STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0075

State of Minnesota,
Respondent,

vs.

Michael John Bacon,
Appellant.

Filed December 27, 2021
Affirmed
Bratvold, Judge

Koochiching County District Court
File No. 36-CR-20-480

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges a judgment of conviction for first-degree drug possession, arguing we should vacate the conviction and allow him to withdraw his guilty plea because the district court failed to inquire about voluntariness, failed to discuss the maximum

sentence, and no written plea petition was signed or submitted. Our review of the record shows appellant's plea was voluntary and intelligent, and the parties fully informed the district court of the plea agreement's details, including the state's promise to dismiss charges against appellant's girlfriend. Thus, we affirm.

FACTS

On August 5, 2020, law-enforcement officers in a joint task force executed a search warrant on appellant Michael John Bacon, and his sedan and apartment in International Falls. During the search of Bacon's apartment, officers found personal items belonging to Bacon and Bacon's girlfriend, K.J., along with about 145 grams of a crystalline substance, which the officers suspected was methamphetamine. Officers arrested Bacon and K.J. and the state charged each with first-degree possession of a controlled substance.

At Bacon's omnibus hearing, Bacon and the prosecuting attorney notified the district court about a plea agreement. Bacon's attorney stated Bacon agreed to plead guilty to first-degree drug possession in exchange for the state's recommendation that the district court impose a sentence of 48 months. This negotiated sentence is a durational departure from the Minnesota Sentencing Guidelines, which recommends a sentence range between 64 and 90 months based on the charged offense and Bacon's criminal-history score of one. *See* Minn. Sent. Guidelines 4.C. (2020) (Drug Offender Grid). Bacon's attorney also stated that "as part of the plea agreement there is a co-defendant in this case by the name of [K.J.] . . . the prosecutor has agreed that the State will dismiss the charges against . . . [K.J.]."

The district court asked about the grounds for departure. The prosecuting attorney responded that Bacon accepted responsibility for his offense, waived his search-warrant challenge scheduled for the omnibus hearing, and would "take responsibility for all of the Methamphetamine that was found during the execution of the search warrant and relieve his co-defendant of any liability for possession of this."

The district court asked whether Bacon had any questions for his attorney or the court before they proceeded, and Bacon said he did not. In response to questions from his attorney about his legal rights, Bacon said he was satisfied with the time he had to discuss and review his case and the plea agreement with his attorney. Bacon also stated he understood the plea agreement. Bacon's attorney reviewed Bacon's constitutional trial rights, and Bacon said he understood his rights, including his right to a contested omnibus hearing about the search warrant. Bacon also agreed he understood going ahead with the plea agreement meant he was waiving his trial rights and the omnibus hearing. Bacon said he was thinking clearly and denied he was under the influence of alcohol or controlled substances. Bacon agreed he was pleading guilty because he was guilty.

The prosecuting attorney asked Bacon about the factual basis for the guilty plea. Under oath, Bacon admitted he rented the apartment searched by the officers and stayed there for about one week before the search. Bacon also admitted he was present while officers conducted the apartment search and the officers told Bacon they found a substance suspected to be methamphetamine.

Bacon stated he did not know about the BCA test results on the substance found in the search but added, "I imagine they are positive." The district court then recessed so

Bacon could review the test results with his attorney. When the hearing resumed, Bacon said he reviewed the test results, agreed the seized substance was over 100 grams of methamphetamine, and confirmed the drugs belonged to him.

The district court accepted Bacon's guilty plea and, at Bacon's request, went ahead with sentencing. The district court found Bacon accepted responsibility for his offense and imposed a 48-month sentence, a downward durational departure.

DECISION

Bacon asks this court to vacate his conviction and allow him to withdraw his guilty plea, arguing his plea was invalid.[1] Bacon did not challenge the validity of his guilty plea during district court proceedings. A guilty plea's validity, however, may be challenged for the first time in a direct appeal. *State v. Schwartz*, 943 N.W.2d 411, 413 (Minn. App. 2020).

A defendant has no "absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). But a court must allow withdrawal of a guilty plea, "even after sentencing, if 'withdrawal is necessary to correct a manifest injustice.'" *Id.* (quoting Minn. R. Crim P. 15.05, subd. 1). The Minnesota Supreme Court has recognized that a manifest injustice has occurred when a guilty plea is invalid. *Id.* at 650. "A defendant bears the burden of showing his plea was invalid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Assessing the validity of a plea presents a question of law that this court reviews de novo. *Id.*

[1] The state did not file a brief with this court, so this case is submitted for decision under Minn. R. Civ. App. P. 142.03 and is "determined on the merits."

For a guilty plea to be valid, it must be accurate, intelligent, and voluntary. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). "A guilty plea must appear on the record to be voluntarily and intelligently made. If not, the plea must be vacated." *State v. Casarez*, 203 N.W.2d 406, 408 (Minn. 1973) (per curiam) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)); *see generally* Minn. R. Crim. P. 15.09 (requiring a verbatim record when a guilty plea is entered and accepted for an offense punishable by a prison sentence).

Minn. R. Crim. P. 15.01, subd. 1, provides a district court, before accepting a guilty plea, "must" examine the defendant under oath about specific topics. We understand "[m]ust is mandatory." *See* Minn. Stat. § 645.44 subd. 15a (2020); *see also State v. Thompson*, 754 N.W.2d 352, 356 (Minn. 2008) (holding the "use of the word 'shall'" in Minn. R. Crim. P. 15.04 suggests requirement is mandatory). The examination outlined in rule 15.01 includes, among other things, whether defendants understand the crime charged, had enough time to discuss the case with an attorney, were advised of their rights, admitted guilt, and understand the plea agreement. Minn. R. Crim. P. 15.01, subd. 1.

The record shows Bacon testified under oath that he understood the crime charged, had sufficient time to discuss the case with his attorney, was advised of his rights, admitted his guilt, and understood the plea agreement. Bacon, however, challenges the validity of his plea. In doing so, Bacon accurately points out that, before the district court accepted his guilty plea, the court did not discuss the maximum sentence for the charged offense or ask whether Bacon was relying on any promises outside the plea agreement in entering his guilty plea. Bacon is also correct that the record does not show he reviewed or signed a

plea petition. These omissions deviate from what rule 15.01 provides, and a written plea petition is preferred practice. *See* Appendix A, Minn. R. Crim. P. 15.

Still, failing to follow "the suggested questions in Minn. R. Crim. P. 15.01 verbatim is not fatal" because "[w]hat is important is not the order or the wording of the questions, but whether the record is adequate to establish that the plea was intelligently and voluntarily given." *State v. Doughman*, 340 N.W.2d 348, 351 (Minn. App. 1983), *rev. denied* (Minn. Mar. 15, 1984).

Bacon contends the district court "completely failed to address voluntariness in any respect," and "no other material in the record establishes the plea was voluntary and intelligent." Bacon specifically argues the district court "failed to ensure" he was aware of "the maximum sentence for the charged offense" and the plea agreement "did not result from improper pressure or inducements" related to the state's promise to dismiss charges against Bacon's girlfriend. We consider each argument in turn.

A. District court's failure to discuss the maximum sentence

A guilty plea is intelligent if "a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea." *Raleigh*, 778 N.W.2d at 96. A plea's consequences are "the maximum sentence and fine." *Id.* As part of the rule 15.01 inquiry, a district court judge "must also ensure defense counsel has told the defendant and the defendant understands," among other things, "[t]he maximum penalty the judge could impose for the crime charged." Minn. R. Crim. P. 15.01, subd. 1(6)(i).

Bacon argues his plea was not intelligent because, during the plea colloquy, the district court failed to discuss the maximum sentence for the charged offense.[2] Bacon relies on *Casarez* to support this argument. There, the supreme court vacated a conviction because the record did not show "the trial judge discussed the consequences of the plea so that defendant would have a full understanding of its consequences." *Casarez*, 203 N.W.2d at 408. But *Casarez* is distinguishable: the supreme court held it had "no way of determining if defendant waived all of his rights" because a complete transcript of plea proceedings was "not available" and the partial transcript was "incomplete." *Id.* at 407–08. Here, a complete transcript of the hearing is available, and the transcript allows us to consider whether Bacon's guilty plea was intelligently made.

It is true the transcript for Bacon's plea hearing does not mention the maximum sentence for Bacon's offense. At the outset of the hearing, however, the parties informed the district court the plea agreement included a negotiated sentence. Bacon repeatedly stated he understood the plea agreement, which Bacon's attorney described as including the state's promise to recommend a downward durational departure of 48 months because

[2] Bacon's brief to this court does not clearly state whether he is challenging the intelligence or voluntariness of his plea based on the district court's failure to discuss the maximum sentence. An appellant must identify "each issue" in the opening brief. Minn. R. Civ. App. P. 128.02, subd. 1(b). If an appellant fails to do so, we may conclude that the issue is forfeited. *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are waived in an appeal in which the appellant "allude[d] to" issues but "fail[ed] to address them in the argument portion of his brief"). Bacon's issue statement and point heading stated one issue in his opening brief—the voluntariness of his plea based on the state's promise to dismiss charges against K.J. But based on the argument that follows in Bacon's brief, we understand Bacon to also challenge to the intelligence of his plea.

Bacon wanted to take responsibility for his conduct. And the district court informed Bacon the sentencing guidelines recommended a range of 64 to 90 months in prison for his offense, based on the severity of the possession charge and his criminal-history score.

Our review of the record shows the district court assessed the intelligence of Bacon's plea. Along with Bacon's understanding of the negotiated sentence, the record shows Bacon's attorney asked whether Bacon understood the trial rights he was waiving, including his right to challenge the drug evidence obtained in the search. During the prosecuting attorney's examination of Bacon about the factual basis for his guilty plea, the district court recessed to allow Bacon and his attorney the opportunity to review and discuss the test results for the seized evidence. After a recess, Bacon said he reviewed the test results, agreed the seized evidence was over 100 grams of methamphetamine, and confirmed the drugs belonged to him. Only after this examination and testimony, did the district court accept Bacon's guilty plea. At that point, the prosecuting attorney reiterated the state's request to sentence Bacon to 48 months. The district court found Bacon's offense was less serious because Bacon accepted responsibility. The district court then sentenced Bacon in accordance with the plea agreement.

Because the record shows Bacon understood his waiver of trial rights and the plea agreement, and the district court informed Bacon of the guidelines sentence before sentencing Bacon in accordance with the plea agreement, we conclude Bacon entered his guilty plea intelligently.

B. State's promise to dismiss charges against K.J.

To determine whether a plea is voluntary, the court considers all relevant circumstances and "examines what the parties reasonably understood to be the terms of the plea agreement." *Raleigh*, 778 N.W.2d at 96. "The voluntariness requirement ensures a defendant is not pleading guilty due to improper pressure or coercion." *Id.* As part of the rule 15.01 inquiry, a judge must determine "[n]either the defendant nor any other person" has received promises outside the plea agreement or "been threatened by anyone" to elicit the guilty plea. Minn. R. Crim. P. 15.01, subd. 1(4)(c).

Bacon argues "the record is silent on [the] voluntariness requirement" and "[t]he lack of [plea] petition, combined with the inadequate in-court inquiry, fails to establish a valid plea on the record." Bacon insists the district court's lack of inquiry "is especially problematic because Mr. Bacon's guilty plea was induced by the state's promise to dismiss a charge against his girlfriend."

The Minnesota Supreme Court has recognized plea agreements with a contingent or "package deal" are not "per se invalid" but "are generally considered 'dangerous because of the risk of coercion.'" *Butala v. State*, 664 N.W.2d 333, 339 (Minn. 2003) (quoting *State v. Danh*, 516 N.W.2d 539, 542 (Minn. 1994). A contingent or "package deal" involves a negotiated plea where a third party is given leniency as a result of a defendant's guilty plea. *Danh*, 516 N.W.2d at 540.

The supreme court's analysis is instructive. First, the supreme court determined that "the standard Minn. R. Crim. P. 15.01 inquiry cannot adequately discover coercion" when a negotiated plea involves a contingent offer to a third party. *Id.* at 542. Second, the

supreme court held, "[t]he state must fully inform the trial court of the details of these agreements at the time a defendant enters a 'package deal' plea, and the trial court must then conduct further inquiries to determine whether the plea is voluntarily made." *Id.*[3] Third, the supreme court also held a defendant "must be allowed" to withdraw a contingent or package guilty plea "if the state fails to fully inform the trial court of the nature of the plea, or if the trial court fails to adequately inquire into the voluntariness of the plea at the time of the guilty plea." *Id.* at 543.

Danh and *Butala* provide helpful contrasts. In *Danh,* the state did not inform the district court of the contingent plea involving defendant's brother and the supreme court remanded for an evidentiary hearing so defendant could offer evidence on the voluntariness of the plea. *Id.* at 540. In *Butala*, the state failed to inform the district court of the contingent plea involving immunity for the defendant's family during the plea hearing, but the state provided full disclosure of the contingent promise during defendant's motion to withdraw his plea. 664 N.W.2d at 339–40. The supreme court in *Butala* affirmed the district court's decision to deny the motion to withdraw, based on the circumstances, which included that defendant proposed the immunity term and the district court conducted rule 15.01 inquiries. *Id.* at 340.

[3] In *Danh*, the supreme court identified factors other courts have used to assess the voluntariness of a contingent or package deal. For example: (1) the presence of a prosecutor's good-faith argument against the third party; (2) the nature and degree of coerciveness from the third party; (3) the weight given to the provision in the choice to plead guilty; (4) the age of the defendant; (5) the instigator of plea negotiations; (6) whether charges had been brought against the third party; and (7) the strength of the factual basis for the plea. *Id.* at 543.

Bacon acknowledges that, unlike the district court in *Danh*, the district court received full disclosure of the contingent plea involving K.J. during the plea hearing. Still, Bacon argues the district court "failed to satisfy *Danh*'s requirement that the court 'must conduct further inquiries' into the guilty plea induced by the state's promise to be lenient" toward K.J., Bacon's girlfriend. While our review would have been enhanced had the district court inquired further during the plea hearing, the record dispels any notion of coercion.

Danh instructs that the voluntariness of a contingent plea must be evaluated based on the totality of the circumstances. 516 N.W.2d at 543. The plea hearing record shows, after the district court learned of the state's promise to dismiss all charges against K.J. if Bacon pleaded guilty, the court conducted standard rule 15.01 inquiries about whether Bacon understood the charge, understood the terms of the plea agreement, and had sufficient time to discuss his case and the agreement with his attorney. Bacon gave unequivocal affirmative responses to each inquiry. Bacon also agreed he was pleading guilty because he was guilty.

The district court did not ask whether Bacon's plea was voluntary and whether he had been given any promises other than those in the plea agreement. Still, we are not persuaded that Bacon's plea was involuntary for two reasons. First, the frank and complete disclosure of the state's promise about K.J. is significant. The state's promise to dismiss charges against K.J. was an express term presented to the district court by Bacon's attorney. Second, the otherwise thorough rule 15.01 inquiries support the district court's decision to

accept the plea. Nothing in the record suggests Bacon's plea was involuntary or involved coercion.

Bacon contends the plea record "focuses" on the state's promise to dismiss charges against K.J. and this "suggests that [it] was a primary term of the plea agreement." We do not agree. The state's promise to dismiss charges against K.J. was mentioned twice, once at the outset by Bacon's attorney and once after sentencing by the prosecuting attorney, who promised to electronically file and serve K.J.'s dismissal on the same day. While Bacon now argues the case against K.J. was weak, he does not contend the complaint against her lacked probable cause and the record reflects that the seized evidence was found near personal items belonging to K.J. and Bacon. Also, Bacon's brief on this point completely overlooks the state's other promise to recommend a downward durational departure, which was mentioned repeatedly during the plea hearing.

We conclude the "record is adequate to establish that the plea" was voluntary. *See Doughman*, 340 N.W.2d at 351. The record establishes Bacon's attorney informed the district court of the state's dual promises to dismiss its complaint against K.J. and to recommend a downward durational departure. The record also establishes an adequate rule 15.01 inquiry into the voluntariness of Bacon's plea, his waiver of rights, and the factual basis for the plea. Thus, Bacon has failed to meet his burden to prove the guilty plea was invalid.

Affirmed.