**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-2050**

State of Minnesota,
Respondent,

vs.

Matthew Michael Schirmer,
Appellant.

**Filed October 23, 2017**
**Affirmed**
**Jesson, Judge**

Washington County District Court
File No. 82-CR-14-4930

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Jesson, Judge.

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

**JESSON**, Judge

Suspected of stealing a television from a Walmart, appellant Matthew Michael Schirmer was detained and searched. The search revealed 7.1 grams of methamphetamine.

Schirmer challenges his conviction of second-degree possession of that methamphetamine, arguing that his guilty plea was inaccurate because it was not supported by an adequate factual basis. Schirmer also contends that he is entitled to have his conviction reduced to third-degree possession and to be resentenced under the 2016 Drug Sentencing Reform Act. We affirm.

## FACTS

In November 2014, because appellant Matthew Schirmer was suspected of stealing a television from a Walmart store, he was detained and searched. Police found 7.1 grams of methamphetamine in crystal form in plastic baggies on his person. Schirmer was charged with one count of second-degree possession of a controlled substance. Minn. Stat. § 152.022, subd. 2(a)(1) (2014).

Schirmer pleaded guilty to second-degree controlled-substance possession. At his plea hearing, defense counsel reviewed the terms of the plea agreement with Schirmer and advised him of his constitutional rights. To establish the factual basis of his crime, Schirmer admitted the following facts:

> The Prosecutor: . . . And they had placed you under arrest, is that correct?
> A: Detained, yes.
> The Prosecutor: And they searched your person?
> A: Yes.
> The Prosecutor: And what did they find on you?
> A: Nothing the first time, and then the second time apparently they found this methamphetamine
> . . . .
> The Prosecutor: You knew it was methamphetamine?
> A: No. I didn't know that it was there.
> The Prosecutor: Okay. You knew you had it on your person?
> A: I did not recall it was on my person, no.

(Discussion off the record between counsel and the defendant)
A: Okay. Yes.
The Prosecutor: What are you saying yes to?
A: It was on my person.
The Prosecutor: Okay. So there was methamphetamine that was discovered on your person and you knew it was methamphetamine; is that what you're saying?
A: Yes.

Schirmer's plea agreement allowed for a reduced sentence if Schirmer complied with conditions prior to sentencing including participation in a substance-abuse treatment program and avoiding new criminal charges. The district court deferred acceptance of Schirmer's guilty plea until sentencing because of these conditions. Schirmer was unable to comply, and the district court found he violated the plea agreement. The court proceeded to treat his plea as a straight plea and sentenced him to the presumptive guidelines sentence of 98 months. Schirmer appeals.

## D E C I S I O N

Schirmer argues that his plea was invalid and inaccurate because it failed to show that he was guilty of second-degree possession of a controlled substance. We review the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). He further asserts that his conviction must be reduced from second- to third-degree controlled substance possession and that he is entitled to resentencing, both based on changes made through the 2016 Drug Sentencing Reform Act ("DSRA" or "the act"). *See* 2016 Minn. Laws ch. 160 at 576. Whether the DSRA applies to Schirmer is a question of statutory construction, which we also review de novo. *State v. Basal*, 763 N.W.2d 328, 332, 335 (Minn. App. 2009).

## I. Schirmer's guilty plea was valid.

Schirmer contends that the district court's refusal to permit him to withdraw his guilty plea created a manifest injustice. The district court may allow a defendant to withdraw a guilty plea after sentencing to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be valid, a guilty plea must be accurate, voluntary, and intelligent. *Id.*

Schirmer asserts that his plea was inaccurate. For a guilty plea to be accurate, it must be established by a proper factual basis. *Id.* To satisfy that requirement, a defendant must admit on the record to sufficient facts that support a conclusion that he is guilty of the crime charged. *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003). We will uphold a guilty plea if there was sufficient evidence to support a jury verdict that the defendant is guilty of the crime to which he pleaded guilty. *Nelson v. State*, 880 N.W.2d 852, 859, 861 (Minn. 2016).

To obtain a conviction of second-degree possession of a controlled substance, the state must prove that "the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine." Minn. Stat. § 152.022, subd. 2(a)(1) (2014). And crimes of possession require proof that the defendant had "actual knowledge of the nature of the substance." *State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010).

The record demonstrates that there was a sufficient factual basis to sustain a conviction of second-degree possession of a controlled substance. Schirmer admitted that

he possessed a controlled substance and that he knew that it was methamphetamine when the prosecutor asked, "So there was methamphetamine that was discovered on your person and you knew it was methamphetamine; is that what you're saying?" and Schirmer responded, "Yes." *See* Minn. Stat. §§ 152.01, subd. 4 (defining a controlled substance as a drug listed in schedule I through V); 152.02, subd. 3(d)(2) (2014) (methamphetamine is a schedule II substance). Schirmer agreed that the weight of the methamphetamine totaled over six grams. In addition, he acknowledged that he had two prior controlled substance convictions within the past ten years. *See* Minn. Stat. § 152.022, subd. 3(b) (enhancing the penalty for subsequent controlled substance convictions). On this record, Schirmer's guilty plea met the statutory element of knowing possession.

Schirmer argues that he failed to testify on the record that his possession of methamphetamine was unlawful. *Cf.* Minn. Stat. § 152.01, subd. 20 (2014) (defining "unlawfully" as "selling or possessing a controlled substance in a manner not authorized by law"). It is true that a factual basis is usually accomplished by the defendant, who explains the circumstances of the crime on the record. *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). And while it is accurate that Schirmer never explicitly stated in the factual basis of his plea that his possession of methamphetamine was unlawful, a "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).

Other evidence includes the complaint since a defendant "by his plea of guilty, in effect judicially admit[s] the allegations contained in the complaint." *State v. Trott*, 338

N.W.2d 248, 252 (Minn. 1983). The complaint supports the factual basis of Schirmer's plea because it states that the methamphetamine found on Schirmer's person was in crystal form instead of pills and it was found in an unmarked bag instead of a prescription bottle. These facts, and common sense, would indicate that Schirmer's possession was not authorized by law.

There are sufficient facts contained in the plea to establish Schirmer knew he was in possession of methamphetamine and sufficient facts in the record to establish that his possession was unlawful. The plea was accurate and the elements of a valid guilty plea are met.

## II. Schirmer is not entitled to have his conviction reduced or to be resentenced under the 2016 Drug Sentencing Reform Act.

Schirmer first argues that his possession of more than six grams of methamphetamine no longer qualifies as second-degree controlled substance possession, but is third-degree possession due to changes made through the 2016 Drug Sentencing Reform Act. Schirmer further argues that he is entitled to resentencing based on the act. We disagree.

The 2016 Drug Sentencing Reform Act makes two general changes to Minnesota law that are relevant here. First, it increases the weight of drugs required to be in a person's possession for different degrees of drug crimes. This means that, while prior to the act, second-degree controlled substance possession required a person to possess only six or more grams, now under the act, a person must possess 25 or more grams. *Compare* Minn. Stat. § 152.022, subd. 2(1) (2014), *with* Minn. Stat. § 152.022, subd. 2(1) (2016). Second,

the act reduces the sentencing ranges for some degrees of drug crimes. For instance before the act, the base range for first-degree possession without any criminal history was 74 to 103 months, while after the act it is 56 to 78 months. *Compare* Minn. Sent. Guidelines 4.A. (2014), *with* Minn. Sent. Guidelines 4.C. (2016).

Schirmer committed his offense in 2014. The act went into effect in 2016. Because the act went into effect when his case was still pending, Schirmer argues both the drug weight changes and sentencing changes should apply to him. The Minnesota Supreme Court decided both of these questions in *State v. Otto*, 899 N.W.2d 501, 502 (Minn. 2017) and *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), and their analysis does not support Schirmer's assertion.

In *Kirby* and *Otto*, the supreme court applied the amelioration doctrine, which provides that an amended criminal statute will apply to crimes "committed before its effective date if: (1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes effect." *Otto*, 899 N.W.2d at 503 (c*iting Edstrom v. State*, 326 N.W.2d 10 (Minn. 1982) and *State v. Coolidge*, 282 N.W.2d 511 (Minn. 1979)). In applying that doctrine, the supreme court distinguished between two types of provisions in the act, one that changed the drug weights for different degrees of drug crimes and one that changed sentencing. It found that the amelioration doctrine does not apply to the change in drug weights, but does apply to sentencing. *Otto*, 899 N.W.2d at 504; *Kirby*, 899 N.W.2d at 496.

In *Kirby*, the appellant sought resentencing for his first-degree controlled substance possession conviction because the sentencing guidelines range for the crime decreased under DSRA section 18. 2016 Minn. Laws ch. 160, § 18 at 591; *Kirby*, 899 N.W.2d at 487. While the original offense took place prior to the DSRA's effective date, the case was still pending on direct appeal. The language in section 18 of the act states that this "section is effective the day following enactment," but provides no additional direction. *Id*. The supreme court determined this language did not show clear legislative intent to abrogate the amelioration doctrine. *Kirby*, 899 N.W.2d at 491 (*citing id*.). The supreme court therefore found the amelioration doctrine applied to the appellant, allowing for mitigated punishment when the case was not yet final on the date of enactment. The supreme court remanded the case for resentencing consistent with the act. *Id*. at 496.

In *Otto*, however, the appellant sought not only resentencing under DSRA section 18, but also a reduced conviction from first- to second-degree controlled substance possession based on the change in drug weights under DSRA sections 3 and 4. 2016 Minn. Laws ch. 160, §§ 3-4 at 577-81; *Otto*, 899 N.W.2d at 503. In that case, too, while the offense occurred prior to the effective date, it was still pending on appeal. But the sections on drug weights in the DSRA contain different effective date language than section 18, stating that they only "appl[y] to crimes committed on or after" the effective date of August 1, 2016. *Id*. In contrast to the language discussed in *Kirby*, the supreme court in *Otto* found the language in these sections did show clear legislative intent to abrogate the amelioration doctrine and only allowed for mitigated punishment when offenses were committed after the effective date. 899 N.W.2d at 503. The first-degree conviction

therefore remained the same. *Id*. at 504. The case was remanded but only for resentencing, since, as in *Kirby*, the sentencing range for first-degree controlled substance possession had decreased. *Id*. at 504.

Schirmer's case is similar to *Otto* in that he seeks both a reduction in the degree of his conviction and resentencing. When Schirmer pleaded guilty to his crime, possession of 7.1 grams of methamphetamine constituted second-degree possession but after the DSRA it no longer does. *Compare* Minn. Stat. § 152.022, subd. 2(1) (2014) (requiring possession of six or more grams), *with* Minn. Stat. § 152.022, subd. 2(1) (2016) (requiring 25 or more grams). But, as the supreme court held in *Otto*, the amelioration doctrine does not apply to a reduction in the degree of a conviction. 899 N.W.2d at 503.

As to the resentencing issue, while the act raised drug weight requirements for second-degree possession offenses committed on or after August 1, 2016, it did not reduce the presumptive sentence for Schirmer's conviction. *Compare* Minn. Sent. Guidelines 4.C. (2016) (stating that, based on Schirmer's criminal history and the severity level of the offense, his presumptive sentence was 98 months with a range of 84-117), *with* Minn. Sent. Guidelines 4.A. (2014) (stating the same). Thus, the act provides no basis on which to resentence Schirmer.

Schirmer is not entitled to have his conviction offense reduced because he unlawfully possessed methamphetamine before the effective date of the act. Therefore, his conviction of second-degree possession of a controlled substance stands. Because Schirmer's sentence remains the same regardless of the act's amended changes to the sentencing guidelines, he is not entitled to be resentenced.

**Affirmed.**