STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1949

Larry Edwin Craig, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 9, 2008
Affirmed
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-CR-07-043231

Thomas M. Kelly, Phillip K. Jacobson, Kelly & Jacobson, 220 South Sixth Street, Suite 215, Minneapolis, MN 55402; and

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Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Christopher P. Renz, Thomsen & Nybeck, P.A., 3300 Edinborough Way, Suite 600, Edina, MN 55435 (for respondent)

Teresa J. Nelson, American Civil Liberties Union Foundation of Minnesota, 450 North Syndicate, Suite 230, St. Paul, MN 55104 (for amici curiae)

Considered and decided by Hudson, Presiding Judge; Toussaint, Chief Judge; and Kalitowski, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellant Larry Edwin Craig challenges the district court's order denying his postconviction petition to withdraw his guilty plea to the misdemeanor offense of disorderly conduct. Amici American Civil Liberties Union and American Civil Liberties Union of Minnesota have filed an amicus brief challenging the constitutionality of the disorderly conduct statute, Minn. Stat. § 609.72, subd. 1(3) (2006). Because we see no abuse of discretion in the denial and conclude that the statute is not overbroad, we affirm.

D E C I S I O N

1. Denial of Petition

This court reviews denials of petitions for postconviction relief and petitions to withdraw guilty pleas under an abuse-of-discretion standard. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (postconviction relief); *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998) (withdrawal of guilty plea).

To be valid, a guilty plea must be "accurate, voluntary and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). For a plea to be accurate, it must be supported by a proper factual basis. *Id.* Appellant argues that the plea was not accurate because it lacked a full record of supporting facts.

Appellant did not appear in person when his plea was filed, but a guilty plea is not invalid merely because it is entered in writing. *See* Minn. R. Crim. P. 15.03, subd. 2

(misdemeanor defendant may file petition to plead guilty "with the understanding and knowledge required of defendants personally entering a guilty plea"); Minn. R. Crim. P. 15, App. B ("Misdemeanor Petition to Enter Plea of Guilty" form, including waiver of right to be present at plea hearing).[1] But, because appellant did not appear, the written plea petition was the only account given to the district court of appellant's version of the offense.

The relevant paragraph of the petition states:

> I am pleading guilty to the charge of Disorderly Conduct as alleged because on June 11, 2007, within the property or jurisdiction of the Metropolitan Airports Commission, Hennepin County, specifically in the restroom of the North Star Crossing in the Lindbergh Terminal, I did the following: Engaged in conduct which I knew or should have known tended to arouse alarm or resentment or [sic] others, which conduct was physical (versus verbal) in nature.

This paragraph sets forth the date and location of the offense to which appellant was pleading guilty and specifies that his disorderly conduct consisted of physical rather than verbal conduct. Appellant argues that because the paragraph lacks a description of the alleged conduct it fails to provide an adequate factual basis.

Appellant concedes that the complaint, which does provide such a description, was available to the district court when it accepted the plea but argues that the record does not show that the district court judge reviewed the complaint or the petition itself because

[1] Although he acknowledges the validity of a plea made without a personal appearance, appellant nevertheless relies on cases that prescribe the requirements for pleas made with a personal appearance. *See, e.g., Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994) (holding that district court bears primary responsibility in establishing adequate factual basis); *Bolinger v. State*, 647 N.W.2d 16, 22 (Minn. App. 2002) (noting duties of prosecutor and defense counsel to question defendant as to factual basis).

there is no judicial signature on the petition.[2]

Appellant's argument is unsupported by the record. A verbatim record was required to be made of the August 8, 2007 proceeding at which appellant's petition to plead guilty was filed and he was sentenced. *See* Minn. R. Crim. P. 27.03, subd. 6(A) (requiring verbatim record of sentencing proceedings). A defendant is responsible for providing a record adequate for appellate review, including a transcript if necessary. *See State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984) (holding claim of trial error could not be reviewed without transcript). Appellant did not order a transcript of the August 8, 2007 proceeding.

Nor did appellant seek a postconviction evidentiary hearing to establish what had occurred at that proceeding. As the postconviction petitioner challenging the guilty plea, appellant had the burden of establishing facts showing that he is entitled to relief. *See Gassler v. State*, 590 N.W.2d 769, 771 (Minn. 1999); *see also Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004) (noting that postconviction petition must be supported by more than argumentative assertions without factual support).

Without a transcript of the August 8, 2007 proceeding, which could show whether judicial review of the complaint and the petition occurred then, or a transcript of a

[2] The factual basis in a plea petition may be supplemented by a summary of the evidence, such as is provided in the complaint. *See Vernlund v. State*, 589 N.W.2d 307, 311 (Minn. App. 1999); *State v. Bishop*, 545 N.W.2d 689, 691 (Minn. App. 1996). The complaint stated that appellant "peered" into the restroom stall occupied by the officer for as long as two minutes and that the officer "observed the Defendant tap his foot several more times and move his foot closer to the stall occupied by [the officer. The officer] moved his own foot up and down slowly. [The officer] observed the Defendant move his right foot so that it touched [the officer's] left foot, at which point the Defendant's foot was within the stall area of the stall occupied by [the officer]."

subsequent evidentiary hearing establishing what occurred at that proceeding, this court has no means of reviewing appellant's claim of lack of judicial review.[3]

Appellant also argues that the factual basis was inadequate because it did not establish that "others," in addition to the undercover officer, would have been alarmed or disturbed by his conduct. *See* Minn. Stat. § 609.72, subd. 1(3) (prohibiting language or conduct "tending reasonably to arouse alarm, anger, or resentment in others"). But the complaint, which was available for the district court's review when appellant's plea was accepted, refers to the presence of others nearby at the time of the offense. By pleading guilty, appellant "judicially admitted" the allegations in the complaint. *See State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (noting that record at time of guilty plea included complaint and that defendant, by pleading guilty, "in effect judicially admitted" allegations in complaint).

Moreover, a statutory reference to "others" does not necessarily mandate the presence of more than one other person. *See* Minn. Stat. § 645.08(2) (2006) (setting out canon of construction that "the singular includes the plural; and the plural, the singular"). This canon has been applied to construe Minn. Stat. § 617.23 (1986), which prohibits indecent exposure in "any place where others are present." In *In re Welfare of C.S.K.*, 438 N.W.2d 375 (Minn. App. 1988), this court rejected the argument that the statute was

[3] In the absence of such a record, this court must presume that judicial review of the complaint and the petition took place. *See Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002) (presumption of regularity attaches to a judgment of conviction); *State v. Skjefte*, 428 N.W.2d 91, 94 (Minn. App. 1988) (applying presumption of regularity in presuming that statement was presented to district court as part of offer of proof), *review denied* (Minn. Aug. 28, 1988).

not violated because only the victim and the defendant were present. *Id*. at 377. "[C]onstruing the term 'others' to include the singular does not thwart the manifest intention of the legislature, nor is it repugnant to the context of the statute." *Id*. Analogously, a violation of Minn. Stat. § 609.72, subd. 1(3), does not require the presence of more than one other person.[4]

Finally, appellant argues that the factual basis was inadequate because the petition did not acknowledge that the undercover officer had at least partially invited appellant's conduct by means of his own conduct, i.e., the petition did not acknowledge entrapment as a defense. But failure to explore an entrapment defense has been found not to justify withdrawal of a guilty plea. *See State v. Nace*, 308 Minn. 170, 170-171, 241 N.W.2d 101, 102 (1976) (rejecting defendant's argument that his guilty plea was not knowingly and voluntarily entered because he had not been questioned about possible entrapment defense).

"[E]ntrapment exists only where the criminal intent originates in the enforcement officials of the government rather than in the mind of the accused." *State v. Grilli*, 304 Minn. 80, 88, 230 N.W.2d 445, 451 (1975). Here, the complaint clearly indicates that the criminal intent originated in the mind of appellant, not in the officer.[5] The fact that appellant's petition to plead guilty did not include facts relevant to the defense of entrapment does not provide a basis for withdrawal. Moreover, appellant cites no support

[4] Appellant cites unpublished opinions of this court disagreeing with the *C.S.K.* analysis. But unpublished opinions are not precedential. Minn. Stat. § 480A.08, subd. 3 (2006).

[5] *See supra* footnote 2, quoting relevant portions of the complaint.

for his implied view that the factual basis of a guilty plea must anticipate every possible defense.

We see no abuse of discretion in the denial of appellant's postconviction petition to withdraw his guilty plea.

2. Constitutionality of Minn. Stat. § 609.72, subd. 1(3)

Appellant also argues that the disorderly conduct statute is unconstitutionally overbroad.[6] The "overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment area, a challenge to a statute both on its face and as applied to the defendant." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Specifically, amici argue that the disorderly conduct statute is overbroad, both facially and as applied to appellant, while appellant argues that it is overbroad as applied to his conduct.

First Amendment protection may extend to conduct as well as to language. *See id.* at 419 (protection may extend to some conduct "because the activity by itself may be communicative"). Whether conduct merits First Amendment protection depends on "whether an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 419-20 (quotation omitted). For purposes of

[6] The state contends that this argument is not properly before this court because appellant did not raise it in the district court and amici could not raise it there on his behalf. This court may decline to decide an issue that is being raised for the first time on appeal. *See State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). But the district court granted amici's motion for leave to file a memorandum raising the issue. Therefore, we will address it. *See* Minn. R. Crim. P. 28.02, subd. 11 (allowing this court to address "any other matter as the interests of justice may require").

this analysis, we assume without deciding that appellant's conduct merits First Amendment protection.

The disorderly conduct statute prohibits a person, whether "in a public or private place," from engaging in "offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3). To be criminally liable, the person must act "knowing, or having reasonable grounds to know that [the conduct or language] will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace. . ." *Id*., subd. 1.

The language prohibited by Minn. Stat. § 609.72, subd. 1(3), has been limited to "fighting words." *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (1978). Amici argue that this limitation should be extended to conduct, because conduct, like language, can be communicative. But "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406, 109 S. Ct. 2533, 2540 (1989) (applying this principle in flag-burning case).

We conclude that Minn. Stat. § 609.72, subd. 1(3), is not unconstitutionally overbroad. Because it is directed at any language or conduct that tends to arouse "alarm, anger or resentment" in others, it necessarily does not specify or describe such language or conduct. But the statute does impose a limit by requiring that the perpetrator know, or have reasonable grounds to know, that the language or conduct will have that effect. Similarly, Minn. Stat. § 609.50, subd. 1 (2006), the obstructing-legal-process statute, prohibits conduct that "obstructs, hinders or prevents the lawful execution of any legal

process" but limits the prohibition to intentional conduct. Its language was held not to be unconstitutionally vague because it "clearly prohibits only intentional physical obstruction or interference with a peace officer in the performance of his duties." *State v. Krawsky*, 426 N.W.2d 875, 878 (Minn. 1988). "[G]iven the wide variety of circumstances in which the type of conduct section 609.05 legitimately seeks to proscribe can occur, it seems unlikely that a substantially more precise standard could be formulated which would not risk nullification in practice because of easy evasion." *Id*. at 878-79. Here also, no more specific standard could reasonably be provided.

The argument that the statute is unconstitutionally overbroad as applied to appellant's conduct is also without merit. There is a "privacy interest in avoiding unwanted communication [that] varies widely in different settings." *Hill v. Colorado*, 530 U.S. 703, 716, 120 S. Ct. 2480, 2489 (2000). This privacy interest is part of the "right to be let alone" that has been described as "the most comprehensive of rights." *Id.* at 716-17, 120 S. Ct. at 2489. Certainly the "privacy interest in avoiding unwanted communication" is very strong in a stall in a public restroom. Although Minn. Stat. § 609.72, subd. 1(3), is not directed particularly at public-restroom behavior, here it is the *place* in which the conduct occurred, as much as or more than the *nature* of the conduct, that determines its offensive nature. The conduct charged here occurred in a place in which the ordinary citizen might feel most eager to "avoid[] unwanted communication." Thus, there is a strong governmental interest in proscribing this type of unsolicited, communicative conduct. Moreover, in general the "state may regulate conduct that is invasive of the privacy of another." *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App.

2006), *review denied* (Minn. Mar. 28, 2006). We believe that appellant's conduct was invasive of the privacy of another and may properly be prohibited as disorderly conduct.

Appellant argues that his conduct may be considered speech and, because it could not be characterized as "fighting words," it is not prohibited by Minn. Stat. § 609.72, subd. 1(3). But the government also has an interest in proscribing speech that violates a privacy interest. A government may constitutionally prohibit such speech if there is "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971). Offensive speech may be prohibited as intrusive when the "captive" audience cannot avoid the speech. *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S. Ct. 2495, 2504 (1988). A person using a restroom stall is such a "captive" audience with substantial privacy interests that would be intolerably invaded even by communications less potentially offensive than sexual solicitations. Thus, even if appellant's foot-tapping and the movement of his foot towards the undercover officer's stall are considered "speech," they would be intrusive speech directed at a captive audience, and the government may prohibit them.

Appellant has not shown that the district court abused its discretion in denying his petition to withdraw his guilty plea, and neither he nor amici have shown that the disorderly conduct statute is unconstitutionally overbroad, either facially or as applied to appellant's conduct.

Affirmed.