STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1843

State of Minnesota,
Respondent,

vs.

Celeste Marie Skaar,
Appellant,

New Day Capital, LLC,
Appellant.

Filed October 12, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-07-113371

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Jill Clark, Jill Clark, P.A., Golden Valley, Minnesota (for appellants)

Considered and decided by Kalitowski, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellants Celeste Skaar and New Day Capital LLC (New Day) argue that the district court abused its discretion by (1) denying their motions to withdraw their guilty pleas for racketeering because the pleas were not supported by an adequate factual basis and were coerced; (2) refusing to grant an evidentiary hearing; and (3) sentencing Skaar's unranked offense as a severity level 8. We affirm.

D E C I S I O N

I.

A district court has broad discretion in deciding whether to allow a defendant to withdraw a guilty plea. *State v. Kunshier*, 410 N.W.2d 377, 379 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). Absent an abuse of that discretion, we will not overturn a district court's decision not to allow withdrawal before sentencing. *State v. Ferraro*, 403 N.W.2d 845, 847 (Minn. App. 1987).

A district court must allow a defendant to withdraw a guilty plea "upon a timely motion" and upon a showing that "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a guilty plea is not "accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). "A proper factual basis must be established for a guilty plea to be accurate." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). An adequate factual basis exists where "there [are] sufficient facts on the record to support a conclusion that

defendant's conduct falls within the charge to which he desires to plead guilty." *Kelsey v. State*, 298 Minn. 531, 532, 214 N.W.2d 236, 237 (1974).

The district court is responsible for ensuring that a sufficient factual basis has been established for a guilty plea. *Ecker*, 524 N.W.2d at 716. "[A]n adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Id.* But an adequate factual basis can be established in other ways. *Holscher v. State*, 282 N.W.2d 866, 867 (Minn. 1979) (holding that a factual basis was sufficient where it consisted of omnibus-hearing testimony and the prosecution's unchallenged summary of its evidence).

The district court rejected appellants' assertion that their guilty pleas were not supported by a sufficient factual basis. The district court concluded, based on the complaint, the plea petition, the plea agreements, and the court's questioning of Skaar as reflected in the transcript of the proceedings, that there was a sufficient factual basis to support Skaar's guilty plea to the racketeering charge, as an individual and as the CEO of New Day. We agree.

Accuracy of Plea: Factual Basis

"Although there are various ways to present the factual basis for a guilty plea, all of them contemplate the disclosure on the record of the specific facts that would establish the elements of the crime to which the defendant is pleading guilty." *State v. Misquadace*, 629 N.W.2d 487, 491-92 (Minn. App. 2001), *aff'd*, 644 N.W.2d 65 (Minn. 2002).

Under Minnesota law, the elements of racketeering are met when a person is proved to be "employed by or associated with an enterprise and intentionally conducts or participates in the affairs of the enterprise by participating in a pattern of criminal activity." Minn. Stat. § 609.903, subd. 1(1) (2004).

Pattern of Criminal Activity

Appellants claim there was an insufficient factual basis to show that they engaged in a pattern of criminal activity. We disagree.

A racketeering conviction requires a showing of a pattern of criminal activity, which the legislature has defined as three or more predicate crimes. Minn. Stat. § 609.902, subd. 6 (2004). The predicate crime here, theft by swindle, is committed when a person "by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person[.]" Minn. Stat. § 609.52, subd. 2(4) (2004). Theft by swindle requires intent to defraud. *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). "Inherent in the intent requirement is that a swindler must act affirmatively to defraud another." *Id.* False representations may be used as evidence of intent to swindle. *State v. Lone*, 361 N.W.2d 854, 858 (Minn. 1985).

During the plea hearing, Skaar admitted to engaging in three predicate crimes of theft by swindle, both as an individual and as the CEO of New Day: (1) using third-party funds to misrepresent a mortgage-seeker's qualifications to obtain a loan; (2) concealing the receipt of commissions from lenders regarding the sale of properties; and (3) placing third-party funds in a mortgage-seeker's account in order to deceive the bank into believing that the seeker qualified for a loan. The district court concluded that these acts

show "participation in, and association with, the enterprise 10Spring Homes, Inc., that engaged in a pattern of criminal activity of theft by swindle."

In *Lone*, the supreme court concluded that misrepresentations about a home's structural damage and waterproofing, which induced the victims to pay appellant for his services, constituted theft by swindle. 361 N.W.2d at 858-60. Here, similarly, appellants' actions show misrepresentations about assets and liabilities that induced banks to loan money to them and to third parties. The district court properly concluded that these crimes constitute the predicate offenses of theft by swindle supporting a racketeering charge.

Finally, appellants' assertion that all of the conduct occurred on one day is not supported by the record and does not prove that there were not three or more distinct criminal acts. We conclude that the district court did not err in determining that a sufficient factual basis existed to show appellants' engagement in a pattern of criminal activity as required for a guilty plea to a racketeering charge.

Enterprise

Appellants claim that the enterprise requirement of their racketeering guilty pleas is not supported by a sufficient factual basis. We disagree.

Minnesota law defines an enterprise as "a sole proprietorship, partnership, corporation, trust, or other legal entity, or a union, governmental entity, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as legitimate enterprises." Minn. Stat. § 609.902, subd. 3 (2004). In *State v. Huynh*, 504 N.W.2d 477, 482 (Minn. App. 1993), *aff'd*, 519 N.W.2d 191 (Minn. 1994), this court

held that an enterprise requires (1) a common or shared purpose; (2) continuity of structure and of personnel; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.

Appellants claim that the only enterprise here was between Skaar and New Day. But as the plea agreements and transcript show, the enterprise here consisted of Skaar, New Day, 10Spring Homes, and other individuals. Skaar testified that she, as both the CEO of New Day and as an individual, intentionally participated with 10Spring Homes and another individual in a pattern of illegal mortgage transactions. Thus, appellants' claim that there was no enterprise to support the guilty pleas for racketeering is without merit.

Appellants further claim that *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002), stands for the proposition that a corporation is not a proper defendant in a racketeering case unless the corporation is, itself, the enterprise. We disagree. Rather, *Najjar* states that a corporate owner or employee and the corporation itself are two distinct entities and that both entities may be liable for racketeering. 300 F.3d at 484-85.

Participation

Appellants claim that there is no evidence that Skaar participated in these crimes because she was not a principal in the illegal activity. We disagree.

A person participates in a pattern of criminal activity if she is "a principal with respect to conduct constituting at least three of the criminal acts." Minn. Stat. § 609.902, subd. 5 (2004). A principal is "a person who personally engages in conduct constituting

a violation or who is criminally liable under section 609.05" (liability for crimes of another). *Id.*, subd. 8 (2004).

Skaar admitted, and the record supports, that she was a principal in these transactions. Thus, we conclude that there was a sufficient factual basis for the district court to determine that Skaar participated as a principal in the commission of these crimes.

Intent

Appellants claim that there was no evidence to support the factual basis for Skaar's guilty plea to racketeering because "there is no evidence that she knew at the time that the acts were illegal." (Emphasis omitted.) As a general rule, ignorance of the law is not a defense. *State v. Jacobson*, 697 N.W.2d 610, 615 (Minn. 2005). And theft by swindle only requires that the actor intentionally engaged in the prohibited conduct, not that the actor knew his actions were illegal. Therefore, the district court did not abuse its discretion by finding a proper factual basis for the requisite intent to support Skaar's guilty plea.

The Complaint

Appellants claim that the district court erred by considering the criminal complaint as part of the factual basis to support their pleas. We disagree.

As the district court noted, a sworn complaint, formal charge, transcript of an arraignment, or a plea may all be considered as part of the factual basis supporting a plea. *State v. Hoaglund*, 307 Minn. 322, 326-27, 240 N.W.2d 4, 6 (1976); *see also Williams v. State*, 760 N.W.2d 8, 13-14 (Minn. App. 2009) (concluding that a sworn complaint

combined with other evidence can provide a strong factual basis for a plea), *review denied* (Minn. Apr. 21, 2009). There is no required method for establishing a factual basis for a plea; the district court may rely on arrest reports, witness statements, transcripts, court questioning, and other documents containing relevant facts. *Vernlund v. State*, 589 N.W.2d 307, 311 (Minn. App. 1999). Moreover, unlike *Hoaglund*, where the supreme court held that a factual basis consisting of little more than the complaint was inadequate, the entire record here supports the factual basis for the pleas. In addition, unlike *Hoaglund*, the district court here questioned Skaar in depth regarding the crimes.

We conclude that the district court did not abuse its discretion in considering the complaint, among other things, to support a factual basis for appellants' pleas.

Voluntary and Intelligent

Manifest injustice sufficient to support the withdrawal of a guilty plea exists when a plea is not "accurate, voluntary, and intelligent." *Perkins*, 559 N.W.2d at 688. The voluntary-plea requirement ensures that the plea is not in response to improper inducements or pressures. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). An intelligent plea ensures that the defendant understands the charges being made, the rights being waived, and the consequences of the plea. *Id.*

Appellants argue that the district court erred by denying their motions to withdraw the guilty pleas because the pleas were not voluntarily made. Appellants first claim that Skaar was induced to plead guilty by the state's promise of a stay of imposition. But this claim is not supported by the record, including Skaar's plea agreement, which provides that the sentencing judge may impose any lawful sentence.

Appellants also claim that Skaar was coerced into pleading guilty because the plea agreements promised not to prosecute her husband, the co-principal of New Day. Appellants cite *State v. Danh*, 516 N.W.2d 539, 542 (Minn. 1994), for the proposition that package deals "are generally dangerous because of the risk of coercion." But the *Danh* court stated that to overcome the problems of such deals, the state must inform the district court of the arrangements when the defendant enters into the deal, and the district court must make further inquiries regarding the voluntariness of the plea. 516 N.W.2d at 542. And here, the transcript shows that the district court inquired about the voluntariness of the pleas, and Skaar stated that she was not under pressure, had not received promises, and her plea was voluntary. In addition, the district court noted "that this deal was fully disclosed to the Court in the Plea Proffers and again referenced in the Plea Petitions. Accordingly, the Court finds no error in this 'package deal' used to procure the guilty pleas." We defer to the district court, which was able to evaluate Skaar's demeanor and assess her credibility. *See Tamarac Inn, Inc. v. City of Long Lake*, 310 N.W.2d 474, 477 (Minn. 1981) ("[D]istrict court findings, which are the product of firsthand observation of the demeanor of parties and witnesses possess a certain integrity not contained in the record alone.").

Appellants also contend that the guilty pleas were not intelligent because Skaar was told to "agree with whatever the prosecutor wanted while she was on the stand, even if it meant lying." But this contention is not supported by the record. Rather, the record indicates that Skaar was truthful in her guilty plea and that no one told her to be anything but truthful. The plea agreements provide that Skaar "shall truthfully disclose all

information" and "shall truthfully testify at trial or other court proceeding" under penalty of perjury. The only support for appellants' assertions is Skaar's affidavit, which the district court did not find credible. We defer to this credibility finding.

In sum, we conclude that the record shows that appellants' guilty pleas were accurate, voluntary, and intelligent, and that the district court did not err in denying appellants' motions to withdraw.

II.

Appellants allege that the district court erred by denying their request for an evidentiary hearing. We disagree.

An evidentiary hearing on a motion to withdraw guilty pleas "need not be allowed unless the [district] court deems it necessary to resolve a disputed fact issue arising from conflicting affidavits or based upon assertions outside the record." *State v. Wolske*, 280 Minn. 465, 474-75, 160 N.W.2d 146, 153 (1968). A defendant is not entitled to an evidentiary hearing if her allegations lack factual support or are refuted in the record. *Williams*, 760 N.W.2d at 14. Here, the district court reviewed the record and concluded that an evidentiary hearing was not necessary. And appellants' assertions regarding ineffective assistance of counsel are not supported by the record, which shows that appellants' attorney advised Skaar on the plea agreements, informed her of her waiver of constitutional rights, and did not advise her to lie. We thus conclude that it was within the district court's discretion to deny an evidentiary hearing.

III.

The Minnesota Sentencing Guidelines rank offenses according to severity. Some offenses, like racketeering, are unranked. *See State v. Kujak*, 639 N.W.2d 878, 883 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002); Minn. Sent. Guidelines V (2006). To assign a rank to an unranked offense, a district court considers the gravity of the conduct underlying the offense, the severity level assigned to any similar, ranked offenses, and the severity level assigned to other offenders who engaged in similar conduct. *State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000). In addition to assigning a severity level to crimes, the sentencing guidelines provide presumptive sentences. Minn. Sent. Guidelines II.C (2006). When sentencing on an unranked offense, like racketeering, district courts exercise their broad discretion twice, "first by assigning a severity level, and then by deciding whether to depart from the guidelines." *Kujak*, 639 N.W.2d at 883.

Appellants argue that the district court abused its broad discretion in sentencing Skaar. We disagree. The record indicates that the district court properly applied the *Kenard* factors and stated that "[t]he gravity was great," "I looked at the ranked offenses and what I thought would be a fair level . . . . and I do believe that this offense should be ranked at a Severity Level 8," and "I looked at the conduct and the severity levels assigned to these other offenders . . . . engaged in similar conduct." In addition, this court has upheld the ranking of racketeering at a higher level than the predicate offenses on which that charge is based. *See, e.g., Huynh*, 504 N.W.2d at 484 (ranking racketeering at level 8 where predicate offense of coercion was ranked at a lower level). Because the

district court supported its decision and adequately considered and applied the *Kenard* factors, we conclude that it did not abuse its broad discretion in ranking Skaar's racketeering offense at level 8.

Affirmed.