This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0700

State of Minnesota,
Respondent,

vs.

Michael Jeffrey Herron,
Appellant.

Filed October 4, 2021
Reversed and remanded
Gaïtas, Judge

Hennepin County District Court
File No. 27-CR-19-21918

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Ross, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this direct appeal from a judgment of conviction for unlawful possession of ammunition, and following a remand to the district court for postconviction proceedings, appellant Michael Jeffrey Herron argues that he is entitled to withdraw his guilty plea. On remand, the district court found that trial counsel erroneously advised Herron that his guilty

plea preserved his right to appeal an alleged speedy-trial violation, and that but for this incorrect information, Herron would not have pleaded guilty. The district court denied Herron's request to withdraw his guilty plea but, in the interest of fairness, "affirm[ed] his right to appeal" the alleged speedy-trial violation. Because Herron's guilty plea was invalid at its inception, we reverse and remand.

FACTS

In September 2019, Minneapolis police investigated a report that Herron had committed an assault while possessing a firearm. The complainant alleged that Herron restrained her in his bedroom, made a statement that caused her to fear he would sexually assault her, and pointed a handgun at her. Herron was discovered hiding in a bush behind a neighboring house, and the police arrested him. The complainant identified Herron as her attacker. Police obtained a search warrant and found a weapon-mounted flashlight and a box of nine-millimeter ammunition in Herron's bedroom. In the upstairs living room, police found a nine-millimeter pistol beneath the sofa. Due to Herron's criminal history, he is prohibited from possessing a firearm or ammunition.

Respondent State of Minnesota charged Herron with one count of unlawful possession of a firearm, Minn. Stat. § 624.713, subd. 1(2) (2018), and one count of threats of violence, Minn. Stat. § 609.713, subd. 1 (2018). On October 14, 2019, Herron demanded a speedy trial, and a trial was scheduled for December 16, 2019.

Days before the scheduled trial, Herron and his counsel appeared before the district court to discuss the trial date. The district court explained that a judge's unexpected health problem had significantly impacted court calendars and would require rescheduling the

December 16, 2019 trial. Herron's attorney acknowledged that there was good cause to continue the trial but noted concern about Herron's speedy-trial rights.[1]

> I think it is important to note that Mr. Herron obviously has his speedy trial rights. He already abrogated them once when he agreed to a two-day extension beyond the original without any, you know, necessity but just because it originally was the first date that the Court had available. The Court found good cause to extend it that two days because we couldn't even get him in prior to that, during his normal speedy.
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> So, he's already being pushed out and now, he's being asked to be pushed out again. He's been in custody, presumed innocent, this whole time and obviously, there's a number of potential benefits to him having a trial quick. But, most importantly, it's his liberty that's on the line and now, he's being asked once again to set it in the new year. I understand that the first date, I think, the parties have available is January 21 and so, it's over a month past where he is now.

The district court stated that this was "one of those situations that nobody could have really done anything to prevent" and found good cause to continue Herron's trial.

On January 21, 2020—the rescheduled trial date—the state added a third count to the complaint, charging Herron with unlawful possession of ammunition, Minn. Stat. § 624.713, subd. 1(2). The following day, just as jury selection was about to begin, Herron

[1] Under the rules of criminal procedure, after a defendant enters a plea other than guilty and demands a trial, the trial must commence within 60 days of the demand. Minn. R. Crim. P. 11.09. However, the district court may begin trial outside the 60-day window on a finding that good cause exists for the delay. *Id.*, (b). A defendant's right to a speedy trial is also guaranteed by the state and federal constitutions. *See State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (citing U.S. Const. amend. VI; Minn. Const. art. I, § 6). The constitutional speedy-trial right does not provide a "fixed rule for all cases that defines how long is too long to wait for a trial." *State v. Mikell*, 960 N.W.2d 230, 244 (Minn. 2021). And "the speed with which an accused must be brought to trial must be considered with regard to the practical administration of justice." *Id.* (quotation omitted).

decided to plead guilty. He waived his right to a trial and entered a guilty plea to unlawful possession of ammunition. In exchange, the state agreed to dismiss the two remaining charges in the complaint. The parties agreed that Herron would receive the presumptive sentence of 60 months in prison at a later sentencing hearing.

During the plea colloquy, Herron's attorney noted Herron's disagreement with the district court's earlier finding that there was good cause to continue his trial from December 2019 to January 2020. The following exchange then occurred between Herron and his attorney:

> Q: Okay. And so the only issue that you've raised about this proceeding was a previous finding of good cause; is that correct?
> A: Yes.
> Q: Okay. You understand all of your other issues you're waiving and giving up, correct?
> A: Yes.

Several weeks later, Herron appeared before the district court for sentencing. The district court sentenced Herron to 60 months in prison.

In May 2020, Herron filed a notice of appeal to this court. He then moved to stay the appeal in order to pursue postconviction relief. We granted Herron's motion and remanded the case to the district court. In November, Herron filed a petition for postconviction relief in the district court. His petition alleged that his guilty plea was invalid because he did not know that, by pleading guilty, he gave up his right to appeal the district court's decision to continue his trial beyond the speedy-trial deadline. In support of the petition, Herron submitted an affidavit stating that his trial counsel had assured him that he would be able to appeal the alleged speedy-trial violation following a guilty plea.

His affidavit also stated that he would have opted for a trial if he had known that by pleading guilty he would lose his right to challenge the district court's speedy-trial ruling.

In March 2021, the district court issued an order denying Herron's petition for postconviction relief. The district court determined that Herron's guilty plea was "generally" valid—"[h]e went through the standard waiver of his rights with counsel and agreed to waive the many rights identified in the written plea petition" and "[h]e similarly acknowledged the 60 month sentence that was to be imposed as a result of his crime." But the district court found that statements made during Herron's guilty-plea colloquy demonstrated that "it was important to Mr. Herron that he preserve his right to challenge the prior decision to continue his trial for good cause." The district court observed that "[h]ad the issue of the right to appeal been more explicitly addressed, there is no doubt in the Court's mind that Mr. Herron would have proceeded differently—such as through a stipulated facts trial—to preserve that right in a more technically proper way." Accordingly, the district court concluded that Herron did preserve his "right to appeal his case based on the earlier decision to find good cause to continue it." Although the district court rejected Herron's request to withdraw his guilty plea by denying him postconviction relief, it "recognize[d]" in the interest of fairness that Herron "retained the right to appeal the decision to continue his [trial] for good cause." To enable Herron to pursue the issue on appeal, the district court stated that it would "allow Mr. Herron the normal time to appeal that issue," beginning the same day the order was issued.

Following the district court's order, we granted Herron's motion to reinstate his direct appeal.

DECISION

On appeal, Herron argues that the district court erred in denying his postconviction request to withdraw his guilty plea for two reasons. First, he contends that, because his guilty plea was founded on the mistaken belief that he was preserving his right to appeal a speedy-trial issue, the plea was not intelligently made and is therefore invalid. Second, he asserts that he only decided to plead guilty based on the ineffective representation of his trial attorney, who wrongly advised him that he would be able to pursue the speedy-trial issue on appeal from the guilty plea.

We first identify the standard of review that we must apply in considering Herron's claims. Herron filed a direct appeal and then stayed the appeal for postconviction proceedings. After the district court denied his petition for postconviction relief, Herron reinstated his appeal. He now challenges the district court's postconviction decisions. Under these circumstances, the Minnesota Supreme Court has instructed that the appellate court should use the standard of review for a direct appeal. *See State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012); *State v. Petersen*, 799 N.W.2d 653 (Minn. App. 2011), *rev. denied* (Minn. Sept. 28, 2011).

Both of Herron's claims concern the validity of his guilty plea. Whether a guilty plea is valid is a question of law that the appellate court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Thus, in reviewing Herron's challenges to his guilty plea, we apply a de novo standard of review. *See State v. Johnson*, 867 N.W.2d 210, 214-15 (Minn. App. 2015) (applying de novo review in determining validity of guilty plea challenged on direct appeal).

Herron argues that he is entitled to withdraw his guilty plea. "A defendant does not have an absolute right to withdraw a guilty plea once it [has been] entered." *State v. Hughes*, 758 N.W.2d 577, 582 (Minn. 2008). Rather, a court "must allow a defendant to withdraw a guilty plea" after sentencing only when the defendant establishes "that 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 not valid." *Raleigh*, 778 N.W.2d at 94.

According to Herron, his guilty plea is invalid because it is constitutionally deficient. To satisfy constitutional requirements, a guilty plea must be intelligent, accurate, and voluntary. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017). A defendant bears the burden of showing that a guilty plea does not comport with these requirements. *Raleigh*, 778 N.W.2d at 94.

Against this legal backdrop, we next consider whether Herron's guilty plea is valid. Herron's first argument is that his plea is not intelligent because he erroneously believed that he would be able to appeal his speedy-trial issue following the plea.

"To be intelligent, a guilty plea must represent a knowing and intelligent choice among the alternative courses of action available." *Dikken*, 896 N.W.2d at 877 (quotation omitted). "Whether a plea is intelligent depends on what the defendant knew at the time he entered the plea . . . ." *Id.* More specifically, a plea is intelligent when it embodies the defendant's understanding of the charges, the rights he has waived, and the consequences of entering the plea. *Id.*; *see Nelson v. State*, 880 N.W.2d 852, 858 (Minn. 2016).

One consequence of pleading guilty is the waiver of all non-jurisdictional defects. *See State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986) ("A guilty plea by a counseled

defendant has traditionally operated . . . as a waiver of all non-jurisdictional defects arising prior to the entry of the plea."). A defendant's right to a speedy trial is a non-jurisdictional issue that is waived by a guilty plea. *See State v. Smith*, 749 N.W.2d 88, 97 (Minn. App. 2008) ("[W]hen [appellant] pleaded guilty, his speedy-trial right evaporated, and any delay up to that time was nullified by his plea.").

Moreover, Minnesota law does not recognize a conditional guilty plea—a guilty plea that expressly reserves a right to appeal—as a vehicle for preserving pretrial issues for appellate review. *See State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980), *superseded by statute*, Minn. R. Crim. P. 26.01, subd. 4; *see also In re Welfare of B.A.H.*, 845 N.W.2d 158, 162 n.2 (Minn. 2014). By pleading guilty, a defendant waives the right to appeal pretrial rulings. *See Ford*, 397 N.W.2d at 878.

Applying these principles here, Herron relinquished his right to have a speedy trial when he entered a guilty plea. *See Smith*, 749 N.W.2d at 97. He also waived his right to appeal any pretrial ruling concerning an alleged speedy-trial violation. *See id.*

The district court found that Herron did not understand these consequences when he pleaded guilty, and in fact, he affirmatively believed the opposite to be true. According to the district court's factual findings, which the state does not challenge on appeal, Herron intended to preserve his right to appeal the alleged speedy-trial violation. And Herron would not have pleaded guilty and "would have proceeded differently" if he had understood that a guilty plea would extinguish his ability to challenge the alleged speedy-trial violation on appeal. Given these findings, Herron asks us to conclude that his guilty plea is not intelligent and therefore invalid.

The state invites us to reframe the issue, however. According to the state, there is "an exception to the general rule" that a guilty plea waives non-jurisdictional defects. Under that exception, a court may consider a pretrial issue notwithstanding a guilty plea "where the record has clearly demonstrated" that the defendant intended to preserve the issue for appeal. The state cites *Lothenbach*, 296 N.W.2d at 857, and *Ford*, 397 N.W.2d at 878, in support of its argument.

In *Lothenbach*, the defendant pleaded guilty but expressly reserved a right to appeal the denial of his suppression motion during the guilty-plea hearing. 296 N.W.2d at 857. The supreme court noted that a guilty plea by a counseled defendant normally operates as a waiver of non-jurisdictional defects. *Id.* But the court articulated a procedure whereby a defendant could preserve non-jurisdictional issues for appeal without having a full trial—by pleading not guilty, waiving a jury trial, stipulating to the facts, and then appealing from the judgment of conviction. *Id.* at 857-58. Under the circumstances of the defendant's case, however, where all parties understood that the defendant was attempting to preserve a pretrial issue for appeal, the supreme court elected to consider the defendant's pretrial issue. *Id.* Several years later, the court did the same in *Ford*. *See* 397 N.W.2d at 878.

Lothenbach was later codified in Minnesota Rule of Criminal Procedure 26.01, subdivision 4, which added additional requirements. The rule "allows a criminal defendant to plead not guilty; waive all trial-related rights, including his or her right to a jury trial; stipulate to the state's evidence in a trial to the court; and then appeal a dispositive, pretrial ruling." *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016). Under the rule, which was enacted to "replace[] *Lothenbach* as the method for preserving a dispositive pretrial issue

for appellate review in criminal cases," *see id.*, both parties must acknowledge that the pretrial issue being preserved is dispositive and that appellate review will concentrate on the pretrial issue only. Minn. R. Crim. P. 26.01, subd. 4. Additionally, these acknowledgements must be made in writing or on the record. *Id.*[2]

The state relies on *Lothenbach* and *Ford* to conclude that the district court did not abuse its discretion by denying Herron's request to withdraw his guilty plea and instead "recogniz[ing]" that Herron could raise his speedy-trial issue on appeal notwithstanding the guilty plea. According to the state, Herron argued in his postconviction petition that he wanted to preserve his right to appeal the speedy-trial issue and the district court's order granted him exactly that relief. The state suggests that although a guilty plea may not have been the appropriate vehicle for preserving the issue, the district court fixed the problem by making the issue appealable despite the procedural problem, much like the supreme court did in *Lothenbach* and *Ford*.

We reject the state's argument. *Lothenbach* and *Ford* do not stand for the proposition that a district court can make a waived or forfeited issue appealable simply by

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[2] In *Myhre*, the Minnesota Supreme Court recognized that "strict compliance" with the provisions of rule 26.01, subdivision 4, has not been required and that a substantial amount of procedural error has been tolerated "when the record shows that the parties clearly intended to achieve the outcome contemplated by either Rule 26.01, subdivision 4, or *Lothenbach*." 875 N.W.2d at 804. Accordingly, the supreme court held that appellate review of alleged procedural errors committed under rule 26.01, subdivision 4, is subject to plain-error analysis rather than automatic reversal of the resulting conviction. *Id.* at 805-06. Because the record in *Myhre* showed that the parties repeatedly referenced *Lothenbach* and intended to invoke rule 26.01, subdivision 4, and the defendant showed no prejudice, the supreme court concluded that the failure to comply with the rule did not satisfy the plain error test and affirmed the defendant's conviction. *Id.* at 806-07. Here, the state does not cite *Myhre* or ask us to apply plain-error review.

saying so in a postconviction order. And the state cites no other authority on this point. Moreover, in *Lothenbach* and *Ford*, the parties mutually intended to achieve the outcome—review of a dispositive pretrial issue—and were mistaken about the required procedure. Here, the record does not support such a finding. Herron entered a guilty plea without reference to the relevant caselaw or rule 26.01, subdivision 4. And the district court found that "the issue of the right to appeal" was not "explicitly addressed" to fully inform Herron of the consequences of pleading guilty.

More significantly, Herron's challenge in his postconviction petition, and now on appeal, concerns the constitutional validity of his guilty plea at its inception. We cannot sidestep this issue. *See* Minn. R. Crim. P. 15.05, subd. 1 ("[T]he court must allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice."). Herron did not pursue his speedy-trial issue on direct appeal. Instead, he specifically sought plea withdrawal on the ground that his guilty plea was not intelligently made and is therefore constitutionally invalid.

Given the district court's unchallenged findings, we cannot conclude that the guilty plea was intelligently entered. Because the district court found that Herron misunderstood the direct consequences of his guilty plea, and otherwise would not have pleaded guilty, we agree with Herron that his guilty plea is not intelligent. *See Taylor*, 887 N.W.2d at 823. A guilty plea that is not intelligent is invalid. *Dikken*, 896 N.W.2d at 877. And when a guilty plea is invalid, there is a manifest injustice. *Raleigh*, 778 N.W.2d at 94. Because Herron's guilty plea was not intelligently made and is invalid, there is a manifest injustice.

"[A] defendant who can show manifest injustice is entitled as a matter of right to withdraw his plea of guilty . . . ." *Hirt v. State*, 214 N.W.2d 778, 782 (Minn. 1974); *see also* Minn. R. Crim. P. 15.05, subd. 1. Here, notwithstanding the manifest injustice, the district court denied Herron's request to withdraw his guilty plea. We conclude that the district court, despite its creative attempt to craft a fair remedy, abused its discretion in denying Herron's petition for postconviction relief. *Brown*, 863 N.W.2d at 786. Thus, we reverse and remand to the district court. On remand, Herron must be given an opportunity to withdraw his guilty plea.

Because we reverse Herron's conviction on the ground that his guilty plea is not intelligent, we do not address his claim that his plea was invalid based on ineffective assistance of trial counsel.

Reversed and remanded.