STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1143

State of Minnesota,
Respondent,

vs.

OhOhoshecha DeFoe,
Appellant.

Filed June 10, 2013
Affirmed
Klaphake, Judge[*]

Crow Wing County District Court
File No. 18-CR-11-4546

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

Donald F. Ryan, Crow Wing County Attorney, Rockwell J. Wells, Janine Lorena Lepage, Assistant County Attorneys, Brainerd, Minnesota (for respondent)

Alan D. Margoles, Michelle Speeter Margoles, Margoles & Margoles Law Firm, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant OhOhoshecha DeFoe challenges his sentence, arguing that the district court abused its discretion by sentencing him without a pre-sentence investigation (PSI) and committed plain error in revising the jury instruction on the elements of his crime and that his counsel's assistance was ineffective. Because we observe no abuse of discretion in the sentencing procedure and no error in the jury instruction and because appellant was provided with effective assistance of counsel, we affirm.

D E C I S I O N

1. Absence of a PSI

Appellant argues that the district court was required to, and did not, obtain a PSI before sentencing him. "May" is permissive; "shall" is mandatory. Minn. Stat. § 645.44, subds. 15,16 (2010). "[T]he [district] court may . . . order a presentence investigation . . . ." Minn. R. Crim. P. 27.03, subd. 1(B)(1)(a). But "the [district] court shall . . . cause a presentence investigation and written report to be made . . . ." Minn. Stat. § 609.115, subd. 1(a) (2010). The apparent conflict between these provisions is resolved by Minn. Stat. § 480.059, subd. 7 (1) (2010) (providing that the rules of criminal procedure supercede statutes and specifically exempting Minn. Stat. § 609.115 from the statutes to which this provision does not apply).

Thus, the district court may, but need not, order a presentence investigation, so a defendant may be sentenced without a PSI. Contrary to appellant's argument, a

defendant has no unwaivable right to a PSI, and no abuse of discretion results from sentencing without a PSI.

Appellant argues in the alternative that, if he waived his right to a PSI, the waiver was not knowing, voluntary, or intelligent because of his "inability to comprehend the proceedings." But appellant's criminal files show that he had significant prior experience with sentencing, probation, probation violations, court proceedings, and incarceration, and appellant's testimony indicates that he understood what waiving a PSI meant and agreed to it.

Appellant replied "Yes" when the district court asked him, "[W]e had that brief conversation about the PSI not being in yet . . . ?" and "You're okay with that?" Appellant's attorney then questioned him.

> Q. [Y]ou and I talked about the presentence investigation that had been ordered by the Court?
> A. Yes.
> Q. And you understand that, for whatever reason, that didn't get completed, so we don't have that?
> A. Yes.
> Q. And you also understand that the rules allow and give you the right to have a presentence investigation prepared before sentencing?
> A. Yes.
> Q. And you and I talked about that, and is it your desire to simply go forward with sentencing without the presentence investigation?
> A. Yes.
> Q. So, are you waiving your right to have that presentence investigation?
> A. Yes.
> . . . .

> Q. And then the prosecutor will make his arguments, and that there won't be any presentence investigation for the Court to take into consideration?
> A. Yes.
> Q. And you're comfortable with that?
> A. Yes.

Thus, the record reflects that appellant's waiver of the PSI was knowing, voluntary, and intelligent.

Moreover, appellant's sentencing complied with Minn. Stat. § 609.115, subd. 1(a) (requiring a sentencing court to be informed concerning "the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community"). Before sentencing appellant, the district court had access to a sentencing memorandum prepared by the public defender's office; the sentencing guidelines worksheet and a copy of appellant's jail credits; a letter from the coordinator of a program for incarcerated students at St. Cloud State University saying that appellant was taking courses; a letter from a counselor at the Division of Indian Work stating that appellant had applied for but was unable to pursue an anger/domestic violence program; and appellant's discharge summary and aftercare/transitional services plan from the chemical dependency program. Thus, the district court had the requisite information under Minn. Stat. § 609.115, subd. 1(a).

The district court did not abuse its discretion by accepting appellant's statement that he wanted to proceed with the sentencing without a PSI.

2. Jury Instruction

Appellant argues that the district court abused its discretion in instructing the jury on the elements of his crime. Because appellant's counsel did not object to the jury instruction at trial, the standard of review is plain error. *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008). A showing of plain error requires (1) an error that (2) is plain and that (3) affected the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the alleged error meets these criteria, the court determines if review is necessary to "ensure fairness and the integrity of the judicial proceedings." *Id.*

In instructing the jury on the elements of appellant's crime, the district court said, "Second, that [appellant] knowingly violated any of the requirements to register" and then explained the notice requirement. The jury was told that, at least five days before a person required to register moves to a new primary address, the person "shall give written notice of the new primary address" and, immediately after leaving an address, the person "shall also give written notice . . . that the person is no longer staying at that address . . . ." Because only one written notice of a move is required, the district court, over the state's objection, revised the instruction to say that a person required to register "shall give written notice of the new primary address" or "[a]lternatively,"[1] shall give written notice of leaving an address. The revised instruction added a final sentence: "(The changes noted herein are made to clarify that only one written notice is required.)"

[1]The copies of the new instruction, at the district court's direction, underlined the added language and struck through the deleted language.

Appellant concedes that the district court's revision "appear[s], at first blush, to work in favor of [appellant], ensuring that the jury does not mistakenly believe two notices are required." But he argues that the revision actually damaged him because it "deemphasized" the need for a knowing violation and was therefore a plain error that affected his substantial right to have the jury receive clear instructions.

But, because of the revision, the jury heard twice instead of only once that one element of appellant's crime was that he "knowingly violated any of the requirements to register." Nothing in the revision indicated or remotely implied that a violation did not have to be "knowing." Correcting the jury instruction "to fairly and adequately explain the law of the case" was not error, much less plain error that affected appellant's substantial right to a properly instructed jury. *See State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002) (providing that jury instructions must, when viewed in their entirety, "fairly and adequately explain the law of the case").

3. Ineffective Assistance of Counsel

Appellant argues that his counsel provided ineffective assistance. A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Appellant argues that his counsel was ineffective in accepting his waiver of a PSI and in not objecting to the district court's revision of the jury instruction. To prevail on this claim, appellant must show that counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error,

the outcome of the trial would have been different. *See State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). But if either prong is determinative, the reviewing court need not address the other prong. *Id.*

Appellant does not explain what information a PSI would have provided that was not already available to the district court and would have had any effect on his sentence. He argues that the PSI could have "[brought] to light the mitigating circumstance of an inability to comprehend." But the only evidence of an "inability to comprehend" appellant mentions is part of his testimony at the sentencing hearing; thus, it was available to the district court regardless of a PSI.

Moreover, considered in context, the testamentary evidence does not indicate an inability to comprehend. When asked if he would like to add anything at the end of the hearing, appellant said, "[T]his law has been very confusing for me, and I've been told only that the State could make me register, and that there is no law that says that I do or do not have to register. It's very confusing." But earlier in the hearing, he had answered, "Yup" when his attorney asked him, "[Y]ou understand the issue here now is that . . . you would have been a person required to register as a predatory offender?" Moreover, in his prior appeal, appellant had no difficulty understanding that he was required to register; he argued only that "the district court failed to articulate the reason why executing his sentence [for failing to register as a predatory offender] outweighs the policies favoring probation." *State v. DeFoe*, No. A10-143, 2010 WL 3307071, at *2 (Minn. App. Aug. 24, 2010) (affirming revocation of appellant's probation because his failure to register his

primary residence and to maintain contact with his probation officer indicates that he is not amenable to probation).

Appellant does not explain why a PSI would have made his alleged "inability to comprehend" obvious to a district court that had heard him both stipulate that he was required to register and testify that he wanted to proceed without a PSI.

Appellant also fails to explain why his counsel was ineffective for failing to object to a change in the jury instructions that appellant concedes was in his own favor, i.e., that he needed to provide only one written notice of a change of address. Failing to object to a change favoring one's client is hardly a "performance [that] fell below an objective standard of reasonableness." *See Rhodes*, 657 N.W.2d at 842.

The district court did not abuse its discretion in sentencing appellant without a PSI or commit plain error by revising the jury instruction, and appellant's counsel provided effective assistance.

Affirmed.