STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1890

State of Minnesota,
Respondent,

vs.

Gregory Lee Boulduc,
Appellant.

Filed September 11, 2017
Affirmed
Florey, Judge

Polk County District Court
File Nos. 60-CR-16-709; 60-CR-16-179;
60-CR-16-823; 60-CR-16-1113

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

Greg Widseth, Polk County Attorney, Hans Erik Larson, Assistant County Attorney, Crookston, Minnesota (for respondent)

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

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant Gregory Lee Boulduc (1) seeks to withdraw his guilty pleas to the offenses of escape from custody and fleeing a peace officer in a motor vehicle, arguing that his pleas were not accurate because they failed to show that he intended to commit those

crimes and (2) seeks correction of his sentence on the escape-from-custody conviction, arguing that imposition of a consecutive sentence rather than a concurrent sentence constituted an unauthorized sentencing departure. We affirm.

FACTS

Within a four-month period, three criminal complaints were filed in Polk County alleging criminal conduct by appellant. On February 3, 2016, appellant was charged with felony theft for stealing a trailer; on April 27, 2016, appellant was charged with felony fleeing a peace officer in a motor vehicle and three misdemeanor offenses; and on May 13, 2016, appellant was charged with two felony counts of check forgery.

Consistent with plea agreements, appellant entered petitions to plead guilty to one count each of felony theft, fleeing a peace officer in a motor vehicle, and check forgery, with all other charges to be dismissed. He was to receive 21-month executed, concurrent sentences for each of the three offenses.

While awaiting sentencing on June 14, 2016, appellant was released from custody on medical furlough in order to attend an appointment. The district court extended the furlough after appellant was admitted to the hospital following the appointment. Upon discharge from the hospital, appellant was required to report back immediately to the Northwest Regional Corrections Center (NRCC) in Crookston. Although he was released from the hospital on June 15, appellant failed to return to the NRCC. A week later, he was charged with felony escape from custody and was later arrested on a warrant.

Appellant petitioned to plead guilty to the escape-from-custody charge, agreeing to a sentence of a year and a day "[c]onsecutive to [the] other Polk County files." The district

court accepted the plea and sentenced appellant consistent with all of his plea agreements, imposing 21-month concurrent sentences for each of the first three offenses, and a consecutive sentence of one year and a day for the escape-from-custody offense. This appeal followed.

D E C I S I O N

I.

After sentencing, an offender is permitted to withdraw a plea if it is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent, and thus the plea may be withdrawn." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997).

The purpose of the accuracy requirement is to "protect[] a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "A proper factual basis must be established for a guilty plea to be accurate." *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (quoting *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994)); *see State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003) (stating that a claim of an insufficient factual basis to support a guilty plea is a challenge to the validity of the plea). In order for a plea to be withdrawn, the "defendant bears the burden of showing his plea was invalid." *State v. Boecker*, 893 N.W.2d 348, 350 (Minn. 2017) (quotation omitted). "A district court should not accept a guilty plea unless the record supports the conclusion that the defendant actually committed an offense at least as serious as the crime to which he is pleading

guilty." *Id*. (quotation omitted). The validity of a guilty plea is a question of law subject to de novo review. *Raleigh*, 778 N.W.2d at 94.

Fleeing a peace officer in a motor vehicle. A person is guilty of the offense of fleeing a peace officer in a motor vehicle if the person "by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer." Minn. Stat. § 609.487, subd. 3 (2014). "Fleeing" is defined as "to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." *Id*., subd. 1 (2014).

In his plea colloquy, appellant admitted that he was driving a motor vehicle when he saw an officer behind him trying to stop him. Appellant explained his conduct to the district court, as follows:

> A. Your Honor, I was in the process of making a turn. I had a destination, which was the shed outside of town, which was land owned by family.
> Q. Okay.
> A. And that was my destination from the beginning. And I was in the process of making a turn on the curve when the officer came up behind me and turned his lights on and I continued until that property figuring that at least my car would be safe and off the road. It was not my intention, Your Honor, to flee or run anywhere. I was aggravated and I believe if I wouldn't have been shooting my mouth off the way I was, I probably wouldn't have this charge right now.
> Q. Okay. Would you agree that you didn't immediately stop? I mean, it sounds like you made your turn. I see that.
> A. Yeah.

Q. And the officer turned on the siren.
A. Yeah.
Q. And you kept going.
A. I did, your Honor.
Q. And then the officer turned on a different siren and you kept going and then the officer actually activated a loud speaker telling you to pull over.
A. Yes.
Q. And you still kept going. And then eventually you turned over – you pulled over onto a field road.
A. Yes. That's our property, yes.
Q. So would you agree you certainly could have stopped a lot sooner? You kept going long enough so it appeared you were trying [to] evade the officer.
A. That would be correct.

The prosecutor asked appellant, "[Y]ou understand that in making these additional turns and not following instructions, including the speaker, that essentially you were making some intentional choices to continue driving?," to which appellant answered, "Yes." Defense counsel also asked appellant if he agreed that a squad recording of the incident showed that he drove "a significant period of time after the lights [were] on, the siren [was] on, and the officer talking over the loud speaker, it was a fair distance that you continued to travel, is that correct?" Appellant answered, "Yes."

Appellant argues that there is no evidence in the record to indicate that he intended to flee from the officer. "[T]he factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty." *Nelson v. State*, 880 N.W.2d 852, 859 (Minn. 2016) (quoting *Iverson*, 664 N.W.2d at 350). Although appellant initially testified that he did not intend to flee from the officer, upon further questioning, he admitted that he kept going after the officer activated two different sirens and directed him to pull over by

a loudspeaker. He also admitted that he could have stopped a lot sooner, made an intentional choice to continue driving, and continued to drive a significant period of time and a fair distance after the officer first attempted to stop his vehicle.

Appellant argues that he did not admit to fleeing because he was not attempting to elude the officer. But the definition of "fleeing" also includes "refus[ing] to stop the vehicle," which appellant clearly admitted to doing. Minn. Stat. § 609.487, subd. 1. To the extent that appellant's initial statement can be construed to negate the intent element of the offense, that statement applied only to limited conduct, and his later more specific statements satisfied the intent element of the offense. Thus, appellant's statements were sufficient to establish the factual basis for the plea.

Plea to escape from custody. At his plea hearing on the escape-from-custody charge, appellant agreed that he was in the "lawful custody" of the NRCC when he was granted a furlough on June 14 "to attend a medical appointment." Appellant also agreed that he "went to th[e] medical appointment," was "admitted to the Altru hospital in Grand Forks, North Dakota," and that the district court judge who had granted him the furlough from custody "extended it until [he was] discharged from the hospital." When asked whether he returned to NRCC after being discharged from the hospital, appellant said, "I did not." When asked whether this conduct made him guilty of the offense of escape from custody by failing to return, appellant answered, "Yes, sir." Before accepting the plea, the district court asked appellant whether the complaint was accurate, and appellant confirmed that it was. Moreover, the district court received appellant's attorney's permission to

"accept[] the probable cause portion of the complaint as additional support for [appellant's] plea."

Appellant argues that the facts he admitted to at the plea hearing were insufficient to show that his "failure to return to custody was intentional or volitional." The acts that amount to escape from custody include "escap[ing] while held . . . in lawful custody on a charge or conviction of a crime." Minn. Stat. § 609.485, subd. 2 (2014). "Escape" is defined to include "failure to return to custody following temporary leave granted for a specific purpose or limited period." *Id*., subd. 1 (2014). The offense is not a specific-intent crime: "the only intent required to constitute the crime of escape is the intent to do the act which results in the departure from custody." *State v. Kjeldahl*, 278 N.W.2d 58, 61 (Minn. 1979); *see State v. Knox*, 311 Minn. 314, 322, 250 N.W.2d 147, 154 (1976) (stating that the acts that constitute the offense of escape from custody "must be intentional and voluntary").

While appellant did not state that he intentionally or voluntarily escaped from custody, "the plea petition and colloquy may be supplemented by other evidence to establish the factual basis for a plea." *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012). That supplemental evidence may include the criminal complaint. *See State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (ruling that the factual basis to support a plea to second-degree assault was sufficient on a record that included the defendant's admissions, the criminal complaint, and photos of the victim's injuries). The complaint here establishes the facts surrounding the granting of appellant's medical furlough and his failure to report back to custody immediately upon discharge from the hospital. Appellant confirmed the

accuracy of the complaint, which includes facts that demonstrate that appellant knew that he should report to the NRCC upon discharge from the hospital, he was warned to return to custody, and he intentionally did not return to custody. With regard to appellant's failure to return to custody, the complaint alleges that appellant's attorney told Deputy Jessica Nelson that he had informed appellant "the previous week" that he "needed to immediately report back to jail," but appellant did not do so. Based on all of the information in the district court record, there is an adequate factual basis to establish the accuracy of appellant's plea.

II.

As an alternative argument to his plea-withdrawal request on the escape-from-custody offense, appellant argues that his consecutive sentence for that offense must be corrected because it constitutes an unauthorized sentencing departure. Generally, a district court's sentencing decision is discretionary and will not be reversed unless the district court abused its discretion. *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). But when the sentencing issue requires determination of whether imposition of a consecutive sentence was permissive or amounted to an upward sentencing departure, the "issue requires interpretation of the sentencing guidelines, which is a question of law subject to de novo review." *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005). Likewise, this court reviews de novo a district court's interpretation of the Minnesota Sentencing Guidelines. *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

"[P]lea agreements cannot form the sole basis of a sentencing departure." *Misquadace*, 644 N.W.2d at 71; *see* Minn. Sent. Guidelines cmt. 2.D.104 (Supp. 2015) (stating, "if a plea agreement involves a sentence departure and no other reasons are provided [for the departure], there is little information available to make informed policy decisions or to ensure consistency, proportionality, and rationality in sentencing"). Instead, a plea agreement that constitutes a departure from the sentencing guidelines "must be supported by substantial and compelling circumstances," and "[a] plea agreement standing alone . . . does not create such circumstances in its own right." *Id*. at 71-72. If the district court imposes a sentence that constitutes a departure without stating the basis for the departure at the time of sentencing, the departure is usually not allowed. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003); Minn. Sent. Guidelines 2.D (Supp. 2015).

The parties disagree about whether imposition of a consecutive sentence for the escape-from-custody offense was a permissible sentencing option or a sentencing departure. The Minnesota Sentencing Guidelines allows consecutive sentencing only under prescribed circumstances. Minn. Sent. Guidelines 2.F (Supp. 2015) ("Imposition of consecutive sentences in any situation not described . . . is a departure.") Guideline 2.F.1 specifies scenarios under which consecutive sentences are presumptive, and guideline 2.F.2 specifies scenarios under which consecutive sentences are permissive.

Guideline 2.F.2.a(2)(i), which encompasses the factual scenario represented here, provides: "If the offender is convicted of felony escape from lawful custody—as defined in Minnesota Statutes section 609.485—and the offender did not escape from an executed prison sentence, the escape may be sentenced consecutively to the sentence for which the

offender was confined."[1] This guideline language is consistent with Minn. Stat. § 609.485, subd. 4(c) (2014), which provides that "unless a concurrent term is specified by the court, a sentence under this section shall be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when the person escaped." *See State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998) (applying cannon of statutory construction that "shall" is mandatory to conclude that plain language of a statute required a term of conditional release to be included in sex offenders' sentences); Minn. Stat. § 645.44, subd. 16 (2016) ("'Shall' is mandatory."). Given the statutory mandate, the only reasonable interpretation of this language is that it applies to an offender such as appellant, who escapes from custody while "confined" following conviction on prior offenses but before sentencing on those offenses. *See State v. Flynn*, 313 N.W.2d 389, 390 (Minn. 1981) (affirming the imposition of a consecutive sentence for attempted escape when "[t]he attempted escape from the jail was made while awaiting sentencing and during the pre-sentence investigation [on other convictions]"). Therefore, under either the guidelines or the statute, the district court's imposition of consecutive sentences on appellant's escape-from-custody conviction did not constitute a sentencing departure.

Affirmed.

[1] In other factual scenarios, consecutive sentencing for escape offenses may be either presumptive or permissive. For example, a consecutive sentence is presumptive if the offender escapes from custody "from an executed prison sentence." Minn. Sent. Guidelines 2.F.2.a(1)(ii). And a consecutive sentence is permissive if the offender commits a new felony "while on felony escape." Minn. Sent. Guidelines 2.F.1.a(1)(iii).