STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0198

State of Minnesota,
Respondent,

vs.

Terry Lee West,
Appellant.

Filed December 30, 2013
Reversed and remanded
Klaphake, Judge[*]

Polk County District Court
File No. 60-CR-11-1260

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Richard Kenly, Kenly Law Office, Backus, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Chutich, 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 Terry West challenges his convictions of possession and sale of controlled substances, claiming the district court denied him an omnibus hearing on the admissibility of evidence used against him at trial. On September 27, 2011, the district court denied appellant's request to schedule an omnibus hearing, finding "that the defendant and his prior attorneys have waived the defendant's right to an omnibus hearing in this case by failing to file timely and proper omnibus motions or by withdrawing any motions that had been filed." Because the district court's factual findings that appellant's omnibus motions were untimely and or withdrawn by appellant are clearly erroneous and its legal conclusion that appellant waived his right to an omnibus hearing was erroneous, we reverse appellant's convictions and remand for further proceedings.

D E C I S I O N

We review the district court's factual determinations under a clearly erroneous standard and its legal conclusions de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). A factual determination is clearly erroneous when, on the entire evidence, a court is left with the "definite and firm conviction that a mistake occurred." *State v. Anderson*, 784 N.W.2d 320, 334 (Minn. 2010).

1. Motions withdrawn

At the September 26, 2011 hearing, the prosecution represented to the district court that on July 11, 2011, appellant "specifically stated he was withdrawing all of [his

omnibus] motions." We acknowledge that the district court was seeking accurate information about what happened at the earlier hearing, but the prosecution's representation was not accurate. The record of the July 11 hearing reveals that the district court at that hearing stated, "Mr. West, here's what I'm going to do. Since you are telling me that you have terminated [your previous counsel] as your attorney, those motions that he has filed on your behalf are hereby withdrawn." Appellant made no statements, general or specific, that he was withdrawing omnibus motions previously filed. Nor did his attorneys at any time make such a statement. Respondent cites no authority that permits a district court to sua sponte withdraw motions properly filed by an attorney, simply because a defendant changes attorneys, without a request by the defendant. On this record, the district court's finding that appellant or his attorneys withdrew his omnibus motions is clearly erroneous.

2. Timely motions

In its brief, respondent argues that appellant's motions filed by his attorney on July 5, 2011, were untimely. This argument was based on a claimed failure to file omnibus motions one week prior to the July 11, 2011 hearing, as directed by the district court. But according to the record (1) appellant's attorney served and filed on the prosecution a demand for disclosure and discovery on June 6, 2011; (2) the prosecution responded to the demand by mailing a disc on Friday, July 1, 2011, after 2:34 PM; (3) there was no mail service on Sunday, July 3, or Monday, July 4; (4) appellant's motions were served and filed on the same day that appellant's attorney received respondent's disclosure, July

5, 2011; and (5) the disc contained 852 pages of disclosure. To respondent's credit, this argument was withdrawn at oral argument.

Respondent continued to argue, however, that all motions subsequent to July 5, 2011, were untimely because they were not filed "at least three days prior to the omnibus hearing," referencing Minn. R. Crim. P. 10.03, subd. 1. But the rule states that motions must be served three days prior to an omnibus hearing, not the first omnibus hearing scheduled. *Id*. The district court, based at least in part on the volume of the disclosure, continued the omnibus hearing to August 8, 2011, and commented that a further continuance was possible if the August 8th date was not practical. On August 1, appellant's new attorney requested a continuance of pretrial motions to late September 2011. The court register of actions shows a continuance of pretrial motions on August 1 to August 29 and again to September 26, but it is not clear that the omnibus motions were rescheduled to a specific date. On August 29, the prosecution objected to any omnibus motions being heard, and an omnibus hearing never was held. This record does not support the district court's finding that omnibus hearing motions were not filed in a timely manner. Accordingly, the district court's finding was clearly erroneous.

3. Waiver

Having concluded that the district court's factual findings were clearly erroneous, it follows that its legal conclusion that appellant waived his right to an omnibus hearing is erroneous. The record here presents an additional concern. Respondent continued to make disclosures; the register of actions in this case shows that respondent filed ten disclosure affidavits between July 7, 2011, and March 26, 2012. Despite this, respondent

repeatedly objected to scheduling an omnibus hearing and pressed the district court to conclude that an omnibus hearing should be considered waived. The fair administration of justice is not served by a defendant's forced early waiver of an omnibus hearing while the state continues to make disclosures. The timing directives of the Minnesota Rules of Criminal Procedure were not designed as a trap for an unwary defendant that is sprung when a defendant changes attorneys.

4. Remand

Following the lead of *State v Krause*, 817 N.W.2d 136, 150 (Minn. 2012), and *State v Licari*, 659 N.W.2d 243, 256 (Minn. 2003), rather than reversing appellant's convictions and ordering a new trial, we remand this matter for an evidentiary hearing. Not less than three days prior to the hearing, appellant may file a motion to suppress evidence, specifically stating what evidence is challenged and the grounds therefore; appellant is not limited to the content of any previous suppression motion. If any of the evidence that was used in appellant's trial is suppressed, the district court shall vacate appellant's convictions and schedule a new trial. If, on the other hand, none of the challenged evidence is suppressed, a new trial is unnecessary, and appellant's convictions are affirmed.

Reversed and remanded.