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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0281

Markhel D. Franklin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 9, 2019
Affirmed
Florey, Judge

Ramsey County District Court
File No. 62-CR-16-8055

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

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Reyes, Judge; and Florey, Judge.

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

FLOREY, Judge

In this appeal from the summary denial of his postconviction petition, appellant argues (1) that the postconviction court erred by amending the offense listed in the warrant

of commitment and removing a conditional-release term to reflect a different conviction-statute subdivision and (2) that plea withdrawal is required because the plea did not establish the elements of the originally listed offense. Because the postconviction court properly remedied the sentencing errors, which consisted of clerical mistakes and an unauthorized conditional-release term, and did not abuse its discretion by deeming appellant's plea accurate and denying the postconviction petition, we affirm.

FACTS

In November 2016, the state charged appellant Markhel D. Franklin[1] with one count of fourth-degree assault. The complaint listed the charge as "Assault 4th Deg–Secure Treatment Facility–Throw/Transfer Bodily Fluid or Feces," and listed the applicable statute as Minn. Stat. § 609.2231, subd. 3a(c)(2) (2016), "with reference to" Minn. Stat. § 609.2231, subd. 3 (2016).

Section 609.2231, subdivision 3a(c)(2), applies to certain committed persons and criminalizes intentionally transferring "urine, blood, semen, or feces" onto "an employee or other individual who supervises and works directly with patients at a secure treatment facility."[2] Section 609.2231, subdivision 3, the statute under which appellant was charged by "reference," criminalizes intentionally transferring bodily fluids or feces onto "an employee of a correctional facility."

[1] In his brief, and in the record, appellant is referred to as Markel Harris-Franklin.

[2] A secure treatment facility is defined to include "the Minnesota Security Hospital" and "the Minnesota sex offender program facility in Moose Lake." *See* Minn. Stat. §§ 609.2231, subd. 3a, 253B.02, subd. 18a, 253D.02, subd. 13 (2018).

The charge description in the complaint indicated that "[o]n or about November 9, 2016," appellant "did intentionally throw or otherwise transfer bodily fluids or feces at or onto an employee of a correctional facility." The probable-cause portion of the complaint stated that appellant was in custody "at the Ramsey County Law Enforcement Center" when a sergeant "and other correctional officers were sent to [appellant's] cell on a suicide attempt," and found him with "his jumpsuit tied in a knot around his neck." According to the complaint, appellant "spat on [the sergeant's] jacket and sleeve," and afterward stated that he was "'talking sh*t' and his spit came out and got on the correctional officer."

On January 27, 2017, appellant pleaded guilty to "assault in the fourth degree." In establishing a factual basis, he acknowledged that "[o]n November 19, 2016,"[3] he was being held "in custody at the Ramsey County Law Enforcement Center," "multiple correctional officers had reason to enter [his] cell . . . on a medical emergency," and during that intervention he intentionally "spit on a correctional officer." Appellant also tendered to the court a plea petition. It indicated that he understood he was charged with fourth-degree assault, but did not present further specifics on the charge.

Prior to sentencing, a presentence investigation (PSI) report was prepared. It stated that appellant pleaded guilty to fourth-degree assault of a correctional officer, but also noted that he was convicted under section 609.2231, subdivision 3a(c)(2), concerning secure treatment facilities, as well as section 609.2231, subdivision 3, concerning

[3] The reference to November 19 appears to be an error, as the offense date listed in the compliant was November 9. Appellant makes no argument concerning this discrepancy. *See Scruggs v. State*, 484 N.W.2d 21, 24 n.1 (Minn. 1992) (concluding that issues not briefed were "waived").

correctional employees. It noted that, pursuant to section 609.2231, subdivision 3a(e), appellant was subject to a five-year conditional-release term should his sentence be executed. It stated that appellant would be appearing for sentencing for fourth-degree assault "of a [c]orrectional [o]fficer." A sentencing worksheet listed the conviction statute as Minn. Stat. § 609.2231, subd. 3a(c)(2).

In March 2017, a sentencing hearing was held. The district court stated that appellant was there for sentencing for "assault in the fourth degree." Appellant's counsel indicated no corrections to the PSI report. In imposing the sentence, the district court stated that appellant had entered a guilty plea "to the crime of assault in the fourth degree" in violation of section 609.2231, subdivision 3, "defining the penalty of not more than two years in prison and a $4,000 [fine] or both." On the charge of "assault in the fourth degree," the district court sentenced appellant to a stay of execution on a 17-month sentence, and placed him on probation for two years. The court also stated that "with respect to the assault charge," pursuant to section 609.2231 subdivision 3(a)(e), appellant was "subject to a five-year [period of] conditional release should his sentence be executed."

The warrant of commitment indicated that appellant was convicted of violating section 609.2231, subdivision 3a(c)(2), involving a "[s]ecure [t]reatment [f]acility," and sentenced under the penalty statute, section 609.2231, subdivision 3, which concerns correctional employees. The warrant of commitment indicated a 17-month sentence, stayed for two years, with a five-year conditional-release term.

In the fall of 2018, appellant petitioned for postconviction relief. He asserted that his plea was inaccurate because it did not establish any of the elements of the offense; he

was convicted of transferring bodily fluids onto an employee of a secure treatment facility, but his crime involved a correctional facility and employee. Appellant asked to withdraw his guilty plea.

In December 2018, the postconviction court summarily denied appellant's petition. The court found that appellant never admitted to transferring bodily fluids onto an individual who worked at a secure treatment facility, rather, he admitted that he transferred bodily fluids onto a correctional officer. The court found that the state intended to charge appellant under the correctional-employee subdivision, and although the complaint listed the wrong subdivision, the charge description and probable-cause recitation concerned a correctional employee. The court found that it was "apparent from the record that all parties involved understood that [appellant] was being charged with, [pleaded] guilty to, and was being sentenced for the crime of assault in the fourth degree based on the intentional transfer of bodily fluids onto a correctional officer." The court found that "[t]he error on the criminal judgment and warrant of commitment can be ascertained and corrected based solely on the record, and cannot be attributed to the exercise of judicial discretion." Therefore, the court concluded that the errors were clerical mistakes.

Pursuant to Minn. R. Crim. P. 27.03, subd. 10, permitting the correction of clerical mistakes "in a judgment, order, or in the record arising from oversight or omission," the postconviction court amended the warrant of commitment to reflect a conviction of fourth-degree assault of a correctional employee, a violation of section 609.2231, subdivision 3(2). Pursuant to Minn. R. Crim. P. 27.03, subd. 9, permitting the correction of unauthorized sentences, the court removed the five-year conditional-release term, which it

concluded was inapplicable. The court also concluded that appellant's plea was accurate because he was "clearly aware of the charge" of assaulting a correctional employee based on the language in the complaint. This appeal followed.

D E C I S I O N

Appellant challenges the denial of his postconviction petition, arguing that his plea was invalid because it did not establish the elements of the offense, and that the sentencing errors could not be remedied under Minn. R. Crim. P. 27.03. We first address whether the postconviction court was permitted, pursuant to rule 27.03, to correct the sentencing errors.

I. The postconviction court was permitted, pursuant to Minn. R. Crim. P. 27.03, subd. 10, to correct the errors in the warrant of commitment as clerical mistakes, and, pursuant to Minn. R. Crim. P. 27.03, subd. 9, to remove the unauthorized conditional-release term.

Rule 27.03, subdivision 10, states that "[c]lerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court." Caselaw on the application of subdivision 10 is limited. In *Pearson v. State*, the supreme court indicated that a postconviction court may remove, as a clerical error, a conviction in the record that is inconsistent with the sentencing transcript. 891 N.W.2d 590, 595 n.5. (Minn. 2017).

Subdivision 10 did not become effective until 2010, and similar language was formerly contained in subdivision 8. *See* Minn. R. Crim P. 27.03, subd. 8 (2008) ("Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."). Additional caselaw exists on the application of the clerical-

mistake rule under subdivision 8. In *State v. Pflepsen*, the supreme court stated that a clerical error "cannot reasonably be attributed to the exercise of judicial consideration or discretion," and concluded that a district court's decision not to order restitution was discretionary, and therefore not a clerical error. 590 N.W.2d 759, 768 n.4 (Minn. 1999) (quotation omitted).

In *State v. Walsh*, this court indicated that subdivision 8 could be used to modify or correct a sentence. 456 N.W.2d 442, 443 (Minn. App. 1990); *see also Tauer v. State*, 451 N.W.2d 649, 651 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). The *Walsh* court utilized caselaw from the civil context to help define a clerical mistake:

> Such a mistake ordinarily is apparent upon the face of the record and capable of being corrected by reference to the record only. It is usually a mistake in the clerical work of transcribing the particular record and cannot reasonably be attributed to the exercise of judicial consideration or discretion.

456 N.W.2d at 443 (quotation omitted). The *Walsh* court noted that "[a] motion to correct a clerical error can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." *Id.* (quotation omitted).

In an earlier case, *State v. Rock*, following a motion from the state several months after sentencing, the district court modified the defendant's sentence to reflect an increased criminal-history score discovered after sentencing. 380 N.W.2d 211, 213 (Minn. App. 1986), *review denied* (Minn. Mar. 27, 1986). This court stated, "we are unaware of any general authority which permits the trial court to resentence a defendant, except under limited circumstances of Minn. R. Crim. P. 27.03, subd. 8 and subd. 9, and "[b]ecause the

sentence here was authorized by law, the trial court lacked authority under the rules to correct the sentence." *Id.* at 213-14; *see also State v. Isaacson*, 409 N.W.2d 291, 293 (Minn. App. 1987) ("We conclude that appellant's original sentence was authorized by law and that the trial court lacked authority to 'correct' the sentence to a consecutive term when it did not originally specify that the sentence was to be served consecutively.").

Whether a district court acted within the confines of rule 27.03, subdivision 10, by correcting a clerical mistake presents a question of law, subject to de novo review. *See Pflepsen*, 590 N.W.2d at 768 n.4 ("The district court's decision not to order restitution . . . was a discretionary conclusion . . . [and] as such, it does not constitute a clerical error."); *Walsh*, 456 N.W.2d at 443-44 (concluding that sentence imposed in accordance with incorrect criminal-history score listed in inaccurate sentencing worksheet could not be corrected as a clerical mistake).

Here, the postconviction court properly remedied the errors in the warrant of commitment as clerical mistakes. The district court, at sentencing, stated that appellant was convicted of violating section 609.2231, subdivision 3, which concerns correctional employees. The warrant of commitment did not reflect the orally pronounced sentence, and remedying that error was not discretionary. *See Pflepsen*, 590 N.W.2d at 768 n.4. "'[A]n orally pronounced sentence controls over a [written] judgment and commitment order when the two conflict.'" *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002) (quoting *United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987)). The error was apparent from the record. *See Walsh*, 456 N.W.2d at 443. The secure-treatment-facility subdivision conflicted with the references to correctional officers contained in the

complaint and made during appellant's plea. Additionally, a conviction under the secure-treatment-facility subdivision was not permissible. *See Rock*, 380 N.W.2d at 213-14. Appellant's offense did not involve a secure-treatment facility. The postconviction court was permitted, pursuant to Minn. R. Crim. P. 27.03, subd. 10, to correct the errors in the warrant of commitment.

The district court also imposed, pursuant to subdivision 3a(e), a five-year conditional-release term, which is inapplicable to a violation of the correctional-employee subdivision, but also inapplicable to the secure-treatment-facility subdivision listed in the complaint and warrant of commitment, subdivision 3a(c).[4] *See* Minn. Stat. § 609.2231, subd. 3a(d), (e). The district court's imposition of a conditional-release term constituted an unauthorized sentence, properly remedied under Minn. R. Crim. P. 27.03, subd. 9. *See Reynolds v. State*, 888 N.W.2d 125, 130 (Minn. 2016) (concluding that unauthorized conditional-release term was properly challenged under rule 27.03, subdivision 9).

II. The postconviction court did not abuse its discretion by denying appellant's postconviction petition, which challenged the accuracy of his plea.

Having determined that the postconviction court was permitted to correct the sentencing mistakes, we next address whether it properly denied appellant's postconviction petition. Appellant argues that his plea was inaccurate because it did not establish the

[4] Section 609.2231, subdivision 3a, contains two sentencing requirements, which apply to subdivision 3a(b), a subparagraph not listed in the complaint. First, subdivision 3a(d) generally requires that a court sentence a person "convicted of violating paragraph (b) . . . for not less than one year and one day." Second, subdivision 3a(e) requires the imposition of a five-year conditional-release term when a person is sentenced "to the custody of the commissioner of corrections" for violating "paragraph (b)."

elements of the offense. The postconviction court concluded that appellant's plea was accurate.

We review a postconviction court's denial of a request to withdraw a guilty plea for an abuse of discretion. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn. 2017). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). "We review findings of fact for clear error and issues of law de novo." *Sanchez*, 890 N.W.2d at 720. We review the validity of a guilty plea de novo. *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017). A postconviction petition may be summarily denied when the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief. Minn. Stat. § 590.04, subd. 1 (2018).

A district court must allow a defendant to withdraw a guilty plea "upon a timely motion and proof . . . that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs when a guilty plea is not accurate, voluntary, or intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A defendant bears the burden of showing that the plea was invalid. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012).

"The accuracy requirement is intended to protect the defendant from pleading guilty to a charge more serious than he or she could be convicted of were the defendant to go to trial." *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Apr. 21, 2009). An accurate plea must be established on a proper factual

basis. *Theis*, 742 N.W.2d at 647. "Ordinarily, an adequate factual basis is established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Williams*, 760 N.W.2d at 12 (quotation omitted).

The Constitution requires the state to inform a defendant of the "nature and cause of the accusation" against him. U.S. Const. amends. VI; *see also* Minn. R. Crim. P. 2.01, subd. 1 ("The complaint must specify the offense charged, the statute allegedly violated, and the maximum penalty."). The state meets this requirement "if the charging instrument contains such descriptions of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime." *State v. Chauvin*, 723 N.W.2d 20, 29-30 (Minn. 2006) (quotation omitted). We review de novo whether a complaint sufficiently informed the appellant of the nature and cause of the accusations against him. *See State v. Bias*, 419 N.W.2d 480, 486 (Minn. 1988).

Here, the complaint sufficiently apprised appellant of the charge of spitting on a correctional officer, and appellant's plea was accurate. Both the charge description and probable-cause portion of the complaint made reference to the crime being committed against an employee or officer working at a correctional facility, and the complaint referenced the correctional-employee subdivision, subdivision 3. The only incorrect portions of the complaint were the reference to subdivision 3a(c)(2), concerning secure-treatment facilities, and the words "Secure Treatment Facility" listed in the charge.

At the plea hearing, appellant, represented by counsel, stated that he understood the charge against him. In establishing a factual basis for the plea, appellant admitted that he was being held "at the Ramsey County Law Enforcement Center," that "multiple

correctional officers" entered his cell, and that he intentionally spat "on a correctional officer." This satisfies the requirements of section 609.2231, subdivision 3, which imposes criminal liability if a person intentionally transfers bodily fluids onto an employee of a correctional facility. This plea in no way satisfies the requirements of subdivision 3a(c)(2), which does not even criminalize the transfer of saliva. *See* Minn. Stat. § 609.2231, subd. 3a(c)(2) (criminalizing the transfer of "urine, blood, semen, or feces").

Appellant correctly notes in his brief that it is an unconstitutional violation of due process to obtain a conviction upon a charge not made. *See Jackson v. Virginia*, 443 U.S. 307, 314, 99 S. Ct. 2781, 2786 (1979). However, appellant was informed, by the complaint, of the charge of assault of a correctional employee, both in terms of the charge description and probable-cause information, as well as the reference to the correctional-employee subdivision contained in the complaint.

The Minnesota Supreme Court has held that "a conviction after a fair trial will stand unless there is actual proof that defendant has in fact been misled as to the charge brought against him, to his prejudice." *Bias*, 419 N.W.2d at 486. Although this case involves a plea, and not a trial, nothing in the record suggests that appellant was misled by the formal defects in the complaint. Given appellant's burden to demonstrate that his plea was invalid, and the lack of anything in the record or postconviction petition suggesting that appellant was misled by the references to secure-treatment facilities in the complaint, the district court did not abuse its discretion by denying appellant's postconviction petition.

Affirmed.