnibus hearing, the district court denied Casique's motion to dismiss the charges for lack of probable cause and amended the complaint "to reference sentencing in accordance with [Minn. Stat.] § 609.175, [s]ubd. 2(3) [2008]," the conspiracy statute.

The case proceeded to trial, and the jury found Casique guilty of conspiracy to commit first-degree sale of a controlled substance and fifth-degree possession of a controlled substance. The district court imposed concurrent sentences of 43 months' imprisonment for the conspiracy offense and 13 months' imprisonment for the fifth-degree-possession offense.

Shortly after the sentencing, the state moved to modify Casique's sentence for the conspiracy offense. Following a hearing on the motion, the district court doubled the sentence from 43 months' to 86 months' imprisonment. This appeal followed.

[1] Later in the proceedings, the district court granted the state's motion to dismiss this charge.

D E C I S I O N

I.

For the first time on appeal, Casique argues that the district court committed reversible error by amending the charge of aiding and abetting first-degree sale of a controlled substance to conspiracy after the commencement of his trial. We review the district court's decision to amend the charges for an abuse of discretion. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). Because Casique failed to object to the amendment, we apply a plain-error analysis. *See* Minn. R. Crim. P. 31.02 (stating that appellate court may consider plain error affecting substantial rights even if such error was not raised before district court). Under this analysis, Casique must demonstrate an error that is plain, that affects substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (applying Minn. R. Crim. P. 31.02). Relief will be granted after doing so only if the plain error affects the fairness and integrity of the judicial proceeding. *Id.*

Before trial, a district court is "relatively free to permit amendments to charge additional offenses . . . provided the [district] court allows continuances where needed." *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). But after the trial has commenced and jeopardy has attached, an additional or different offense may not be added. Minn. R. Crim. P. 17.05; *State v. Smith*, 313 N.W.2d 429, 430 (Minn. 1981). Jeopardy attaches when the jury is sworn. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985). Although aiding and abetting and conspiracy are related theories of criminal liability, each statute has different elements and reflects a different legislative intent. *In re Welfare of D.W.O.*,

594 N.W.2d 207, 210 (Minn. App. 1999). Thus, aiding and abetting and conspiracy are different offenses under Minnesota law. *Id.*

Because aiding and abetting and conspiracy are different offenses, whether the district court erred by amending the complaint depends on *when* the amendment occurred. *Id.*; *see Smith*, 313 N.W.2d at 430. Casique contends that the relevant amendment occurred on the second day of trial. The state counters that such amendment occurred before trial. Our resolution of this issue requires a careful review of the record.

That the state initially charged Casique with aiding and abetting first-degree sale of a controlled substance is undisputed. Casique moved to dismiss the charge for lack of probable cause, arguing at a contested omnibus hearing that the testimonial evidence supported "at best, a conspiracy charge." The district court took "the issue regarding conspiracy versus aiding and abetting under advisement." On the second day of the hearing, the district court reiterated Casique's argument that "aiding and abetting is not appropriate but conspiracy may be appropriate." Throughout this proceeding, however, the state maintained that aiding and abetting, which requires a completed crime, was the appropriate charge. *See* Minn. Stat. § 609.05, subd. 1.

In its written order and memorandum, the district court concluded that it is "fair and reasonable to require [Casique] to stand trial for all counts of the Complaint," but "because no sale was actually concluded, if . . . found guilty [Casique] shall be sentenced as a conspirator in accordance with Minn. Stat. § 609.175, [s]ubd. 2(3)." The district court amended the complaint "to reference sentencing in accordance with [Minn. Stat.] § 609.175, [s]ubd. 2(3)."

The matter proceeded to trial with a different judge presiding. After the jury was sworn and jeopardy attached, the district court advised the parties that it had spoken with the original district court judge and had reviewed the written order and memorandum. The presiding judge explained that, because the first district court judge had earlier "determined as a matter of law that in order to be found guilty of the first degree possession, or sale, it has to be in terms of the conspiracy," the jury would be instructed on conspiracy.

Casique contends that the district court judge who presided at trial amended the complaint. We are not persuaded. After examining the district court's pretrial order and memorandum, we conclude that, when read together, they advised the parties of the amendment to the conspiracy allegation. Because the district court is "relatively free" to permit such amendments before the jury trial commences, we conclude that the amendment at issue here is not erroneous.[2] *See Bluhm*, 460 N.W.2d at 24. Casique fails to establish plain error. He, therefore, is not entitled to relief on this ground.

[2] Although Casique does not challenge the sua sponte nature of the amendment of the charge, and the Minnesota Supreme Court has previously upheld such amendment by the district court, *see State v. Ostrem*, 535 N.W.2d 916, 922-23 (Minn. 1995) (concluding that district court's sua sponte amendment of charges, at the close of evidence, did not give an appearance of favoritism toward the prosecution), we nevertheless observe that such sua sponte amendment distorts the district court's neutral role in a criminal proceeding. We also observe that the absence of an arraignment on the new charge, which would formally advise both the defendant and counsel of the new offense and its maximum potential penalties, invites confusion and may foreclose meaningful plea negotiation before trial. But Casique also does not raise this issue on appeal.

II.

Casique next objects to the district court's jury instructions. Because he was no longer charged with aiding and abetting, Casique argues, the district court erroneously instructed the jury on both conspiracy and aiding and abetting, which confused and misled the jury. Casique also raises this issue for the first time on appeal. Again, we apply a plain-error analysis. Minn. R. Crim. P. 31.02; *see also Griller*, 583 N.W.2d at 740 (applying Minn. R. Crim. P. 31.02).

The district court has "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). The district court is not required to use model jury instructions, *State v. Smith*, 674 N.W.2d 398, 401 (Minn. 2004), and it may tailor jury instructions to fit the facts, *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). But a district court errs when its instructions to the jury materially misstate the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). To determine whether the jury instructions materially misstate the law, we review in their entirety the instructions given to determine whether they fairly and adequately explain the law. *Id.* at 555-56.

Here, when instructing the jury on the definition and elements of first-degree sale of a controlled substance and conspiracy, the district court modified the definition and elements of first-degree sale of a controlled substance that appear in the criminal jury instructions guide to reference conspiracy. *See* 10, 10A *Minnesota Practice*, CRIMJIG 5.06-.11, 5.13-.14, 20.01-.02 (2006). Casique argues that this modification constitutes reversible error.

Under Minnesota law, a person is guilty of conspiracy if the person "conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy." Minn. Stat. § 609.175, subd. 2 (2008). Because conspiracy is an anticipatory crime, the crime that is the object of the conspiracy need not be completed. *See id.*

Here, the district court instructed the jury, in relevant part, that Casique was charged with conspiracy to sell a controlled substance in the first degree using a modified version of CRIMJIG 20.01-.02. The district court instructed the jury as follows:

> The statutes of Minnesota provide that whoever conspiring with another on one or more occasions within a 90 day period unlawfully sells one or more mixtures of a total weight of 10 grams or more containing cocaine is guilty of a crime. The elements of conspiring to commit a controlled substance violation in the first degree are: First, the Defendant conspiring with another on one or more occasions within a 90 day period *unlawfully sold one or more mixtures of a total weight of 10 grams or more containing cocaine.* . . . Second, the Defendant knew or believed that the substance sold was a mixture containing cocaine. Third, one or more of the sales took place on or about July 1, 2010 in Carver County, Minnesota.

(Emphasis added.) In doing so, the district court erroneously instructed the jury that conspiracy to commit a first-degree controlled-substance violation requires a completed sale. *See id.* The district court plainly erred. *See Kuhnau*, 622 N.W.2d at 556. To be entitled to relief under the plain-error standard, however, Casique must demonstrate that the district court's erroneous instruction affected his substantial rights. *See Griller*, 583 N.W.2d at 740.

Casique argues that his substantial rights were affected because there is "a probability that the jurors' verdict was not unanimous." This argument is unavailing. After the erroneous portion of the jury instruction, the district court correctly instructed the jury on the law of conspiracy. In doing so, the district court instructed the jury:

> It is not necessary that the crime that was the object of the conspiracy actually had been completed or committed[. A]s long as there was an agreement to commit the crime and an overt act was committed for the purpose of furthering that conspiracy, the crime of conspiracy is complete.

Although the initial description of the conspiracy offense erroneously instructed the jury that a completed sale was required—which is a higher legal standard—the instruction that followed correctly apprised the jury of the requisite elements for conviction. When the conspiracy instruction is viewed in its entirety, it is not reasonably likely that the error had a significant effect on the jury's verdict. Moreover, because the erroneous portion of the jury instruction required the state to meet a higher standard of proof, any confusion would have resulted in a jury determination that there is more than sufficient evidence to convict Casique of the conspiracy offense. *See* Minn. Stat. § 609.175, subd. 2 (requiring only an "overt act in furtherance of such conspiracy"). Because Casique fails to establish that the erroneous jury instructions affected his substantial rights, he is not entitled to relief on this ground.[3]

[3] As Casique fails to establish the third element of the plain-error test, we do not consider whether granting the remedy he seeks is necessary to ensure fairness and the integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740.

III.

Casique challenges the district court's decision to increase the sentence imposed for the conspiracy offense because the original sentence was authorized by law. When the district court initially imposed a sentence of 43 months' imprisonment for the conspiracy conviction, it did so pursuant to section 609.175, subdivision 2(3), which sets the maximum sentence for conspiracy as one-half the maximum sentence permitted for the crime that is the object of the conspiracy. Minn. Stat. § 609.175, subd. 2(3). Shortly after the sentencing hearing, the state moved for resentencing under Minn. Stat. § 152.096, subd. 1 (2008), which grants the district court discretion to impose a sentence "up to the maximum amount authorized by law for the act the person conspired to commit" when the defendant is convicted of conspiracy to commit a controlled-substance crime. The district court granted the state's motion and increased Casique's sentence from 43 to 86 months' imprisonment.

Although the district court may at any time correct a sentence that is not authorized by law, Minn. R. Crim. P. 27.03, subd. 9, a district court shall not increase a sentence that was authorized by law when it was imposed, *State v. Montjoy*, 354 N.W.2d 567, 568 (Minn. App. 1984). Whether an imposed sentence is authorized by law presents a question of law, which we review de novo. *State v. Borrego*, 661 N.W.2d 663, 666 (Minn. App. 2003). Casique does not contest that section 152.096, subdivision 1, applies. Rather, he challenges the district court's decision to modify the original sentence because it is authorized by law.

Citing *State v. Calmes*, 632 N.W.2d 641 (Minn. 2001), and *State v. Humes*, 581 N.W.2d 317 (Minn. 1998), the state argues that Casique's original sentence was unauthorized by law because the district court did not apply the controlling sentencing statute. *Calmes* and *Humes* are easily distinguishable, however. In both cases, the Minnesota Supreme Court affirmed the amended sentences because they reflected a *mandatory*-conditional-release term that had not been originally imposed. *Calmes*, 632 N.W.2d at 643-44, 649; *Humes*, 581 N.W.2d at 319-20; *see also State v. Garcia*, 582 N.W.2d 879, 881 (Minn. 1998) (observing that *Humes* addresses "mandatory and nonwaivable" terms of a statute).

Here, it was within the district court's discretion to impose a sentence under either statutory provision, Minn. Stat. § 609.175, subd. 2(3), or Minn. Stat. § 152.096, subd. 1. The sentence originally imposed is not an unauthorized sentence that warranted correction. *See Borrego*, 661 N.W.2d at 667. Accordingly, the district court erred by increasing Casique's original sentence.

IV.

In a pro se supplemental brief, Casique raises three additional challenges.

A.

Casique argues that his conviction of conspiracy to commit first-degree possession of a controlled substance must be reversed. Casique was not convicted of this offense, however. He was convicted of conspiracy to commit first-degree sale of a controlled substance. Because the district court granted the state's motion to dismiss the first-degree possession charge at the beginning of trial, Casique's challenge is moot. *See State v.*

Rud, 359 N.W.2d 573, 576 (Minn. 1984) (generally an issue may be dismissed as moot if an event occurs that resolves the issue).

B.

Casique next argues that his conviction must be reversed because Det. Schmidtke's warrantless search of Casique's vehicle violated Casique's constitutional rights. The Fourth Amendment to the United States Constitution and Article I, section 10, of the Minnesota Constitution protect citizens from unreasonable government searches and seizures. Searches that are not authorized by a warrant "are *per se* unreasonable" unless a "specifically established and well-delineated" exception applies. *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998) (quotation omitted). The motor-vehicle exception permits the police to search a vehicle without a warrant when there is probable cause to believe that the vehicle is carrying controlled substances. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

Here, based on information from a CI, the police found cocaine in the possession of Casique and one of his passengers immediately after the two men exited the vehicle. Under these circumstances, the motor-vehicle exception to the warrant requirement applies. *See id.* at 135-37. But because all of the cocaine was seized from Casique or his passenger, not from the motor vehicle in which they traveled, Casique's challenge is equally invalid on this ground.

C.

Finally, Casique argues that the district court "erred by using hearsay and entrapment to convict" him. Because these claims are raised for the first time on appeal,

we conclude that Casique has waived this challenge. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that reviewing court generally will not consider matters raised for first time on appeal).

Affirmed in part, reversed in part, and remanded.