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STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1797

State of Minnesota,
Respondent,

vs.

Benjamin Marc Frauss,
Appellant.

Filed August 28, 2017
Affirmed
Reyes, Judge

Anoka County District Court
File No. 02-CR-13-7782

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

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

REYES, Judge

On remand from the supreme court, appellant argues that (1) his plea of guilty to communication of sexually explicit materials to children is invalid because it lacked an

adequate factual basis and (2) he is not obligated to register as a predatory offender for life because his conviction is not on the list of enumerated offenses that trigger registration. We affirm.

FACTS

In November 2013, respondent State of Minnesota charged appellant Benjamin Frauss with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1a (2012). Appellant subsequently pleaded guilty to an amended charge of communicating sexually explicit materials to a child in violation of Minn. Stat. § 609.352, subd. 2a(2) (2012). Before sentencing, however, appellant moved to withdraw his guilty plea as invalid. The district court denied the motion and sentenced appellant to 15 months in prison, stayed subject to three years of probation. Appellant was also ordered to comply with predatory-offender registration. This appeal followed.

After this appeal was filed and briefing was concluded, this court released *State v. Muccio*, 881 N.W.2d 149 (Minn. App. June 20, 2016), *rev'd*, 890 N.W.2d 914 (Minn. 2017), 2016), which declared Minn. Stat. § 609.352, subd. 2a(2), unconstitutional. Based on that decision, this court reversed appellant's conviction in an order opinion. *State v. Frauss*, No. A15-1797 (Minn. App. Sept. 6, 2016). The supreme court subsequently granted the state's petition for further review and stayed further proceedings pending a final disposition in *Muccio*, in which review had also been granted.

In March 2017, the supreme court reversed this court's decision in *Muccio*, and held that Minn. Stat. § 609.352, subd. 2a(2), is not facially unconstitutional under the First Amendment. 890 N.W.2d at 929. The supreme court then vacated this court's decision in

this case, and remanded the matter to this court for reconsideration in light of the supreme court's decision in *Muccio*, "and for consideration of any issues that [appellant] raised before the court of appeals but that [were] not . . . addressed."

D E C I S I O N

I. The district court did not err in denying appellant's motion to withdraw his guilty plea as inaccurate under the manifest-injustice standard.

Appellant argues that the district court erred by denying his request to withdraw his guilty plea to correct a manifest injustice[1] because his plea was inaccurate. We disagree.

A district court must allow withdrawal of a guilty plea if a defendant proves that his plea is invalid, making "withdrawal . . . necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1; *see State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Nelson v. State*, 880 N.W.2d 852, 858 (Minn. 2016) (quotation omitted). The validity of a plea is a question of law that we review de novo. *Raleigh*, 778 N.W.2d at 94. "A defendant bears the burden of showing his plea was invalid." *Id.*

An accurate plea must be supported by a proper factual basis. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). A proper factual basis requires "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted). The complaint may supplement the defendant's admissions. *See, e.g., State v.*

[1] Appellant does not challenge the district court's reasoning in denying his motion under Minn. R. Crim. P. 15.05, subd. 2, the "fair and just" standard.

Trott, 338 N.W.2d 248, 252 (Minn. 1983); *Williams v. State*, 760 N.W.2d 8, 13 (Minn. App. 2009) ("[T]he sworn complaint, which was part of the record at the time of the plea and referred to at the plea hearing, summarizes witness testimony that showed, in all likelihood, that [defendant] committed both crimes."), *review denied* (Minn. Apr. 21, 2009). A defendant may challenge the lack of a factual basis to support a guilty plea for the first time on appeal. *See State v. Iverson*, 664 N.W.2d 346, 349-50 (Minn. 2003).

Minn. Stat. § 609.352, subd. 2a(2), provides that a person is guilty of a felony if he, with the intent to arouse the sexual desire of any person, uses electronics, including the Internet or a computer, for "engaging in communication with a child . . . relating to or describing sexual conduct." Minn. Stat. § 609.352, subd. 2a(2).

Appellant argues that his guilty plea lacked an adequate factual basis, and was therefore inaccurate, because although he admitted that he viewed pornography himself, and that his ten-year-old daughter K.M.H. was exposed to pornography, he "did not admit that he communicated the pornography to his daughter or in any other way communicated with her about sexual conduct."[2] We disagree. The supreme court in *Muccio* clarified that the phrase "'engaging in communication' with a child requires the adult to direct the prohibited content at a child." 890 N.W.2d at 920. In so clarifying, the supreme court

[2] Relying on *Iverson*, the state argues that appellant waived his right to plea withdrawal because he consulted with counsel. But in *Iverson*, the supreme court stated that "[a] claim that the factual basis for the plea was insufficient . . . is a challenge to the validity of the plea itself. Thus, by pleading guilty, a defendant does not waive the argument that the factual basis of his guilt was not established." 664 N.W.2d at 350. Here, as in *Iverson*, appellant challenges the factual basis for his plea. Therefore, under *Iverson*, appellant did not waive his argument that his guilty plea is invalid.

stated that section 609.352, subdivision 2a(2), "does not proscribe non-targeted mass electronic communications such as social-media posts that a child happens to view." *Id.* at 920-21. Rather, the electronic transmission "must be directed at a child," and "the child must be the object of the adult's attention." *Id.* at 921.

When viewed as a whole, the record in this case establishes a valid factual basis. After appellant admitted that K.M.H. was exposed to pornography while in his care, the prosecutor asked: "And when you were viewing pornography *with* [K.M.H.], why would you do that?" (Emphasis added.) In response, appellant admitted that he "used pornography for my sexual gratification." Appellant's response indicates an acknowledgement that he viewed pornography "with" K.M.H., and that he used pornography for his sexual gratification while viewing it "with" K.M.H. In other words, by admitting to viewing pornography "with" K.M.H., appellant admitted to orchestrating the process of bringing the pornography to K.M.H.'s perception. *See id.* (stating that the phrase "'engaging in communication' with a child requires the adult to direct the prohibited content at a child").

Moreover, the complaint provides key evidence that appellant communicated the pornography to K.M.H., who was the object of his attention. *See Williams*, 760 N.W.2d at 13. It states that K.M.H. told law enforcement that "on a recent visitation she was with [appellant] at his home and [he] had her watch pornography on his laptop." The allegations in the complaint, in conjunction with appellant's admissions at the plea hearing, establish an adequate factual basis to support the conclusion that appellant committed the charged

offense. Therefore, we conclude that the district court did not err by denying appellant's motion to withdraw his guilty plea.

II. The plain language of Minn. Stat. § 243.166, subds. 1b, 6(d) (2012), mandates that appellant register as a lifetime predatory offender.

Appellant also contends that he is not required to register as a lifetime predatory offender because his offense is not an enumerated offense listed in Minn. Stat. § 243.166, subd. 1b. We are not persuaded.

The state contends that appellant forfeited "this argument" because he "fail[ed] to present this issue to the district court," and "agreed that he was subject to lifetime registration." We agree. Generally, failure to raise an issue before the district court results in a forfeiture on appeal. *See State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Because appellant raises this issue for the first time on appeal without first presenting it to the district court, appellant's argument is forfeited.[3]

Moreover, even if addressed on the merits, appellant's argument fails. Under Minnesota law, a person "shall register" as a predatory offender if he or she was convicted (1) of an enumerated offense or (2) of "another offense arising out of the same set of circumstances" *as a charged enumerated offense*. Minn. Stat. § 243.166, subd. 1b(a). A person required to register as a predatory offender under Minn. Stat. § 243.166, subd. 1b must register for life if that person "has a prior conviction or adjudication for an offense

[3] In his reply brief, appellant urges us to ignore the state's forfeiture argument, citing Minn. R. Crim. P. 27.03, subd. 9, which allows a court to correct at any time a sentence that is not authorized by law. But rule 27.03, subdivision 9 is not applicable in this case because the registration requirement is not part of a criminal sentence. *See Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002).

for which registration was or would have been required under subdivision 1b." *Id.*, subd. 6(d)(1). Whether a person is subject to the predatory-offender-registration requirement is a question of law that we review de novo. *See State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010) (reviewing de novo whether defendant was required to register as predatory offender); *State v. Patterson*, 819 N.W.2d 462, 464 (Minn. App. 2012), *review denied* (Minn. Oct. 24, 2012).

It is undisputed that appellant has a prior conviction requiring registration as a predatory offender after being convicted in 2004 of possessing pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4(a). But appellant's current offense of conviction is not an enumerated offense listed in Minn. Stat. § 243.166, subd. 1b. *See State v. Ulrich*, 829 N.W.2d 429, 431 (Minn. App. 2013) (holding that Minn. Stat. § 243.166, subd. 1b(a)(2) does not require predatory-offender registration for violation of Minn. Stat. § 609.352, subd. 2a(2)). Therefore, we must analyze the second prong under section 243.166, subdivision 1b(a).

The registration requirement is triggered by a person's conviction of a non-enumerated offense "arising out of the same set of circumstances" as a charged enumerated offense so long as probable cause existed to support the ultimately unproven charge. *State v. Haukos*, 847 N.W.2d 270, 274-75 (Minn. App. 2014). "[T]he facts underlying the two must be sufficiently linked in time, location, people, and events to be considered the "same set of circumstances." *Lopez*, 778 N.W.2d at 706.

Here, the original complaint charged appellant with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1a, an enumerated offense listed in

section 243.166, subdivision 1b. Appellant does not appear to dispute that his conviction of a nonenumerated offense of communicating sexually explicit materials to a child arose from the same set of circumstances as the initially charged enumerated offense of first-degree criminal sexual conduct. Therefore, appellant was required to register under Minn. Stat. § 243.166, subd. 1b.

Finally, appellant argues that a "same set of circumstances" analysis is unnecessary because that language is absent from Minn. Stat. § 243.166, subd. 6(d). Appellant misconstrues subdivision 6(d). This subdivision provides in relevant part that:

> A person shall continue to comply with this section for the life of that person:
>
> (1) if the person is convicted of or adjudicated delinquent for any offense *for which registration is required under subdivision 1b*, . . . and that person has a prior conviction or adjudication for an offense for which registration was or would have been required under subdivision 1b.

Minn. Stat. § 243.166, subd. 6(d) (emphasis added).

A plain reading of subdivision 6(d) demonstrates that it specifically references subdivision 1b, which requires registration if an offender is convicted of an offense that arose out of the same set of circumstances as a charged enumerated offense. *See State v. Struzyk*, 869 N.W.2d 280, 284 (Minn. 2015) ("If the Legislature's intent is clear from the statute's plain and unambiguous language, then [appellate courts] interpret the statute according to its plain meaning without resorting to the canons of statutory construction."

(quotation omitted)). Accordingly, under the plain language of section 243.166, subdivisions 1b and 6(d), appellant is subject to lifetime predatory offender requirements.

Affirmed.