STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0878

State of Minnesota,
Respondent,

vs.

Christopher Marlin Vosburg,
Appellant.

Filed April 13, 2020
Reversed and remanded
Bratvold, Judge

Hennepin County District Court
File No. 27-CR-17-23193

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Ryan Magnus, Blair Magnus, PLLC, Mankato, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

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

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction, appellant challenges the district court's denial of his motion to withdraw a guilty plea. Appellant pleaded guilty to engaging in a pattern of stalking conduct by committing, within five years, two or more

acts in violation of the stalking-by-telephone statute, and then testified to sending multiple unwanted text messages to his ex-girlfriend during two distinct time periods. *See* Minn. Stat. §§ 609.749, subd. 2(4) (stalking by telephone), subd. 5(a) (pattern of stalking conduct) (2016). The district court later rejected appellant's motion to withdraw his plea, found him guilty of a pattern of stalking conduct, and sentenced him to prison.

While this appeal was pending, we issued our decision in *State v. Peterson*, 936 N.W.2d 912 (Minn. App. 2019), in which we invalidated the stalking-by-telephone statute as facially overbroad in violation of the First Amendment. Before the submission of this appeal to this court, the state conceded that *Peterson* "controls the outcome in this case." After due consideration, and given our decision in *Peterson*, we conclude that appellant's guilty plea is not accurate and thus invalid. We reverse and remand for the district court to allow appellant to withdraw his guilty plea to correct a manifest injustice.

FACTS

In January 2017, appellant Christopher Marlin Vosburg's ex-girlfriend reported to law enforcement several incidents during and after their roughly two-and-a-half-year romantic relationship. The state charged Vosburg with two counts of nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, subd. 1 (2016). After further investigation, the state amended its complaint to allege a pattern of stalking conduct under Minn. Stat. § 609.749, subd. 5(a) (count one); third-degree criminal sexual conduct (penetration using force or coercion) under Minn. Stat. § 609.344, subd. 1(c) (2014) (count two); third-degree criminal sexual conduct (penetration and victim physically helpless) under Minn. Stat. § 609.344, subd. 1(d) (2016) (count three); and two counts of

nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, subd. 1 (counts four and five).[1]

The parties negotiated a plea agreement in which Vosburg agreed to plead guilty to the pattern-of-stalking-conduct charge (count one) and the state agreed to recommend a "bottom-of-the-box" sentence of 33 months and to dismiss the other four counts. At the plea hearing, Vosburg pleaded guilty to engaging in a pattern of stalking conduct and admitted that he sent many text messages to his ex-girlfriend during two distinct time periods in 2016 and early 2017, that he knew or should have known that the text messages would cause her to fear for her safety, and that she had, in fact, been afraid for her personal safety.

At the sentencing hearing, Vosburg asked for a continuance so he could move to withdraw his guilty plea, which the district court granted. Vosburg moved to withdraw his guilty plea, arguing that his plea was not intelligent. The district court denied Vosburg's motion, found him guilty, and sentenced him to 33 months in prison with credit for 43 days. The state dismissed the remaining four counts.

Vosburg appealed.

D E C I S I O N

In his brief to this court, Vosburg argues that the district court abused its discretion in denying his motion to withdraw his guilty plea without an evidentiary hearing and asks

[1] Although it is not at issue in this appeal, we note that, while Vosburg's appeal was pending, this court held that Minn. Stat. § 617.261 was unconstitutionally overbroad in violation of the First Amendment. *State v. Casillas*, 938 N.W.2d 74, 91 (Minn. App. 2019). The supreme court granted review in *Casillas* on March 17, 2020.

this court to reverse and remand so he can prove that his plea was not intelligently made. Vosburg and the state filed briefs on the issue in August and October 2019, respectively. This court scheduled oral argument for January 16, 2020.

On December 9, 2019, this court issued its opinion in *State v. Peterson*, in which we determined that Minn. Stat. § 609.749, subd. 2(4), which criminalized stalking by telephone, was facially overbroad and could not be remedied by a narrowing construction. 936 N.W.2d 912 (Minn. App. 2019). A petition for review was filed on January 8, 2020.

On January 8, 2020, the state moved to strike oral argument and either stay this appeal pending the outcome of the petition for review filed in *Peterson*, or "issue a decision consistent with *Peterson*." Vosburg did not respond to the motion. On January 13, we granted the state's motion to strike oral argument. The matter was submitted for decision after a nonoral conference on January 16, 2020. The supreme court denied review in *Peterson* on February 26, 2020.

As mentioned above, the state's motion to strike asserted that "*Peterson* controls the outcome in this case." Even if a party concedes an issue, "it is the responsibility of appellate courts to decide cases in accordance with law." *State v. Hannukesla*, 452 N.W.2d 668, 673 n.7 (Minn. 1990); *see also State v. Werner*, 725 N.W.2d 767, 772 n.1 (Minn. App. 2007) ("While we generally accept a party's concessions, we need not do so when the party has made a concession on a threshold issue that presents a question of law."); *see, e.g.*, *State v. Watson*, 829 N.W.2d 626, 631 (Minn. App. 2013) (rejecting the state's concession that the district court erroneously sentenced appellant), *review denied* (Minn. June 26,

2013). We therefore consider whether Vosburg has a right to withdraw his guilty plea based on our decision in *Peterson*.

A defendant does not have an "absolute right" to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). But a court must permit a defendant to withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1 ("At any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice."); *see also State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (reversing and remanding where guilty plea was not accurate).

A manifest injustice occurs when a guilty plea is invalid, meaning it is not "accurate, voluntary, and intelligent." *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002). For a guilty plea to be accurate, "there must be sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). The validity of a guilty plea is a question of law that appellate courts review de novo. *See State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Vosburg pleaded guilty to a pattern of stalking conduct under Minn. Stat. § 609.749, subd. 5(a). Subdivision 5(b) defines a "pattern of stalking conduct" as a felony in which a defendant commits "two or more acts within a five-year period that violate or attempt to violate the provisions *of . . . this section*." Minn. Stat. § 609.749, subd. 5(b) (emphasis added). Thus, to be accurate and valid, the factual basis for Vosburg's plea must establish at least two acts that violate section 609.749, which defines eight acts as stalking. *Id.*,

subd. 2 (1)-(8). For example, Minn. Stat. § 609.749, subd. 2(4), provides that an individual commits a gross misdemeanor upon "repeatedly mak[ing] telephone calls [or] send[ing] text messages." "Stalking" means that the actor "knows or has reason to know" that his or her conduct would "cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim." Minn. Stat. § 609.749, subd. 1.

At the plea hearing, Vosburg testified that he sent his ex-girlfriend many text messages during two different time periods, that he knew or should have known his conduct would cause her to fear for her safety, and that she did fear for her personal safety. In other words, at the time of Vosburg's plea and conviction, he had admitted to acts that violated Minn. Stat. § 609.749, subd. 2(4), the stalking-by-telephone statute.

But after Vosburg's plea and conviction, *Peterson* invalidated the stalking-by-telephone statute as facially unconstitutional. *Peterson*, 936 N.W.2d at 922. When a court declares a statute unconstitutional, "it is not a law and it is as inoperative as if it had never been enacted." *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 349 (Minn. 2005); *see also State v. Mullen*, 577 N.W.2d 505, 512 (Minn. 1998) (stating that an appellate court's determination that a statute is unconstitutional renders the statute inoperative).

Because *Peterson* invalidated Minnesota Statutes section 609.749, subdivision 2(4), and because Vosburg testified to two instances of violating the stalking-by-telephone statute to support his guilty plea of pattern-of-stalking conduct, *Peterson* governs our review of the factual basis for Vosburg's plea. The factual basis must "support a conclusion

that defendant's conduct falls within the charge to which he desires to plead guilty." *Iverson*, 664 N.W.2d at 349 (quotation omitted). Vosburg testified to two instances of conduct that are no longer criminalized as stalking by telephone and meet no other definition of stalking conduct. Thus, because Vosburg's testimony does not provide the factual basis for one element of the pattern-of-stalking-conduct offense—a pattern of conduct in violation of "this section"—his plea is not accurate. Because Vosburg's plea is inaccurate, it is invalid, and we conclude that Vosburg has a right to withdraw his invalid guilty plea to correct a manifest injustice. *See* Minn. R. Crim. P. 15.05, subd. 1.

Given our conclusion, we do not consider or decide whether Vosburg's plea was intelligent. Rather, we reverse and remand for the district court to allow Vosburg to withdraw his guilty plea and for further proceedings consistent with this opinion.[2]

Reversed and remanded.

[2] *See generally State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000) (where trial court has set aside guilty verdicts before sentencing because a subdivision of the charging statute was declared unconstitutional, retrial under an amended complaint is not prohibited under the Double Jeopardy Clauses of the state and federal constitutions).