STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0268

State of Minnesota,
Respondent,

vs.

Jason D. Busick,
Appellant.

Filed February 17, 2009
Affirmed
Minge, Judge

Polk County District Court
File No. CR-07-2325

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Ronald I. Galstad, 1312 Central Avenue Northeast, P.O. Box 386, East Grand Forks, MN 56721 (for respondent)

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

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

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

MINGE, Judge

Appellant challenges his conviction of test refusal/DWI in the second degree, arguing that his guilty plea was inaccurate because it lacked an adequate factual basis. We affirm.

FACTS

In July 2007, police stopped a pickup driven by appellant Jason D. Busick in East Grand Forks. Appellant submitted to a preliminary breath test (PBT), which indicated he had an alcohol concentration of .16. He was arrested, transported to the police station, and read the implied consent advisory. Police asked appellant to submit to an Intoxilyzer 5000 breath test and explained that, if he refused the test, the refusal would result in an additional criminal charge. Appellant was provided telephone books and access to a telephone for approximately 40 minutes to consult with an attorney on whether to submit to the test. During this 40-minute time period, appellant looked through the telephone books, called one attorney, and left one message. After failing to reach an attorney, appellant refused to submit to the breath test, stating twice that he would not take the test unless he first spoke to his attorney. Appellant did not tell police that he had asthma or refused to take the test due to asthma or any other medical condition.

Appellant was charged with test refusal/DWI in the second degree, DWI in the third degree, and driving after suspension. He agreed to plead guilty to the test refusal charge in exchange for dismissal of the remaining charges and a favorable sentence. At the plea hearing, appellant testified that he reviewed the plea petition and his rights with

his attorney, understood his rights, had no questions about his plea petition, and was satisfied that his attorney fully advised and represented him. Appellant then admitted that he was driving, that the PBT results indicated that he had an alcohol concentration of .16, that he was read the implied consent advisory, that he was asked to take the breath test, and that he refused to take the test. Through his attorney, appellant consented to the state's request that the probable cause portion of the criminal complaint be placed into the record in furtherance of the plea. Appellant also stated that he refused the breath test because he has asthma, that, when he refused, he mistakenly believed that he had a right to choose a different test, and that he would have submitted to a blood test if it had been offered.

When appellant appeared for sentencing, in an apparent effort to reduce his charges or sentence, he repeated that he refused the breath test only because he has asthma. The district court responded by asking appellant whether he was asking to withdraw his guilty plea, and the district court afforded appellant time to consult with his attorney regarding that issue. After some time, appellant stated that he had had enough time to talk with his attorney and that he wanted to proceed with sentencing. Appellant never sought leave of the district court to withdraw his guilty plea. This appeal follows.

D E C I S I O N

On appeal, the issue is whether, at appellant's request, this court should set aside appellant's guilty plea on the ground that he had a reasonable basis for refusing to take

the breath test.[1] Appellant does not have an absolute right to withdraw a guilty plea; he has the burden of establishing facts warranting reopening his case. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A guilty plea may be withdrawn if it can be proven to the satisfaction of the court that it is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when an appellant can show that his guilty plea was not "accurate, voluntary, and intelligent (i.e., knowingly and understandingly made)." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). Appellant argues his plea was not accurate.

"The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he could properly be convicted of at trial." *Munger v. State*, 749 N.W.2d 335, 337 (Minn. 2008). "Accuracy requires an adequate factual basis to support the charge." *Id.* at 337-38. "The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Id*. at 338 (quotation omitted). This requirement is satisfied usually by a defendant's own statements about what happened or his answers to questions posed by counsel or the district court, but "[o]ther important ways of establishing a

[1] We note that this is a direct appeal and that appellant did not request that the district court allow him to withdraw his guilty plea. This court generally does not consider matters not submitted to the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *State v. Hemstock*, 276 Minn. 457, 458, 150 N.W.2d 562, 563 (1967). However, requests to withdraw pleas have been considered for the first time on appeal in rare, compelling circumstances when the record contains all relevant facts. *State v. Anyanwu*, 681 N.W.2d 411, 413 (Minn. App. 2004). Here, respondent does not object to appellant's request to withdraw his guilty plea on the ground it was not presented to the district court, and we do not consider that issue.

factual basis would be to include written statements of witnesses as exhibits or to take testimony of certain witnesses." *State v. Genereux*, 272 N.W.2d 33, 34 n.2 (Minn. 1978).

It is undisputed that appellant admitted facts sufficient to satisfy the elements of the test-refusal crime: (1) the police had probable cause to believe that he was driving under the influence of alcohol; (2) he took a PBT and the result indicated an alcohol concentration of .08 or more; (3) he was given the implied consent advisory by the police; (4) he was requested by the police to submit to a chemical test of his breath; (5) he refused to submit to the test; and (6) these events act took place in Polk County on July 28, 2007. *See* 10A *Minnesota Practice*, CRIMJIG 29.28 (Supp. 2008); *accord* Minn. Stat. § 169A.20, subd. 2 (2006). The contention is that his plea was inaccurate because the refusal-to-test offense requires that he "unreasonably" refuse to submit to a test, that the asthma condition constituted a reasonable basis for not taking the breath test, and that with his asthma rationale for refusing the test clearly stated at the plea hearing, without any countervailing evidence, it is manifestly unjust to allow the plea to stand.

Section 169A.20 does not state or imply that the district court must determine whether appellant's rationale for refusal was unreasonable *absent* appellant's raising the defense. As a result, "unreasonable refusal" is not an element of the crime of test refusal. Certainly, when a driver is charged with the crime of test refusal, he may raise an affirmative defense that his refusal was based on *reasonable* grounds. *State v. Johnson*, 672 N.W.2d 235, 242 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004). Also, we recognize physical inability as a reasonable ground for refusal. *Lewandowski v. Tschida*, 396 N.W.2d 711, 713 (Minn. App. 1986). However, there is a significant

difference between an affirmative defense to a crime and the elements of the crime. *See* Minn. R. Crim. P. 9.02, subd. 1(3)(a) (describing the procedure for raising an affirmative defense); *cf. State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003) ("The factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty.").

Here, appellant pleaded guilty without raising an affirmative defense. Because "unreasonable refusal" is not an element of the crime and because appellant never raised an affirmative defense, the accuracy requirement does not require appellant to admit or the prosecution to establish that he had no reasonable basis for refusing to submit to testing.

Appellant nonetheless references the defense of physical inability and asserts that his statements at his plea and sentencing hearings regarding his rationale for refusal should compel this court to allow him to withdraw his plea. We disagree. Although appellant stated that he refused testing because he had asthma, appellant never claimed at these hearings that he was physically incapable of submitting to the test, and, more importantly, he never made such a claim on the night of his arrest. The affirmative defense of physical inability cannot be used as a post hoc explanation for why a driver refused to submit to testing. Physical inability is a defense for drivers who attempt to provide a breath sample but fail to provide an adequate one. *Lewandowski*, 396 N.W.2d at 713. Appellant cites no legal precedent that establishes that a driver may decide—independently and tacitly—to not take the breath test and then claim as a defense that,

had he taken the test, he would have been physically unable to provide the adequate sample.

Whether a person is physically unable to provide a breath sample is an issue of fact. If the issue is raised, there must be findings of fact from which to conclude that the driver's failure to provide a sample actually resulted from physical inability. *Id.* Here, there is nothing in the record that substantiates this claim. There are no facts indicating that appellant tried to provide a breath sample or expressed any willingness to take an alternative blood or urine test. In fact, there are no facts in the record indicating that appellant told police that he had asthma or that—for any reason—the asthma condition precluded him from attempting to take a breath test. On the contrary, the record supports the notion that appellant refused testing because he failed to reach his attorney and did not want to take the test without first speaking to an attorney.

If a driver has a medical condition that he believes may prevent him from providing a proper breath sample, the driver must convey this to the officer so that the officer can respond to the driver's concern and, if the officer determines it is necessary, provide an alternative test. *See* Minn. Stat. § 169A.51, subd. 3 (2006) (stating that it is the officer—not the driver—who determines whether the test is of blood, breath, or urine). If a driver refuses to take a breath test and does not tell the officer that his rejection is based on a concern that he may be medically incapable of taking the test, this constitutes a refusal. Here, the officer received no claim or indication of asthma, and appellant did not try to provide a breath sample.

Lastly, we note that, during the sentencing hearing, when appellant again stated that he refused the breath test because of his asthma, the district court directly asked appellant whether he wanted to withdraw his plea, and he refused that option. "Public policy favors the finality of judgments and courts are not disposed to encourage accused persons to play games with the courts by setting aside judgments of conviction based upon pleas made with deliberation and accepted by the court with caution." *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002) (quotation omitted).

Because the record indicates that appellant admitted or conceded every element of the test refusal charge, because he did not either raise an affirmative defense of physical inability to take the test, and because there is no evidence in the record that appellant was physically incapable of providing a breath sample for the test, we conclude that appellant cannot meet his burden of proving that his plea was not accurate. Consequently, we conclude that this record does not support a determination of manifest injustice permitting appellant to withdraw his plea.

Affirmed.

Dated: