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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0373**

State of Minnesota,
Respondent,

vs.

Paul Jacob Bohn Salmon,
Appellant.

**Filed May 27, 2014
Affirmed
Johnson, Judge**

Pine County District Court
File No. 58-CR-12-225

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

Steven C. Cundy, Pine County Attorney, Pine City, Minnesota (for respondent)

Steven J. Meshbesh, David Lundgren, Meshbesh & Associates, P.A., Minneapolis,
Minnesota (for appellant)

Considered and decided by Johnson, Presiding, Cleary, Chief Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Paul Jacob Bohn Salmon pleaded guilty to fifth-degree criminal sexual conduct.
Shortly after his sentencing, he sought to withdraw his guilty plea on the ground that it is

not accurate or intelligent. The district court denied Salmon's postconviction petition without an evidentiary hearing. We affirm.

FACTS

In the early morning hours of April 5, 2012, an officer from the Pine County Sheriff's Department responded to a report of a sexual assault in the city of Sturgeon Lake. The officer spoke with the caller, C.C., a 17-year-old girl, who provided the following information. She had been at a home the previous evening where Salmon provided her and a friend with alcoholic beverages. She was trying to sleep on a couch when Salmon lay down next to her and began rubbing her back. She told him to stop, left the couch, and went to a spare bedroom. She fell asleep but awoke later to find Salmon in bed with her with his fingers inside her vagina. She "jumped up" and told Salmon to leave the room. Salmon complied but later came back to the room and apologized. C.C. then left the home and contacted law enforcement.

The officer went to the home identified by C.C. and spoke with Salmon. Salmon admitted to serving alcoholic beverages to C.C. and her friend and admitted to being in the bedroom with C.C., but he denied having any physical contact with her. The officer believed Salmon was intoxicated and asked him to take a preliminary breath test, which indicated an alcohol concentration of .16.

The state charged Salmon with fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451 (2010), and furnishing alcohol to minors, in violation of Minn. Stat. § 340A.503, subd. 2(1) (2010). In September 2012, Salmon and the state entered into an agreement by which Salmon agreed to plead guilty to fifth-degree criminal sexual

conduct, and the state agreed to dismiss the second charge and to recommend that Salmon spend no more than 90 days in jail. During the plea hearing, Salmon indicated that he did not remember the incident because he was intoxicated when it occurred. In December 2012, the district court sentenced Salmon to 365 days in the Pine County jail, with 290 days stayed for two years. The district court also ordered Salmon to complete chemical dependency treatment and to enter into a psychosexual treatment program.

In January 2013, Salmon filed a postconviction petition in which he sought to withdraw his guilty plea. The district court denied the petition because the time for a direct appeal had not yet expired. *See* Minn. Stat. § 590.01, subd. 1 (2012). Salmon then appealed from his conviction and sentence. In March 2013, this court granted his request to stay the appeal and remand the case to the district court for postconviction proceedings. *See State v. Salmon*, A13-0373 (Minn. App. Mar. 20, 2013) (order) (citing Minn. R. Crim. P. 28.02, subd. 4(4)).

In March 2013, Salmon again petitioned the district court for postconviction relief. He sought relief on the ground that his guilty plea is not accurate, voluntary, or intelligent. The district court conducted a hearing on Salmon's petition in early May 2013, but Salmon did not present any evidence. Later that month, the district court issued an order denying Salmon's petition. This court later dissolved the stay of Salmon's appeal. *See State v. Salmon*, A13-0373 (Minn. App. May 31, 2013) (order).

D E C I S I O N

Salmon argues that the district court erred by denying his postconviction petition, in which he challenged the validity of his guilty plea.

“A defendant does not have an absolute right to withdraw a guilty plea.” *State v. Hughes*, 758 N.W.2d 577, 582 (Minn. 2008). After a defendant is sentenced, a “motion to withdraw a guilty plea must be raised in a petition for postconviction relief.” *Lussier v. State*, 821 N.W.2d 581, 586 n.2 (Minn. 2012) (quotation omitted). Such a postconviction petition must allege, and a petitioner subsequently must prove, that withdrawal is necessary to correct a “manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1; *Lussier*, 821 N.W.2d at 590-91. A defendant may establish manifest injustice by showing that his guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007).

For a guilty plea to be valid, it “must be accurate, voluntary and intelligent.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). As the supreme court has explained,

The main purpose of the accuracy requirement is to protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial. Other possible benefits of the accuracy requirement include assisting the court in determining whether the plea is intelligently entered and facilitating the rehabilitation of the defendant. The purpose of the voluntariness requirement is to insure that the defendant is not pleading guilty because of improper pressures. The purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea.

State v. Trott, 338 N.W.2d 248, 251 (Minn. 1983). If a guilty plea fails to meet any of these three requirements, the plea is invalid. *Theis*, 742 N.W.2d at 650.

This court ordinarily applies an abuse-of-discretion standard of review to a district court’s decision to deny a petition for postconviction relief. *See Francis v. State*, 781

N.W.2d 892, 896 (Minn. 2010). But if an appellant files a direct appeal that is stayed to allow for postconviction proceedings, this court applies the standard of review applicable to a direct appeal. *See Santiago v. State*, 644 N.W.2d 425, 439 (Minn. 2002). This court applies a *de novo* standard of review to the validity of a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

We note that the parties sometimes refer to Salmon’s plea as a *Norgaard* plea and sometimes as an *Alford/Goulette* plea. A *Norgaard* plea is different and distinct from an *Alford/Goulette* plea. A *Norgaard* plea is a guilty plea in which a defendant “plead[s] guilty even though he . . . claims a loss of memory . . . regarding the circumstances of the offense.” *Ecker*, 524 N.W.2d at 716; *see also State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961). An *Alford/Goulette* plea is a guilty plea in which a defendant maintains his innocence but reasonably believes that the state has sufficient evidence to obtain a conviction. *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)). At the plea hearing, Salmon did not maintain his innocence; he claimed that he could not remember the incident because he was intoxicated. Accordingly, Salmon’s plea is a *Norgaard* plea.

A. Accuracy of Plea

Salmon argues that his guilty plea is invalid because it is not accurate. The accuracy of a *Norgaard* plea is particularly important because the plea “is not supported by the defendant’s admission of guilt.” *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009) (quoting *Theis*, 742 N.W.2d at 649), *review denied* (Minn. Apr. 21, 2009). In *Williams*, this court synthesized the supreme court cases of *Ecker*, a case concerning

Norgaard pleas, and *Theis*, a case concerning *Alford/Goulette* pleas, to clarify the two essential elements of an accurate *Norgaard* plea: “[1] a strong factual basis and [2] the defendant’s acknowledgement that the evidence would be sufficient for a jury to find the defendant guilty beyond a reasonable doubt.” *Id.* at 12-13. Salmon contends that his *Norgaard* plea does not satisfy either of these two elements.

1. Strong Factual Basis

Salmon contends that his guilty plea is not accurate on the ground that it is not supported by a strong factual basis. Specifically, he contends that the record is inadequate because it contains only one piece of inculpatory evidence, the “uncorroborated statement of the alleged victim.”

The factual basis supporting a *Norgaard* plea is “strong” if a defendant’s partial recollections, coupled with victim and witness statements from the state’s complaint, satisfy each element of the offense. *See Williams*, 760 N.W.2d at 13-14. A person commits fifth-degree criminal sexual conduct if he engages in nonconsensual sexual contact with another person. Minn. Stat. § 609.3451, subd. 1(1). Sexual contact includes “touching by the actor of the complainant’s intimate parts” with “sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(a)(i) (2010).

In this case, Salmon admitted during the plea hearing that he “cuddled” with C.C. in bed. Salmon also admitted that C.C. did not consent to sexual contact. The complaint recites C.C.’s statement that Salmon put his fingers inside her vagina while she was asleep and later apologized to her. These facts strongly suggest that Salmon touched C.C.’s intimate parts without her consent and did so with sexual or aggressive intent.

Thus, we conclude that the record contains a strong factual basis for Salmon's guilt of fifth-degree criminal sexual conduct.

2. Acknowledgement of Sufficiency of Evidence

Salmon also contends that his plea is not accurate on the ground that he did not acknowledge that the evidence would "be sufficient for a jury to convict him when applying the presumption of innocence and reasonable doubt standards."

An accurate *Norgaard* plea requires that a defendant acknowledge on the record that "the evidence would be sufficient for a jury to find [him] guilty beyond a reasonable doubt." *Williams*, 760 N.W.2d at 12-13. This standard is satisfied if a defendant agrees that there is a "substantial likelihood" that a jury will convict him of the charged crime and acknowledges that the state must prove him guilty beyond a reasonable doubt. *Id.* at 14. The standard is not satisfied if a defendant admits that there is a "mere risk" that a jury will convict him. *Theis*, 742 N.W.2d at 649-50.

In this case, Salmon acknowledged during the plea hearing that there is a "substantial chance" that a jury would find him guilty. Salmon's acknowledgement is essentially the same as the acknowledgement of the appellant in *Williams*, who agreed that there was a "substantial likelihood" that a jury would find him guilty. 760 N.W.2d at 14. Although "substantial likelihood" and "substantial chance" are not identical, Salmon's concession of the latter, in context, is sufficient under *Williams*. Thus, Salmon made an adequate acknowledgement that the evidence would be sufficient for a jury to find him guilty.

Salmon contends that his plea is not accurate because he did not expressly acknowledge during the plea hearing that the jury would be required to find him guilty beyond a reasonable doubt. Salmon did not make such an acknowledgement orally during the plea hearing, but he did so in writing in a rule 15 plea petition, which he signed before the plea hearing. The petition states, “I have been told by my attorney and I understand that . . . I would be presumed innocent until my guilt is proved beyond a reasonable doubt.” A signed guilty plea petition gives rise to a presumption that a defendant is aware of the rights the document purports to waive. *State v. Propotnik*, 299 Minn. 56, 58, 216 N.W.2d 637, 638 (1974); *State v. Sandmoen*, 390 N.W.2d 419, 422 (Minn. App. 1986). Salmon’s plea petition undermines his contention that he did not acknowledge the likelihood of a conviction under a beyond-a-reasonable-doubt evidentiary standard.

Salmon also contends that his plea is not accurate because he did not expressly state that he was entering a *Norgaard* plea and did not explain why he was willing to do so. No such statement or explanation is required by law. The “best practice” for a district court is to make a clear record that describes the type of guilty plea being offered and the defendant’s reasons for pleading guilty notwithstanding his claimed loss of memory. *See Ecker*, 524 N.W.2d at 717. But Salmon has not cited any cases in which the supreme court or this court has concluded that a *Norgaard* plea or an *Alford/Goulette* plea is invalid because of a lack of an explicit statement about the type of plea or the lack of a defendant’s statement of reasons for deciding to enter such a plea, and this court is not aware of any such caselaw.

Salmon also contends that his plea is not accurate because of certain statements he made after his guilty plea in a psychosexual evaluation. As Salmon contends in his brief, he made a statement to the evaluator in which he denied the allegations. But his statement to the evaluator appears to have been equivocal, not conclusive. Furthermore, the statement is inconsistent with statements he made, on the record and under oath, at his plea hearing. Salmon relies on *Beaman v. State*, 301 Minn. 180, 221 N.W.2d 698 (1974), a case in which the supreme court allowed the appellant to withdraw her guilty plea based in part on a presentence investigation, on the ground that it “should have alerted the trial court that possibly it had erred in accepting petitioner’s guilty plea without inquiring more thoroughly into” the incident giving rise to the charge. *Id.* at 185, 221 N.W.2d at 701. But *Beaman* is distinguishable for at least two reasons. First, the district court in that case was presented with an abundance of evidence from various sources that should have alerted it to factual deficiencies in the plea. *See id.* at 184-85, 221 N.W.2d at 700-01. In this case, the only contradictory evidence presented to the district court at sentencing was Salmon’s own self-serving statement from his psychosexual evaluation. Second, the appellant in *Beaman* did not enter a *Norgaard* plea and, thus, was required to provide an undisputed factual basis for her plea. *See id.* at 180-85; 221 N.W.2d at 698-701. In this case, Salmon entered a *Norgaard* plea, which allows a defendant to plead guilty without admitting the entire factual basis of the plea because he cannot remember the circumstances of the offense. *See Williams*, 760 N.W.2d at 12. For these reasons, *Beaman* does not support Salmon’s argument.

Thus, we conclude that Salmon failed to demonstrate that his guilty plea is invalid on the ground that it is not accurate.

B. Intelligence of Plea

Salmon also argues that the district court erred by denying his request for an evidentiary hearing. At oral argument, Salmon’s attorney clarified that the sole purpose of an evidentiary hearing would be to allow for the introduction of evidence to support the argument that Salmon’s plea was not intelligently entered. “The purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea.” *Trott*, 338 N.W.2d at 251. The “consequences” of a plea are the “direct consequences,” *i.e.*, the maximum sentence and fine that may be imposed for the offense. *Raleigh*, 778 N.W.2d at 96.

A postconviction petition filed pursuant to chapter 590 of the Minnesota Statutes “shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired.” Minn. Stat. § 590.02, subd. 1 (2012). “[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.” Minn. Stat. § 590.04, subd. 3 (2012). The postconviction court must hold an evidentiary hearing on a postconviction petition “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” *Id.*, subd. 1; *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). To be entitled to an evidentiary hearing, the petitioner must allege facts sufficient to entitle him to the relief requested and must make

allegations that are more than mere “argumentative assertions without factual support.” *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

We note that the district court actually did provide Salmon with a hearing and an opportunity to present evidence, but he did not take advantage of the opportunity. After Salmon filed his postconviction petition, the district court issued an order scheduling a hearing. Salmon was present for the hearing. At the beginning of the hearing, the district court asked Salmon’s newly retained attorney whether he was prepared to present live testimony. But Salmon’s attorney responded by saying that he was not prepared to put on evidence and that he wanted the district court to schedule another hearing at a later date. The district court then asked for an offer of proof so that the district court could determine whether an evidentiary hearing is necessary. The transcript gives the impression that the district court would have allowed Salmon’s attorney to present evidence at that hearing if he had been prepared to do so. Nonetheless, we will assume for purposes of this opinion that the district court denied Salmon an evidentiary hearing on the ground that evidence is unnecessary.

In support of his argument that he improperly was denied an evidentiary hearing, Salmon relies on statements he made in an affidavit that was submitted to the district court with his postconviction petition. In his affidavit, Salmon states that he did not understand the rights he was giving up by pleading guilty, that his attorney did not discuss most of the plea petition with him, that his attorney did not discuss the rights he was giving up, that he did not know that he was presumed innocent until proven guilty, that his attorney did not explain to him the state’s burden of proof, that his attorney did

not explain that a jury verdict needed to be unanimous, and that his attorney did not explain to him the differences between a straight guilty plea and a *Norgaard* plea and an *Alford/Goulette* plea. He claims that his attorney merely discussed the charges against him and the plea agreement in general terms.

Salmon's contention fails because his affidavit is in direct conflict with the sworn statements he made during the plea hearing in response to questioning by his attorney:

COUNSEL: [P]rior to coming before the court did we go over what's entitled a Petition to Enter Plea of Guilty in Felony or Gross Misdemeanor case pursuant to Rule 15?

SALMON: Yes, we have.

COUNSEL: And do you understand all your constitutional rights set forth in that document?

SALMON: Yes, I do.

COUNSEL: And did we discuss and do you understand that by entering this plea today there will be no trial of this case to a judge or to a jury?

SALMON: Yes.

COUNSEL: And you are waiving your right to have a jury of 12 persons determine your guilt or innocence of the offense?

SALMON: Yes.

COUNSEL: You have any questions concerning any of your rights as set forth in that document?

SALMON: No, I do not.

In addition, before accepting Salmon's plea, the district court also inquired into Salmon's waivers:

COURT: Mr. Salmon, you have the right to have me go through all your rights again on the record, the same rights that appear on this plea petition that you went through with Mr. Spear. Would you like me to go through your rights again on the record with you, sir?

SALMON: No, Your Honor.

COURT: Do you understand all the rights you are giving up by entering into this agreement?

SALMON: Yes, I do.

Furthermore, Salmon's plea petition explains all the rights he waived by pleading guilty. Salmon also confirmed during the plea hearing that he had discussed with his attorney all the "facts," "circumstances," and "possibilities" of the case; that he had "sufficient time" to do so; that his guilty plea was being made "freely and voluntarily"; and that he "under[stood] what[] [was] happening . . . [that] morning."

The caselaw provides that if a defendant "had a full opportunity to consult with his counsel before entering a plea," a court "may safely presume that counsel informed him adequately concerning the nature and elements of the offense." *State v. Russell*, 306 Minn. 274, 275, 236 N.W.2d 612, 613 (1975) (citing *Propotnik*, 299 Minn. 52, 216 N.W.2d 637). Furthermore, the caselaw also provides that a district court need not consider a defendant's post-plea statements if they contradict sworn statements he made earlier at the plea hearing. *See Coolen v. State*, 288 Minn. 44, 50-51, 179 N.W.2d 81, 86 (1970); *Anderson v. State*, 746 N.W.2d 901, 907 (Minn. App. 2008). If we remove the statements in Salmon's affidavit that are inconsistent with the transcript of his plea hearing, we are left with mere "argumentative assertions." *See Sanchez-Diaz*, 758

N.W.2d at 846. There would have been no point in an evidentiary hearing because the evidence proffered by Salmon in his affidavit demonstrates that his testimony would have done nothing more than contradict his prior sworn statements, which would not have entitled him to postconviction relief.

Salmon also contends that an evidentiary hearing is necessary because his plea petition is incomplete and contains typographical errors. For example, some of the boxes in the form petition that may be checked are left blank, including a box that is designed to indicate that a defendant was under the influence of alcohol at the time of the offense. For several reasons, the petition in this case gives the strong impression that counsel did not take great care in its preparation. But that impression does not give rise to a need for an evidentiary hearing. We have reasoned that an evidentiary hearing is unnecessary because of Salmon's oral statements at the plea hearing, which are directly contrary to the statements in his affidavit. An incomplete or carelessly prepared plea petition does not undermine the reliability of the statements Salmon made at the plea hearing.

In sum, even though the procedures employed at the time of Salmon's guilty plea were less than perfect, the district court did not err by denying Salmon's petition for postconviction relief without an evidentiary hearing.

Affirmed.