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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0803**

State of Minnesota,
Respondent,

vs.

Michael David Henry,
Appellant.

**Filed May 7, 2018
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-16-27333

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his convictions of first-, third-, and fifth-degree controlled-substance crimes, and of four counts of possession of ammunition or a firearm by an

ineligible person, arguing that the district court committed reversible error by accepting his jury-trial waiver because, pursuant to Minn. R. Crim. P. 26.01, subd. 4, the parties failed to identify a dispositive pretrial issue, and appellant did not acknowledge that appellate review would be limited to the pretrial issue. We affirm.

FACTS

In July 2016, Bloomington police officers received information from a “cooperating individual” that a Richfield resident was dealing methamphetamine and storing the drugs in two storage lockers at different self-storage facilities in Bloomington. Subsequent investigation by law enforcement identified appellant Michael David Henry as the suspected dealer. The officers conducted canine sniffs outside the storage lockers using a certified narcotics dog, which alerted the officers to the presence of narcotics.

On July 7, the officers obtained and executed warrants to search both storage lockers. In the first storage locker, unit 15, located at a facility on West American Boulevard, they discovered two rifles and .06 grams of a substance that field tested positive for methamphetamine. In the second locker, unit 363, located at a facility on West 81st Street, they discovered approximately 1,534 grams of a substance that field tested positive for methamphetamine.

The officers then located appellant, conducted a traffic stop of his vehicle, and arrested him. The officers conducted a canine sniff of the exterior of appellant’s vehicle, and the narcotics dog alerted to the presence of narcotics. An officer found a loaded handgun magazine in the back pocket of the driver’s seat and an unrecoverable quantity of

suspected marijuana crumbs on the floorboards of the vehicle. While detained in the back of a squad car, appellant admitted that there was additional contraband in his home.

That night, the officers obtained and executed a warrant to search appellant's home in Richfield. There, they found a pistol, ammunition, 21 OxyContin pills, .84 grams of a substance that field tested positive for methamphetamine, and 45.87 grams of marijuana wax that field tested positive for tetrahydrocannabinol.

On July 8, the officers provided appellant a *Miranda* warning and interviewed him. Appellant admitted to using both storage lockers to facilitate drug sales and to possessing the methamphetamine, firearms, ammunition, and OxyContin pills recovered by the officers. Appellant also admitted to receiving 30 OxyContin pills without a prescription and to giving away some of the pills.

Respondent State of Minnesota charged appellant with seven offenses: first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2014), relating to the methamphetamine; third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1(1) (2014), relating to the OxyContin; fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014), relating to the marijuana; and four counts of possession of ammunition or a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2014), relating to the firearms and ammunition discovered in his home, vehicle, and storage locker.

Appellant moved to suppress the evidence found in the search of the storage lockers, his home, and his vehicle, and to suppress the statements he made while detained in a squad car after his arrest and at an interview at jail the next day. Appellant argued that the

evidence discovered in the searches of the storage lockers was unlawfully obtained, and he contested the probable-cause basis of the search warrants, the canine sniffs of the lockers, and the execution of the warrant to search unit 363. Appellant next argued that the evidence discovered in the search of his home was unlawfully obtained because the search warrant was derived from the fruit of the unlawful searches of the storage lockers and appellant's postarrest statements taken without a *Miranda* warning, and a nighttime search was unjustified. Appellant also argued that the police lacked reasonable suspicion to search his vehicle after his arrest and that the canine sniffs were unreliable. Finally, appellant argued that his July 7 statements were inadmissible because he received no *Miranda* warning and that his July 8 confession was coerced despite receiving a *Miranda* warning.

Following a contested omnibus hearing, the district court granted appellant's motion, in part, concluding that appellant's July 7 statements should be suppressed because the officers provided no *Miranda* warning. The district court denied the remaining portions of appellant's motion, concluding that the search warrants and canine sniffs of the storage lockers were lawful and properly executed, that the warrant to search appellant's home, even having suppressed his July 7 statements, was lawful and properly executed, that the search of his vehicle was lawful, and that his July 8 confession was not coerced.

Appellant waived his right to a jury trial, stipulated to the state's evidence, and agreed to submit the case to the district court for a determination of guilt or innocence pursuant to Minn. R. Crim. P. 26.01, subd. 4. At the February 13, 2017 hearing, the state represented to the district court that appellant had agreed to make the necessary waivers to preserve for appellate review the "pretrial rulings." The state submitted a written

stipulation of the parties' agreement. Appellant's attorney asked whether appellant intended to "enter into the option that the [s]tate just put on the record of submitting this case on stipulated facts, preserving your right to appeal our pretrial litigation." Appellant responded, "Yes." Appellant then acknowledged his understanding that, in proceeding under Minn. R. Crim. P. 26.01, subd. 4, he was waiving his right to a jury trial, to testify on his own behalf, to have any witnesses testify on his behalf, and to confront and cross-examine the state's witnesses. The parties' written stipulation memorialized the same waivers and provided that "[t]he parties have agreed that the issue presented at the evidentiary hearing is dispositive in the case." The prosecutor, appellant, and appellant's attorney signed the stipulation.

After the case was submitted on the prosecution's evidence, the district court found appellant guilty of all charges, convicted him of all offenses, and sentenced him to 98 months in prison.

On May 22, 2017, appellant filed his appeal. On October 20, appellant filed a motion to stay his appeal and to remand his case to the district court to "compel the parties . . . to follow the procedure required by Minnesota Rule of Criminal Procedure 26.01, Subdivision 4," arguing that (1) the parties had not identified a single dispositive pretrial issue and (2) appellant had not acknowledged that the scope of appellate review would be limited to the pretrial issue. In an order dated November 1, 2017, this court denied the motion, concluding that the parties had complied with Minn. R. Crim. P. 26.01, subd. 4. Appellant filed a second motion, requesting reconsideration of his motion or in the

alternative a stay and remand for postconviction proceedings, which this court denied in an order dated November 9, 2017.

This appeal follows.

DECISION

Appellant argues that the district court erred in accepting his jury-trial waiver under Minn. R. Crim. P. 26.01, subd. 4, because (1) the parties did not agree that a specified pretrial issue was dispositive of the case and (2) appellant did not acknowledge, in writing or on the record, that appellate review would be limited to the dispositive pretrial issue.¹

Minn. R. Crim. P. 26.01, subd. 4, “allows a criminal defendant to plead not guilty; waive all trial-related rights, including his or her right to a jury trial; stipulate to the state’s evidence in a trial to the court; and then appeal a dispositive, pretrial ruling.” *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016). The rule was enacted to “replace[] *Lothenbach* as the method for preserving a dispositive pretrial issue for appellate review in a criminal case.” *Id.*

In *Myhre*, the Minnesota Supreme Court recognized that “strict compliance” with the provisions of Minn. R. Crim. P. 26.01, subd. 4, has not been required and that a

¹ Respondent contends that the law-of-the-case doctrine bars appellant from seeking further appellate review of his waiver because two previous orders addressed the same issues that appellant raises in this appeal. However, the law-of-the-case doctrine is a “discretionary doctrine developed by the appellate courts to effectuate the finality of appellate decisions.” *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994). We have previously recognized that the doctrine is not a “blanket rule which precludes us from re-examining an issue that was brought before the special term panel.” *Banque Internationale Luxembourg v. Dacotah Cos.*, 413 N.W.2d 850, 852 (Minn. App. 1987). On this unique record, we will consider the appeal on its merits and independently review the issues raised by appellant. *See id.*

substantial amount of procedural error has been tolerated “when the record shows that the parties clearly intended to achieve the outcome contemplated by either Rule 26.01, subdivision 4, or *Lothenbach*.” *Id.* at 804. Accordingly, the supreme court held that appellate review of unobjected-to procedural errors committed under Minn. R. Crim. P. 26.01, subd. 4, is subject to plain-error analysis. *Id.* at 805-06.

Under the plain-error test, appellant must show (1) an error, (2) that is plain, and (3) that affects his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain when it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If all three prongs of the three-part test are met, we then consider “whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings.” *Griller*, 583 N.W.2d at 740. Because appellant failed to object to the alleged errors in district court, we will review for plain error.

I. Dispositive issue

Appellant argues that the district court committed prejudicial plain error because the parties did not identify that a single pretrial issue was “dispositive of the entire case,” as required by the plain language of rule 26.01, subdivision 4. We disagree.

“The interpretation of the rules of criminal procedure is a question of law that we review de novo. We interpret court rules in accordance with the rules of grammar and give words and phrases their common and approved usage.” *Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013) (quotation and citation omitted). “In construing a procedural rule, we consider both the plain language of the rule and its purpose.” *State v. Burdick*, 795 N.W.2d 873, 875 (Minn. App. 2011).

Minn. R. Crim. P. 26.01, subd. 4, provides, in part:

(a) When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary, the following procedure must be used to preserve the issue for appellate review.

....

(c) The defendant and the prosecutor must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.

....

(g) The defendant and the prosecutor must make the preceding acknowledgments personally, in writing or on the record.

The purpose of the rule is to promote efficient use of judicial resources and to preserve a defendant's right of appeal while avoiding an otherwise unnecessary jury trial. *State v. Verschelde*, 595 N.W.2d 192, 195 (Minn. 1999).

Rule 26.01, subdivision 4(a), (c), and (g), provide that when the parties agree that a "specified pretrial issue is dispositive of the case," they must personally acknowledge that the issue is dispositive in writing or on the record. Here, the parties represented to the district court in their written stipulation and at the February 13, 2017 hearing that they had reached an agreement under rule 26.01, subdivision 4. The parties' stipulation, which appellant and the prosecutor signed, stated that appellant had filed a pretrial motion to suppress evidence in which he contested the validity of the searches and his postarrest statements. The stipulation also stated that the parties had submitted briefs and oral argument on the motion, and that "[t]he parties have agreed that the issue presented at the evidentiary hearing is dispositive in the case."

Despite the parties' apparent acknowledgment that the pretrial evidentiary issue was dispositive, appellant contends that the district court's ruling actually comprised "multiple independent suppression issues—not one specified dispositive suppression issue," and that the entire suppression ruling cannot be considered a dispositive issue under the rule.

"[E]vidence discovered by exploiting previous illegal conduct is inadmissible" and is "considered fruit of the poisonous tree." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (quotation omitted) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)), *review denied* (Minn. Dec. 11, 2001).² In appellant's suppression motion, appellant advanced several theories in support of his argument that the storage-locker searches were unlawful, and therefore that the evidence should be suppressed. As grounds to suppress the evidence discovered in his home, appellant argued the search of his home was, in part, based on evidence tainted by the unlawful storage-locker searches. Further, the evidence discovered through the subsequent search of appellant's vehicle arose from his seizure and arrest, which law enforcement initiated based on the evidence they discovered in the storage lockers. In sum, all of the physical evidence of narcotics, firearms, and ammunition, for which appellant was convicted of seven offenses, was discovered through the successive searches of the storage lockers, appellant's vehicle, and his home, and is connected under the fruit-of-the-poisonous-tree doctrine to the initial storage-locker searches, which appellant challenged. Accordingly, the district court's

² The determination of whether such "evidence was obtained by means sufficiently distinguishable to be purged of the primary taint" requires application of a multi-factor balancing test, which we do not reach because appellant did not challenge the merits of the district court's suppression ruling in this appeal. *Id.*

pretrial ruling on the lawfulness of the storage-locker searches is dispositive in this case. We conclude that the district court did not err in accepting appellant's waiver pursuant to rule 26.01, subdivision 4, based on the parties' agreement or acknowledgment of the dispositive pretrial issue.

II. Acknowledgment that appellate review is limited to the dispositive issue

Appellant next argues that the district court committed prejudicial plain error because appellant failed to acknowledge, in writing or on the record, that, pursuant to rule 26.01, subdivision 4, appellate review would be limited to the dispositive pretrial issue.

Minn. R. Crim. P. 26.01, subd. 4(f), provides that "[t]he defendant must also 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(g), provides that "[t]he defendant and the prosecutor must make the preceding acknowledgments personally, in writing or on the record."

Here, at the February 13 hearing, the prosecutor described the parties' agreement as preserving appellant's right to appeal "the pretrial rulings" while appellant's attorney described the agreement as preserving appellant's right "to appeal [his] pretrial litigation." However, the record indicates that neither appellant nor the prosecutor expressly acknowledged, in writing or on the record, that appellant could seek appellate review of *only* the pretrial suppression ruling. Because the text of rule 26.01, subdivision 4(g), requires that appellant acknowledge the limited scope of appellate review, we conclude that the district court committed a plain error by failing to require such acknowledgment. *See Myhre*, 875 N.W.2d at 808-09 (concluding that the district court committed plain error

because the parties failed to acknowledge the dispositive nature of the pretrial issue when the text of Minn. R. Crim. P. 26.01, subd. 4, clearly requires it).

To satisfy the third prong of the plain-error test, appellant must show that the error impacted his substantial rights by affecting the outcome of the case. *Griller*, 583 N.W.2d at 741. Appellant claims that his failure to acknowledge the scope of appellate review prevented him from challenging whether the state proved his guilt beyond a reasonable doubt. However, Minn. R. Crim. P. 26.01, subd. 4, defines the scope of appellate review and specifically prohibits a defendant from challenging his guilt.

Here, the record shows that the parties intended to enter an agreement under rule 26.01, subdivision 4, and appellant cannot explain how a failure to acknowledge the scope of appellate review prejudiced him. The parties acknowledged multiple times at the February 13 hearing and in their stipulation that they had reached an agreement under rule 26.01, subdivision 4. In addition, appellant was represented by counsel at the hearing and confirmed that he wanted to “submit[] this case on stipulated facts, preserving [appellant’s] right to appeal [his] pretrial litigation, [and] agreeing to a sentence of 98 months.” Based on this record, there is no reasonable likelihood that the outcome would have been different had appellant expressly acknowledged the limited scope of appellate review. Appellant received the benefit of the parties’ agreement to proceed under rule 26.01, subdivision 4, and therefore, we conclude that the district court’s error had no impact on appellant’s substantial rights. Appellant cannot satisfy the third prong of the plain-error test, and he is not entitled to relief based on this error.

Because appellant does not challenge the merits of the district court's suppression ruling in his appeal of his convictions, we do not reach the issue of whether the district court erred in suppressing, or not suppressing, the evidence.

Affirmed.