STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1348

State of Minnesota,
Respondent,

vs.

Michael Travis Porter,
Appellant.

Filed July 23, 2018
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-16-17219

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of refusal to submit to chemical testing, appellant argues that (1) the factual basis for his guilty plea was insufficient because it failed to

establish that the implied-consent advisory was read to him before he refused the test, and (2) his trial counsel provided ineffective assistance by failing to provide adequate support for appellant's presentencing motion to withdraw his plea. We affirm.

FACTS

Appellant Michael Travis Porter was charged with felony first-degree refusal to submit to chemical testing (test refusal). The state agreed to amend the charge to gross-misdemeanor second-degree test refusal in exchange for Porter pleading guilty to the amended charge, completing driving while impaired (DWI) court, and complying with conditions in two other criminal cases.

During the plea hearing, the following factual basis was provided to support Porter's plea:

> Q. . . . [I]s it true . . . that you were driving a motor vehicle on June 27, 2016 . . . ?
> A. Yes.
> Q. And law enforcement had kind of a speed trap set up, but nevertheless they stopped your motor vehicle because you were going 44, I think, in a 35, correct?
> A. Yes.
> Q. They – now, at the time they stopped you[,] you had a warrant out for your arrest, actually two warrants, correct?
> A. Yes.
> Q. And they placed you under arrest. And when they did that, they smelled alcohol in the car. They drew a conclusion that you were under the influence of alcohol, took you down to the Crystal Police Department, and asked you to take an Intoxilyzer test, correct?
> A. Yes.
> . . . .
> Q. Okay. And when downtown, you were not able to provide an adequate sample and then they continued to ask you whether or not you were going to take the, what we call, the Intoxilyzer test and you refused to do so, correct?

A. Yes.
. . . .
Q. You hesitated somewhat. Indeed you did refuse[] the test, correct?
A. I blew, but they say I didn't blow adequately.
Q. Okay. And I explained the law is very clear? . . . When you provide, what we call, is a deficient sample, that's a test refusal, correct?
A. Correct.

Porter did not complete DWI court and was furloughed to treatment. Before sentencing, Porter moved to withdraw his plea. The district court denied the motion. This appeal followed sentencing.

D E C I S I O N

I.

"A defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). "Withdrawal is permitted in two circumstances." *Id.* First, a district court must allow a defendant to withdraw a guilty plea "[a]t any time" if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). Second, a district court may allow a defendant to "withdraw a plea at any time before sentence if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2.

Porter moved to withdraw his plea under the fair-and-just standard. But on appeal, he argues that the plea was invalid because the factual basis was insufficient. A defendant may challenge the lack of a factual basis to support a guilty plea for the first time on appeal.

State v. Johnson, 867 N.W.2d 210, 214 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015).

The validity of a plea is a question of law, which this court reviews de novo. *Raleigh*, 778 N.W.2d at 94. To be valid, a guilty plea must be accurate, voluntary, and intelligent. *Id*. To be accurate, a plea must be supported by a factual basis sufficient to establish the elements of the offense to which the defendant is pleading guilty. *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011). "The accuracy requirement protects 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." *Raleigh*, 778 N.W.2d at 94.

Porter pleaded guilty to criminal test refusal under Minn. Stat. § 169A.20, subd. 2 (2014), which makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine" when a test is required under the implied-consent statute. The implied-consent statute states:

> [A chemical] test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it[.]

Minn. Stat. § 169A.51, subd. 1(b)(1) (2014). "[A] driver must have been read the implied-consent advisory in order to have criminally refused chemical testing." *State v. Olmscheid*, 492 N.W.2d 263, 265 (Minn. App. 1992).

Porter objects to the use of leading questions to establish the factual basis for his plea, and he argues that the factual basis for his plea was insufficient because it did not establish that the implied-consent advisory was read to him before he refused testing. The supreme court has cautioned against using only leading questions asked by counsel to establish the factual basis for a guilty plea. *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012). But "a defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction." *Raleigh*, 778 N.W.2d at 94.

"The factual-basis requirement is satisfied if the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty." *State v. Genereux*, 272 N.W.2d 33, 34 (Minn. 1978). By pleading guilty, a defendant "in effect judicially admit[s] the allegations contained in the complaint." *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983). Accordingly, "[t]he complaint may provide a factual basis for a defendant's plea, and we are permitted to examine the complaint to assess whether a defendant's plea was accurate." *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015), *aff'd*, 890 N.W.2d 716 (Minn. 2017).

At the plea hearing, Porter admitted the allegations in the complaint regarding his conduct and the arrest, and his admissions are sufficient to establish that he refused a chemical test. And, although Porter did not admit at the plea hearing that the implied-consent advisory was read to him, the complaint states, "PORTER was read the implied consent advisory, and agreed to take a breath test. However, it was obvious to the officer

that PORTER was intentionally not blowing hard or long enough into the machine to obtain a reading." This was the arresting officer's statement about the procedure followed before Porter refused testing, and Porter judicially admitted to it by pleading guilty. The officer's statement in the complaint, together with Porter's admissions, which are consistent with allegations in the complaint, show that there is credible evidence available that would support a jury verdict that Porter is guilty of test refusal. The record provides a sufficient factual basis to support Porter's guilty plea.

II.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "A 'reasonable probability' means 'a probability sufficient to undermine confidence in the outcome.'" *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). The defendant bears the burden of proving both prongs of the *Strickland* test. *Id.* The reviewing court need not address both prongs if one is determinative. *Id.* Because ineffective-assistance-of-counsel claims involve mixed questions of law and fact, they are reviewed de novo. *Id.*

Porter argues that his attorney provided ineffective assistance at the plea-withdrawal hearing by failing to state any reason or a legal basis for him to withdraw his guilty plea. He contends that he told the district court that he wished to withdraw his plea because he

was innocent and never wanted to plead guilty, but he was pressured into doing so, and, if his attorney had advocated for him and properly argued this as a basis for plea withdrawal, there is a reasonable probability that these reasons would have been sufficient to establish that plea withdrawal was fair and just.

The district court judge who presided over Porter's plea hearing also presided over the plea-withdrawal hearing. At the plea-withdrawal hearing, Porter said to the district court:

> And, like, when I did plead guilty, you could see I was very hesitant and I didn't want - - I agreed to it because I feel that I am innocent and I feel like I was pressured into pleading guilty because I don't feel like I was treated justly and fairly from the beginning of the proceedings of the Court.

Porter then described problems that he had with two attorneys who represented him before he hired the attorney who represented him at both the plea hearing and the plea-withdrawal hearing.

When Porter finished speaking, his attorney spoke, and then the following exchange between the court and Porter occurred:

> THE COURT: All right. [Your current attorney] is right. Your issues with your previous lawyers don't weigh into my decision on the motion to withdraw your plea at all, primarily because [your current attorney] represented you at the plea.
>
> So it's irrelevant, to be quite frank, what happened prior to that date. And that's why you changed lawyers. And that happened successfully and [your current attorney] has represented you.
>
> I took the plea. I have no reason to think that you didn't know what was happening then and that you didn't make that decision knowingly and intentionally. It sounds like you have changed your mind since then --

> THE DEFENDANT: Okay.
>
> THE COURT: -- which you can't do. It's not a reason to withdraw the plea. And so I have no legal grounds to allow you to do so, so I'm not going to let you. I'm going to deny the motion.

This exchange demonstrates that the district court was aware that Porter wanted to withdraw his plea because he was innocent and felt that the unfair treatment he received pressured him into pleading guilty, but the court concluded that these reasons were not a basis for allowing Porter to withdraw his plea. There is not a reasonable probability that the district court would have reached a different conclusion if Porter's attorney, rather than Porter, had presented these reasons to the court. Porter has failed to sustain his burden of proving the second *Strickland* prong. *Nissalke*, 861 N.W.2d at 94. The fact that Porter was dissatisfied with the representation that his earlier attorneys provided did not demonstrate that it was fair and just to allow him to withdraw his plea.

Affirmed.