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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1216**

State of Minnesota,
Respondent,

vs.

Vondale Lamar Kincaide,
Appellant.

**Filed July 16, 2018
Affirmed
Bratvold, Judge**

Olmsted County District Court
File No. 55-CR-15-5327

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

At his pretrial hearing, appellant pleaded guilty to first-degree assault in exchange
for the state's promise that, at sentencing, he could move for a dispositional departure from

the sentencing guidelines and, if that was not granted, the state would ask for a bottom-of-the-box sentence of 135 months in prison, provided he remain law-abiding. At his sentencing hearing, appellant did not move for a sentencing departure and acknowledged that he faced new criminal charges in a different county. The district court imposed a sentence of 135 months in prison. On appeal, appellant argues that the district court erred when it sentenced him without holding an evidentiary hearing to determine whether he had violated release conditions based on the new criminal charges. Because appellant forfeited the issue he attempts to raise on appeal, we affirm.

FACTS

On August 6, 2015, the state charged appellant Vondale Lamar Kincaide with five counts stemming from an incident in Olmsted County on July 22, 2015 (Olmsted County complaint): (1) first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2014); (2) first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2014); (3) first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(b) (2014); (4) ineligible person in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b (2014); and (5) second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2014).

On March 20, 2017, Kincaide appeared for his pretrial hearing on the Olmsted County complaint and decided to enter into a plea agreement with the state. The agreement provided that Kincaide would plead guilty to first-degree assault “and the other [four] counts would then be dismissed.” Kincaide and the state also agreed that Kincaide would “be able to argue for a downward departure, and if the departure was not granted, the [s]tate agree[d] to recommend a [bottom-of-the-box]” sentence of 135 months. Also under the

agreement, Kincaide would “remain at liberty pending sentencing.” Before approving the agreement, the district court told Kincaide that “in order to take advantage of this plea agreement . . . [and] for [the court] to seriously consider a downward departure,” Kincaide would have to follow three release conditions: return for sentencing, cooperate fully with the presentence investigation, and remain law-abiding. The district court added that if “those three conditions [were] not met” it would not consider itself bound by the plea agreement.

During the plea hearing, Kincaide testified that, on July 22, 2015, he shot A.J.W. while doing a “weed ripoff” at A.J.W.’s home in Rochester. Kincaide added that, earlier in the day, he had been released from custody in Lino Lakes, was homeless, and “met a guy” who drove him to A.J.W.’s home so he could steal the marijuana. The district court approved the plea agreement and deferred adjudication of guilt until sentencing. Kincaide was released on the conditions described above.

Probation filed a presentence investigation report (PSI), which recommended that Kincaide be sentenced to 158 months in prison because Kincaide was not amenable to probation.

On April 28, 2017, the state charged Kincaide with three counts stemming from an incident in Mower County on April 27, 2017, during which Kincaide allegedly broke a car window with a shotgun (Mower County complaint): (1) ineligible person in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b(a) (2016); (2) second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2016); and (3) criminal property damage in violation of Minn. Stat. § 609.595, subd. 3 (2016).

On May 5, 2017, Kincaide appeared for sentencing on the Olmsted County complaint. The state asked the district court to follow the PSI recommendation, arguing that the new charges against Kincaide meant he had violated the terms of the plea agreement and the state was not bound to request 135 months. Kincaide's attorney stated that he had been "preparing and working" on a memorandum in support of a motion for a downward dispositional departure, but after learning of the new charges against Kincaide, he did not file the motion. Instead, Kincaide's attorney asked the district court to follow the PSI recommendation. Kincaide denied the allegations in the Mower County complaint and his attorney told the court that Kincaide said "he never possessed any such thing."

The district court told the parties that it "consider[ed] violating conditions of release to be like probation violations," could "set this for a hearing," and the state would be required to prove by clear and convincing evidence that Kincaide violated his release conditions. Alternatively, the district court stated, "we can go ahead with the sentencing today and let Mower County take care of itself." The district court reasoned that it was "ill-advised" for Kincaide to testify about the alleged violation and then explicitly declined to hold a hearing on the alleged violation of release conditions, stating, "I'm going to let [Kincaide] deal with Mower County in Mower County."

The district court then gave the parties an opportunity to respond. Kincaide's attorney did not object or request an evidentiary hearing; he said that the PSI recommendation was "the just outcome." Kincaide said that he had followed "everything that [the district court] had said" and that he knew "for sure" that the Mower County allegations "[were] going to wash out." The state revised its recommendation and asked

the district court to “stick by the 135 [month sentence], our original deal.” Kincaide’s attorney agreed with the 135-month sentence and stated that this was the “more lenient sentence.”

The district court sentenced Kincaide to 135 months in prison. This appeal follows.

D E C I S I O N

On appeal, Kincaide argues that the district court improperly denied him the opportunity to seek a downward departure from the sentencing guidelines, as bargained for in his plea agreement, and then erred when it sentenced him without holding an evidentiary hearing to determine whether he had violated release conditions. The state argues that Kincaide “forfeited his right to appeal his sentence with respect to the dispositional departure because he failed to file the proper motion and request for a contested hearing in accord” with Minn. R. Crim. P. 27.03. This court reviews questions concerning the interpretation of the rules of criminal procedure *de novo*. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Minnesota Rule of Criminal Procedure 27.03 provides that “[a]ny party may move for a sentencing hearing after receipt of the presentence investigation and guidelines worksheet” and must serve and file the motion no later than eight days before the hearing. Minn. R. Crim. P. 27.03, subd. 1(B)(6). If a motion has been filed, the district court must hear motions at the sentencing hearing and “allow the record to be supplemented with relevant testimony.” Minn. R. Crim. P. 27.03, subd. 1(B)(7).

A party’s failure to request an evidentiary hearing before sentencing results in forfeiture of the issue for appeal. For example, in *State v. Schroeder*, the district court relied

on the PSI when it sentenced the appellant, who then challenged his sentence on appeal and disputed statements in the PSI. 401 N.W.2d 671, 673-75 (Minn. App. 1987), *review denied* (Minn. Apr. 23, 1987). Because appellant had not requested an evidentiary hearing to challenge the PSI, this court held that a “defendant may not wait until appeal to contest the veracity of facts in the presentence report.” *Id.* at 675. We affirmed the sentence based, in part, on the PSI. *Id.*; *see also State v. Booker*, 348 N.W.2d 753, 755-56 (Minn. 1984) (affirming sentence and holding appellant forfeited any hearsay challenge to the PSI because he did not request an evidentiary hearing).

Before his sentencing hearing, Kincaide did not file a motion contesting the PSI’s recommendation, seek a departure from the sentencing guidelines, or otherwise request an evidentiary hearing. At the sentencing hearing, “parties may raise other sentencing issues.” Minn. R. Crim. P. 27.03, subd. 1(B)(7)(b). Yet, during the sentencing hearing, Kincaide did not request an evidentiary hearing to determine whether he had violated his presentence release conditions, nor did he object to the district court’s decision not to hold an evidentiary hearing. We conclude that Kincaide forfeited his claim that the district court should have conducted an evidentiary hearing before imposing a sentence.

Kincaide argues that he did not need to request an evidentiary hearing because Minn. R. Crim. P. 6.03 requires a hearing to determine whether a defendant has violated release conditions. The state argues that rule 6.03 applies only to *pretrial* release violations and Kincaide was subject to *presentence* release conditions. Rule 6.03 provides that, after a summons or warrant has issued alleging that a defendant has violated a release condition,

a “defendant is entitled to a hearing on alleged violations of release conditions.” Minn. R. Crim. P. 6.03, subds. 1, 3.

We conclude that rule 6.03 is inapplicable because the district court never determined whether Kincaide violated his release conditions, therefore, no hearing was required. Instead, the district court “let Mower County take care of itself.” In fact, the district court imposed the bottom-of-the-box sentence that the state promised to recommend in the plea agreement. The district court imposed a sentence of 135 months, not the PSI recommendation of 158 months. Kincaide, therefore, received the benefit of his plea bargain because the state’s recommendation tracked the “original deal.”

In sum, Kincaide failed to move for a sentencing departure, or otherwise request an evidentiary hearing as required under Minn. R. Crim. P. 27.03; thus, he forfeited the issue he attempts to raise on appeal. Accordingly, the district court did not err when it sentenced Kincaide without holding an evidentiary hearing.

Affirmed.