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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1205**

State of Minnesota,
Respondent,

vs.

Brian James Olson,
Appellant.

**Filed March 19, 2018
Affirmed
Bjorkman, Judge**

Olmsted County District Court
File No. 55-CR-14-5215

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

Duane A. Kennedy, Kennedy Law Office, Rochester, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant seeks reversal of his conviction for attempted solicitation of a minor to
engage in prostitution, arguing that the state violated his constitutional protection against

double jeopardy by subjecting him to a second prosecution on the same facts after the district court granted his motion to withdraw his guilty plea to a similar charge. We affirm.

FACTS

On May 22, 2014, appellant Brian James Olson was arrested in Rochester during a sting operation. Police had placed an advertisement, including photos of scantily clad young girls, on a web-based adult-services site. Olson texted the listed phone number and arranged to pay \$200 to hire a 15-year-old female for sex. Olson was apprehended after he arrived at the designated location at the prescribed time with \$200 in his rear pocket. Olson waived his *Miranda* rights and admitted his conduct to police. The state charged him with hiring or agreeing to hire “an individual under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact,” in violation of Minn. Stat. § 609.324, subd. 1(b)(2) (2012).

Olson agreed to plead guilty to “hir[ing] or offer[ing] or agree[ing] to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact.” Minn. Stat. § 609.324, subd. 1(c)(2) (2012).¹ During his plea hearing, Olson admitted to soliciting a minor with the intention of having sex. At the end of the hearing, the district court accepted Olson’s guilty plea, finding that it was voluntary, accurate, and intelligent, and supported by an adequate factual basis. Olson was ordered

¹ The original charge and the offense to which he pleaded guilty are both felonies, but the punishments are more severe for an offense involving a younger victim. *Compare* Minn. Stat. § 609.324, subd. 1(b)(2) (setting forth punishment of “imprisonment for not more than ten years or . . . payment of a fine of not more than \$20,000, or both”), *with id.*, subd. 1(c)(2) (setting forth punishment of “imprisonment for not more than five years or . . . payment of a fine of not more than \$10,000, or both”).

to cooperate with a presentence investigation and return for sentencing in two months. The district court did not adjudicate Olson's guilt.

Before sentencing, Olson moved to withdraw his guilty plea, arguing that it was not intelligently or voluntarily made because he was unaware of many aspects of his trial rights and did not understand the consequences of pleading guilty. At the motion hearing, the district court rejected Olson's arguments, noting that Olson's assertions were contradicted by statements he made in his plea petition and at the plea hearing, and that there was no evidence that Olson had been coerced to plead guilty. But the court granted Olson's motion on the alternative ground that the plea was inaccurate due to conflicting references to the minor's age Olson made during his plea colloquy. The criminal complaint charged Olson with soliciting sex with a minor "under the age of 16 years but at least 13 years." But the plea petition referenced a minor "under the age of 18 years but at least 16 years." Olson's plea colloquy reflects confusion; he admitted to both soliciting a minor whom he believed was 15 years old and a minor who was "over the age of 16." Due to this discrepancy, the district court concluded that Olson had not provided a sufficient factual basis to support his guilty plea. Accordingly, the court vacated Olson's guilty plea and set the matter for trial.

Olson moved to dismiss the complaint on double-jeopardy grounds. He argued that the state could not prosecute him because the district court's unconditional acceptance of his guilty plea resulted in a conviction. The district court denied the motion, reasoning that "[w]ithout an adjudication of guilt on the record, the [district] [c]ourt did not 'record' the guilty plea," and jeopardy "did not attach."

During the pendency of Olson’s motion to dismiss, the state amended the complaint to assert a charge of attempted solicitation of a minor for prostitution. Minn. Stat. §§ 609.17, subd. 1, .324, subd. 1(b)(2) (2012). Olson was convicted of this offense after a jury trial. Olson appeals.

D E C I S I O N

The federal and state constitutions prohibit the prosecution of a criminal defendant for the same offense following an acquittal or a conviction. U.S. Const. amend. V; Minn. Const. art. I, § 7; *see Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977). “The Double Jeopardy Clause protects against multiple punishments for the same offense and against a second prosecution after an acquittal or conviction.” *State v. Jeffries*, 806 N.W.2d 56, 60-61 (Minn. 2011) (footnote omitted). We review the application of double jeopardy *de novo*. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

Minnesota law defines a conviction as “any of the following *accepted* and *recorded* by the court: (1) a plea of guilty; or (2) a verdict of guilty by a jury or a finding of guilty by the court.” Minn. Stat. § 609.02, subd. 5 (2016) (emphasis added). A defendant is convicted under the first prong when a “district court accepts and records a guilty plea.” *Jeffries*, 806 N.W.2d at 61. “[I]n the context of a plea agreement, . . . jeopardy attaches, at the latest, following a conviction.” *State v. Martinez-Mendoza*, 804 N.W.2d 1, 6 (Minn. 2011); *see also State v. Miller*, 849 N.W.2d 94, 97 (Minn. App. 2014) (“Jeopardy attaches after the district court accepts a guilty plea and adjudicates the defendant guilty.”). Olson contends that jeopardy attached at the time he entered his guilty plea.

We first consider whether the district court accepted Olson’s guilty plea. Once a defendant has tendered a valid guilty plea, the district court “must accept or reject the plea of guilty on the terms of the plea agreement” or “postpone its acceptance or rejection until it has received the results of a presentence investigation.” Minn. R. Crim. P. 15.04, subd. 3(1). In determining which option a district court selected, we consider the language used by the district court at the plea hearing. In *Jeffries*, the supreme court concluded that the district court’s statements of “I’ll accept your plea of guilty” and “you are convicted of that” reflect unconditional acceptance of the guilty plea. 806 N.W.2d at 62. The court cautioned, however, that the case was limited to its facts and there are not “magic words that will always result in a conviction for double jeopardy purposes.” *Id.* at 63. The *Jeffries* court contrasted its holding with *State v. Thompson*, 754 N.W.2d 352, 356 (Minn. 2008), which it described as a “useful comparison.” 806 N.W.2d at 62. In *Thompson*, the supreme court held that the district court’s statements that it “would . . . adjudicate” the defendant guilty of the charge and would “reserve a decision . . . pending the results of the [presentence investigation]” did not demonstrate acceptance of the defendant’s tendered guilty plea. 754 N.W.2d at 356.

The district court stated at Olson’s plea hearing that it “accept[ed]” Olson’s guilty plea. And the court did so without reservation. The district court then ordered Olson to “cooperate with the completion of a presentence investigation report” and to return for sentencing on a later date. As in *Jeffries*, the record does not reflect “that the district court intended to postpone its decision to accept the plea or to accept the plea on terms other than

those agreed to by the parties.” 806 N.W.2d at 62. Rather, the district court accepted Olson’s tendered guilty plea at the plea hearing.

We next address whether the plea acceptance was recorded—the second requirement for a conviction. In *Martinez-Mendoza*, the supreme court stated that a guilty plea is recorded either “when the clerk enters the judgment of conviction,” or when the district court accepts the guilty plea and “adjudicate[s] the defendant guilty on the record.” 804 N.W.2d at 6. The supreme court subsequently observed that “[b]ecause we have held that a guilty plea is ‘recorded’ when a court adjudicates a defendant guilty on the record, that holding is part of the ‘conviction’ definition [of section 609.02, subdivision 5] as though written therein.” *State v. Nodes*, 863 N.W.2d 77, 81 (Minn. 2015).

The language used by the district court in accepting Olson’s plea did not include an adjudication of guilt. But Olson contends that the court’s acts of ordering a presentence investigation and directing him to return for sentencing constitute recording of his guilty plea. This argument is unavailing. As noted above, caselaw establishes a bright-line rule. This is important because all parties to a criminal proceeding must know when a conviction comes into existence—when the defendant’s guilty plea is accepted and recorded. Here, the district court did not adjudicate Olson guilty on the record during the guilty plea hearing. And the clerk did not enter a judgment of conviction. Under these circumstances, we conclude that jeopardy did not attach when the district court accepted Olson’s guilty plea because Olson was not convicted of a crime.

Finally, even if Olson had been convicted when he entered his guilty plea, we are not persuaded that the Double Jeopardy Clause bars prosecution. After all, Olson, not the

state, sought the plea withdrawal. Before entering a guilty plea, defendants are specifically advised that if the district court does not accept their plea, they have “an absolute right to withdraw the guilty plea and *have a trial*.” Minn. R. Crim. P. 15.01, subd. 1.6.n (emphasis added). When a district court grants a defendant’s plea-withdrawal motion, the court “remove[s] the barrier of his plea and allow[s] him a trial.” *Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994). Accordingly, the typical procedure following a defendant’s successful plea-withdrawal motion is for the case to “proceed to trial.” *Id.*; see *State v. Benson*, 330 N.W.2d 879, 880 (Minn. 1983) (stating that defendant’s remedy for mistaken guilty plea is to withdraw the guilty plea and “stand trial on the original charges”); *State v. Chapman*, 362 N.W.2d 401, 404 (Minn. App. 1985) (upon reversal for inadequate factual basis to support a guilty plea, remanding to allow the defendant the “opportunity to withdraw her plea and go to trial, or to negotiate another plea agreement”), *review denied* (Minn. May 1, 1985). Because Olson moved to withdraw his guilty plea, the double-jeopardy concerns are not implicated.

Affirmed.