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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1864

Michael A. Rosillo, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 6, 2011
Affirmed
Minge, Judge

Clay County District Court
File No. 14-K9-06-000075

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Peterson, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of his postconviction petition seeking to withdraw his guilty plea for felony nonsupport of a child, arguing that the lack of a transcript created a manifest injustice, that venue was improper, and that the county

failed to make the prerequisite attempt to obtain a contempt order before filing criminal charges. Because in this case the missing transcript does not create a manifest injustice, the district court did not err in denying withdrawal of the guilty plea. Because a valid guilty plea waives the venue and attempt-to-obtain-a-contempt-order issues, we do not reach them. We affirm.

FACTS

In January 1999, appellant Michael Rosillo was ordered by the Clay County District Court to pay child support for his minor child. His last payment was in August 1999. In November 2005, the county attempted to obtain a court order holding Rosillo in contempt for failing to pay his child support, a necessary prerequisite to filing criminal charges. The effort was initiated by an unsuccessful effort to serve him at the most recent address he had supplied to the child-support office. *See* Minn. Stat. § 609.375, subd. 2b (2004). Service was unsuccessful because Rosillo no longer lived there and his new address was unknown. No other attempt at service was made. In January 2006, Rosillo was charged with felony nonsupport of a child in excess of 180 days under Minn. Stat. § 609.375, subd. 2a(1) (2004). He pleaded guilty in July 2007 and was subsequently sentenced by the district court to a stayed 24-month prison term and two years of probation. No transcript of the guilty-plea hearing is available because it was not recorded on the original or backup disc, and because the court reporter could not locate a hard copy of the stenographic notes.

In June 2009, Rosillo filed a pro se petition in Clay County District Court seeking to withdraw his guilty plea. The district court identified the petition as a motion for

postconviction relief and sent a copy of one of Rosillo's pro se filings to the public defender's office. In October 2009, the parties became aware that no transcript or record of the guilty-plea hearing was available. Subsequently, Rosillo's legal counsel filed a supplemental petition for postconviction relief. After a hearing in July 2010, the district court denied the postconviction petition. This appeal follows.

D E C I S I O N

I. Transcript/ Guilty Plea Withdrawal

The first issue is whether the absence of a transcript for Rosillo's plea hearing creates a manifest injustice allowing him to withdraw his guilty plea. In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). A defendant may withdraw a guilty plea after sentencing only if it is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. There is a manifest injustice if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be constitutionally valid, a guilty plea "must be accurate, voluntary, and intelligent." *Id.* (quotation omitted). "A defendant bears the burden of showing his plea was invalid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010)

Rosillo argues that he is entitled to at least one meaningful review of his conviction by an appellate or postconviction court. *See State v. Knaffla*, 309 Minn. 246,

252, 243 N.W.2d 737, 741 (1976) (noting that postconviction statute, combined with United States Supreme Court decision, entitles convicted defendant "to at least one right of review by an appellate or postconviction court"). However, lack of a transcript does not necessarily preclude meaningful review. Court rules address situations in which an appeal may proceed without a transcript. Minn. R. Crim. P. 28.02, subds. 8−9. The rules state that the parties may prepare a statement of the case and present it to the district court for its approval. *Id.* In addition, on appeal, an appellant "may prepare a statement of the proceedings from the best available means, including recollection" when a transcript is unavailable. Minn. R. Civ. App. P. 110.03.

In *Hoagland v. State*, the Minnesota Supreme Court reversed the denial of a petition for postconviction relief when appellant claimed that statements by the trial judge and defense counsel misled him about the appeals process, no transcript of the trial was available, the court reporter's notes had been destroyed, and the trial judge was deceased. 518 N.W.2d 531, 535 (Minn. 1994). The *Hoagland* court discussed provisions of the Rules of Civil Appellate Procedure allowing for a statement in lieu of a transcript if approved by the trial judge, but the death of the trial judge precluded the preparation of a statement and led to the reversal. *Id.* at 535−36.

In this case, *Hoagland* does not apply because it appears that the trial judge is still available and there is no indication that a statement of the proceedings cannot be prepared or that satisfactory review cannot be conducted with such a statement. Rosillo has not taken any steps to prepare a statement of the plea hearing. Indeed, he explicitly waived a postconviction evidentiary hearing at which an attempt could have been made to

reconstruct what occurred at the plea hearing. Rosillo only argues that the lack of a transcript denies his right to a meaningful review and automatically entitles him to withdraw his guilty plea. Rosillo alleges no deficiencies in his guilty plea and provides no basis for finding that his guilty plea was not accurate, voluntary, or intelligent. The remedy of automatic plea withdrawal that he seeks is not supported by *Hoagland* or by the policy favoring finality of judgments. *See State v. Spraggins*, 742 N.W.2d 1, 4 (Minn. App. 2007).

Because Rosillo did not allege any error in his guilty plea, because he did not attempt to follow the procedural rules to prepare a summary of the plea hearing, and because he waived the opportunity to reconstruct the record, we conclude that Rosillo has not shown a manifest injustice allowing withdrawal of his guilty plea.

II. Venue

The second issue raised by Rosillo is that Clay County was not the proper venue for the case. Rosillo argues that because none of the parties reside in Clay County, the case could not be brought in that venue. This court reviews legal issues de novo. *McLain v. McLain*, 569 N.W.2d 219, 222 (Minn. App. 1997), *review denied* (Minn. Nov. 18, 1997).

Rosillo's unsuccessful challenge to his guilty plea has consequences for this venue claim. A valid, counseled guilty plea waives all nonjurisdictional defects in the prosecution. *State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986). Venue "deals with convenience and location of trial" and is less significant than jurisdiction because it does not implicate the court's power to hear the action. *State v. Smith*, 421 N.W.2d 315, 320

(Minn. 1988). Objections to improper venue are deemed to be waived unless raised before trial. *State v. Blooflat*, 524 N.W.2d 482, 484 (Minn. App. 1994).

Because the record indicates Rosillo had counsel when he pleaded guilty and because he has not established a basis for withdrawing his guilty plea, we conclude Rosillo waived the venue question by pleading guilty.

III. Service of Contempt Order

The final issue is whether failure of service of legal process incident to the contempt order provides a basis for reversal of Rosillo's conviction for felony nonsupport. The statute provides that:

> A person may not be charged with [felony nonsupport] unless there has been an attempt to obtain a court order holding the person in contempt for failing to pay support or maintenance . . . . This requirement is satisfied by a showing that reasonable attempts have been made at service of the order.

Minn. Stat. § 609.375, subd. 2b.

Here, because the nature and extent of efforts to serve the order to show cause is important to the issue of whether the prosecutor made an adequate effort to obtain a contempt order, the service issue concerns proving the elements of the crime by producing sufficient evidence, not obtaining jurisdiction. As previously noted, nonjurisdictional defects are waived by a counseled guilty plea. *Ford*, 397 N.W.2d at 878. Sufficiency of the evidence is such a nonjurisdictional matter. *See State v. Jenson*, 312 N.W.2d 673, 675 (Minn. 1981) (holding that a valid counseled guilty plea is considered so reliable an admission of guilt that it "removes the issue of factual guilt from the case") (citation omitted).

Because Rosillo's challenge to service is in this unique situation a question of the sufficiency of the evidence, we conclude that the matter is waived by his guilty plea.

Affirmed.

Dated: