

*0This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0474**

State of Minnesota,
Respondent,

vs.

Mitchell Neff,
Appellant.

**Filed May 6, 2008
Reversed and remanded
Collins, Judge***

Kanabec County District Court
File No. K6-04-652

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Amy R. Brosnahan, Kanabec County Attorney, Kelly A. Nash, Assistant County Attorney, 18 North Vine Street, Suite 202, Mora, MN 55051 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins,
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.

UNPUBLISHED OPINION

COLLINS, Judge

On direct appeal from the convictions of three counts of second-degree criminal sexual conduct, appellant argues that the district court erred in accepting his *Alford* plea and in denying his motion to withdraw his plea. Because the district court erred by accepting appellant's *Alford* plea without first establishing a sufficient factual basis on the record, appellant's plea was inaccurate and invalid. We reverse and remand.

DECISION

Appellant Mitchell Oscar Neff was charged with one count of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. Neff initially pleaded not guilty and a jury trial was scheduled. On the day the trial was to begin, Neff entered an *Alford* plea to the three second-degree counts pursuant to a plea agreement. Neff repeatedly asserted on the record that, despite his claim of innocence, he preferred to plead guilty rather than proceed with a trial for first-degree criminal sexual conduct and face the risk of conviction with a much longer sentence.

Four months after the plea hearing, Neff moved to withdraw his plea. The district court denied the motion, and Neff was given concurrent sentences of 21, 27, and 34 months, in accordance with his plea agreement.

Neff contends that the district court erred in accepting his *Alford* plea because a proper factual basis was not established on the record, and therefore, the plea was inaccurate. Neff concedes that this issue was not presented to the district court inasmuch as he did not raise it in a postconviction challenge. But the “supreme court has held a

direct appeal an inappropriate means of challenging acceptance of a guilty plea only where the grounds for the challenge go outside the record on appeal.” *State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). Here, the validity of the plea is appropriate for consideration by this court because Neff’s claim is based exclusively on the district court record. The validity and enforcement of a plea agreement are issues of law subject to de novo review. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). Therefore, we will consider the validity of Neff’s plea de novo. *See id.* at 431.

In the ordinary case, before accepting a plea of guilty, the district court must see to it that sufficient facts are elicited from the defendant to ensure that there is a factual basis for all elements of the offense. Minn. R. Crim. P. 15.01; *State v. Hoaglund*, 307 Minn. 322, 325, 240 N.W.2d 4, 5 (1976). “The court should not accept the plea unless the record supports the conclusion that the defendant actually committed an offense at least as serious as the crime to which he is pleading guilty.” *State v. Trott*, 338 N.W.2d 248, 251-52 (Minn. 1983). “When a defendant pleads guilty but at the same time denies that he is in fact guilty, the rationality of the defendant’s decision is immediately called into question.” *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). Therefore, “careful scrutiny of the factual basis for the plea is necessary within the context of an *Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence.” *State v. Theis*, 742 N.W.2d 643, 648-49 (Minn. 2007).

Neff argues that the factual basis for his *Alford* plea was not properly established because the district court did not conduct its own independent analysis of the facts on the

record, but merely relied upon Neff's concession that sufficient facts existed that could result in a first-degree criminal-sexual-conduct conviction if the matter proceeded to trial. The state counters that the district court had sufficient facts before it to prove the elements of the three counts of second-degree criminal sexual conduct, including the complaint, statements and videos of expected witness testimonies, and evidence that was revealed during a contested pretrial hearing involving issues of competence of the child witnesses and admissibility of their statements.

There are three requirements for a valid plea: "it must be accurate, voluntary and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). If a plea fails to meet any of these requirements, it is invalid. *Id.* "A proper factual basis must be established for a guilty plea to be accurate." *Id.* In an *Alford* plea situation, a well-established factual basis provides the district court "with a basis to independently conclude that there is a *strong* probability that the defendant would be found guilty of the charge to which he pleaded guilty, notwithstanding his claims of innocence." *Theis*, 742 N.W.2d at 649.

This [factual basis] discussion may occur through an interrogation of the defendant about the underlying conduct and the evidence that would likely be presented at trial, the introduction at the plea hearing of witness statements or other documents, or the presentation of abbreviated testimony from witnesses likely to testify at trial, or a stipulation by both parties to a factual statement in one or more documents submitted to the court at the plea hearing.

Id. at 649 (citations omitted)¹

¹ *Theis* was issued after the present case was concluded in the district court, and we are mindful that the district court did not have *Theis* for guidance to properly develop a factual basis supporting the guilty plea. However, we also note that *Theis* did not alter

Here, neither the district court nor either counsel identified on the record the specific testimony or factual evidence that would form a sufficient basis for convictions of the charges to which Neff was pleading guilty. Both the court and counsel alluded to the expected evidence generally, but did not specify the facts drawn from the evidence that would satisfy the essential elements for the three charges of second-degree criminal sexual conduct. Neff agreed that the expected evidence would be sufficient for a jury to convict him of first-degree criminal sexual conduct, but no record was made of specific facts that would be developed by that evidence.

Furthermore, the record of the plea hearing could be interpreted to indicate that Neff only believed there would be a “risk” of conviction had the case been tried, not a belief that he would be convicted. “In the context of an *Alford* plea, where a defendant maintains his innocence, the defendant’s acknowledgment that there is a risk that he could be convicted does not meet the standard for accuracy,” *Theis*, 742 N.W.2d at 650.

Absent a record of facts supporting Neff’s convictions, the requisite factual basis was lacking. The district court may have been able to accept Neff’s plea based on the allegations contained within the complaint, but a mere passing reference to the complaint does not constitute a sufficient record of a factual basis to support a guilty plea and sustain a conviction. There is no indication in the record that the court independently

existing law, but instead provided a synthesis of precedents that established the accuracy requirements of a valid *Alford* plea. *See Theis*, 742 N.W.2d at 648-49.

assessed the strength of the evidence before accepting Neff's plea. The court apparently relied on Neff's own assessment of risk.

Because the factual basis is not sufficient for Neff's *Alford* plea, the plea was not accurate and is thus invalid. A manifest injustice exists where a guilty plea is not accurate, and therefore, on remand to the district court, Neff must be permitted to withdraw his guilty plea. See *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997) ("Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent, and thus the plea may be withdrawn.").

Reversed and remanded.