*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0282**

State of Minnesota,
Respondent,

vs.

Dustin Lee Hicks,
Appellant.

**Filed December 21, 2020**
**Reversed and remanded**
**Larkin, Judge**

Goodhue County District Court
File No. 25-CR-19-968

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

Stephen F. O'Keefe, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Red Wing, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

## UNPUBLISHED OPINION

**LARKIN**, Judge

Appellant challenges his conviction and sentence for criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. He argues that the district court erred by convicting him of that offense even though he pleaded guilty to another offense. We reverse and remand.

## FACTS

In April 2019, respondent State of Minnesota charged appellant Dustin Lee Hicks with several offenses, including criminal vehicular homicide—gross negligence, under Minn. Stat. § 609.2112, subd. 1(a)(1) (2018). The record indicates that Hicks tendered a "straight" guilty plea to that offense and that there was no agreement regarding the sentence to be imposed. The district court asked Hicks: "To the charge of criminal vehicular homicide, operating a motor vehicle in a grossly negligent manner, this [is] a felony offense and it could carry a penalty of up to fifteen years in prison, a $20,000 fine, or both; how do you plead?" Hicks responded, "Guilty." Hicks waived his trial rights in response to a series of questions from his attorney, and he submitted a petition to plead guilty to the court. Hicks acknowledged that there was no agreement regarding the sentence to be imposed, that the state would seek an executed prison sentence, and that based on the severity level of the offense and his criminal history, the presumptive sentencing range under the Minnesota Sentencing Guidelines was 67 to 93 months.

As a factual basis for his guilty plea, Hicks admitted that, on April 27, 2019, he drove a vehicle after consuming alcohol and that his alcohol concentration, as measured

within two hours of driving, was 0.202. While he was driving, he swerved to avoid a deer in the road, which caused the vehicle to roll. His passenger, K.K., was killed as a result. Hicks acknowledged that the alcohol in his system affected his ability to avoid the deer and that he was grossly negligent by choosing to drive after consuming alcohol.

The prosecutor questioned whether Hicks's admissions were sufficient to establish a factual basis for his guilty plea to criminal vehicular homicide—gross negligence. She suggested that Hicks's proffer more readily aligned with criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving, under Minn. Stat. § 609.2112, subd. 1(a)(4) (2018). The prosecutor stated that both charges had the same severity level for sentencing purposes. After some discussion on the record, defense counsel stated that she would prefer to apply the proffered factual basis to the proposed new charge instead of adding more facts to support the gross-negligence charge. The prosecutor moved to amend the complaint to replace the charge of criminal vehicular homicide—gross negligence, with criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. Defense counsel did not object to that amendment.

The district court granted the state's request to amend the complaint. But the district court did not ask Hicks if he wanted to plead guilty to the amended charge of criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. And Hicks did not renew his waiver of trial rights in response to the amendment or otherwise indicate a desire to plead guilty to the new charge. In fact, after the district court granted the state's request to amend the complaint, Hicks did not make any statements at the hearing. The

district court continued the matter for sentencing and ordered a presentence investigation, without indicating that it had accepted Hicks's guilty plea or adjudicated him guilty.

The parties appeared for sentencing before a different district court judge. A sentencing worksheet indicated that the presumptive sentencing range was 100 1/2 months to 139 1/2 months. At that time, defense counsel informed the district court that the presumptive sentencing range was higher than she had anticipated when Hicks pleaded guilty. The increased range was due to a sentence modifier that applied to criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. Counsel explained, "for Mr. Hicks' benefit mostly and also for Your Honor," that when she and the prosecutor had contemplated "possible options for this file and what to do from a sentencing standpoint, I don't believe that [the prosecutor] or myself had ever had explicit conversations about that modifier; so the numbers that we had been contemplating in terms of possible consequence were significantly smaller." Defense counsel conceded, however, that the presumptive sentencing range was accurate for the new charge. The following exchange occurred:

> THE COURT: And you're saying that when [Hicks] pled to [the plea judge] you -- when [Hicks] entered that plea you weren't -- you weren't factoring that in?
> DEFENSE COUNSEL: That is correct. The numbers here on the worksheet filed are in fact accurate. I looked at the modifiers and I --
> THE COURT: Okay. But they're higher than you and Mr. Hicks had thought, it was beyond that piece of paper?
> DEFENSE COUNSEL: Correct.

Defense counsel did not object to proceeding with sentencing. The district court heard from several of K.K.'s family members regarding K.K.'s tragic death and the impact

of Hicks's offense. The state argued for a prison sentence of 139 1/2 months. Defense counsel argued for a downward dispositional departure and a probationary sentence. The district court entered a judgment of conviction for criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving, and sentenced Hicks to serve 120 months in prison. Hicks appeals.

## DECISION

Hicks challenges his conviction and sentence for criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. He contends that he "never pleaded guilty to that amended offense" and argues that because he pleaded guilty only to criminal vehicular homicide—gross negligence, that was the only offense on which judgment of conviction could be entered.

A conviction requires either a guilty plea, a guilty verdict by a jury, or a guilty finding by the court, and it must be "accepted and recorded by the court." Minn. Stat. § 609.02, subd. 5 (2018). A guilty plea is not a conviction, as a conviction does not occur until the district court both accepts and records the guilty plea. *State v. Walker*, 913 N.W.2d 463, 467 (Minn. App. 2018). "[A] court 'records' a guilty plea upon accepting the guilty plea and adjudicating the defendant guilty on the record." *State v. Martinez-Mendoza*, 804 N.W.2d 1, 6 (Minn. 2011).

Hicks pleaded guilty to the offense of criminal vehicular homicide—gross negligence. The district court did not accept that guilty plea or adjudicate Hicks guilty of that offense. Instead, the district court adjudicated Hicks guilty of the amended offense of criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving.

Hicks argues that the district court erred in doing so because "at the most basic level, [he] never pleaded guilty to" criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving, and therefore "he cannot be convicted and sentenced for that offense."

The state counters that the district court did not err "when it accepted [Hicks's] guilty plea and sentenced [him] for the offense of" criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving, because defense counsel "consented to the amended charge." The state further argues that defense counsel "was aware of and consented to the District Court accepting the guilty plea to the amended charge."

We reject the state's argument for two reasons. First, the argument ignores the fact that Hicks did not plead guilty to the amended charge. Second, "[a] decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision that may be made only by a defendant and only with the defendant's consent." *In re Welfare of B.R.C.*, 675 N.W.2d 348, 352 (Minn. App. 2004). "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty, waive a jury, testify [on] his or her own behalf, or take an appeal . . . ." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). We therefore will not treat defense counsel's concessions as a guilty plea to the amended charge by Hicks.

The district court and counsel seem to have assumed that Hicks's guilty plea to the offense of criminal vehicular homicide—gross negligence, automatically applied to the amended offense of criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving. We are not aware of authority supporting that assumption. Indeed,

it is inconsistent with our jurisprudence regarding guilty pleas. *See* Minn. R. Crim. P. 8.02, subd. 1 (stating that an arraignment must be conducted in open court and that the court must ask the defendant to enter a plea); Minn. R. Crim. P. 15.01, subd. 1 (stating that before a judge accepts a guilty plea in a felony case, the defendant must be sworn and questioned regarding whether the defendant understands the precise offense to which he is pleading guilty); *State v. Bertsch*, 707 N.W.2d 660, 665 (Minn. 2006) (stating that a "defendant can hardly be said to understand the consequences of his plea when the count to which he has pled is a moving target subject to later amendment by the state" (quotation omitted)); *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983) (stating that a plea must be intelligent to ensure "that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea"); *State ex rel. Lacklineo v. Tahash*, 126 N.W.2d 646, 649 n.4 (Minn. 1964) (stating that "a plea of guilty must be personally and formally made by the accused").

It is also inconsistent with caselaw indicating that a prior waiver of constitutional rights must be renewed if the state amends a criminal complaint to include a new offense. *See State v. Little*, 851 N.W.2d 878, 879 (Minn. 2014) ("Existing case law plainly requires a court to obtain a renewed jury-trial waiver when the State amends its complaint to add an additional charge after the defendant has made an initial jury-trial waiver."); *State v. Rhoads*, 813 N.W.2d 880, 882 (Minn. 2012) ("When the State files an amended charge that doubles the maximum possible punishment after a hearing at which the defendant waived his right to counsel, a defendant must renew his waiver of his right to counsel in a manner that demonstrates an understanding of the increased maximum possible punishment.").

In sum, the state does not cite—and we are not aware of—authority permitting a guilty plea to one offense to serve as the basis for a conviction of another offense. We therefore conclude that Hicks's conviction for criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving is invalid.

We turn to the issue of remedy. Hicks asks this court to reverse his conviction for criminal vehicular homicide—alcohol concentration of 0.08 within two hours of driving and remand to the district court "with instructions to enter a conviction for criminal vehicular homicide—[gross negligence], and to impose a sentence within the permissible presumptive range for that offense." That relief is not appropriate because the district court did not accept Hicks's guilty plea to criminal vehicular homicide—gross negligence, and it was not required to do so. There is no "absolute right on the part of a defendant to plead guilty," but a court may, in its discretion, "allow [a defendant] to do so in proper cases." *State v. Linehan*, 150 N.W.2d 203, 206 (Minn. 1967). The acceptance of a guilty plea is within the district court's discretion. *Petersen v. State*, 937 N.W.2d 136, 143 (Minn. 2019). Because the district court was not required to accept Hicks's guilty plea to criminal vehicular homicide—gross negligence, we will not compel the district court to do so on remand. Instead, we reverse and remand for further proceedings consistent with this opinion.[1]

**Reversed and remanded.**

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[1] Because we reverse on other grounds, we do not address Hicks's argument that the factual record does not support his sentence.