STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0436

Samuel Eugene Brown, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

Filed March 24, 2009
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. K4-03-1487

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

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, 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.

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

SHUMAKER, Judge

In this appeal from the district court's denial of postconviction relief, appellant contends that his plea of guilty lacked an adequate factual basis to show the time of the criminal sexual conduct for which he was sentenced. Because, in context and read reasonably, the record as a whole shows a sufficient factual basis for appellant's plea, we affirm.

FACTS

The state charged appellant Samuel Eugene Brown with one count of criminal sexual conduct in the first degree, alleging that he engaged in the sexual penetration of C.G., a female under 16 years of age, between November 9, 1998, and November 8, 2000.

Until August 1, 2000, the presumptive sentence for that crime was 86 months' imprisonment. On that date, a statutory amendment became effective and the sentence was increased to 144 months' imprisonment.

Brown and the state reached a plea agreement under which the district court would depart upward from the presumptive sentence and impose imprisonment for 216 months. The departure was supported by various aggravating circumstances including the fact that Brown had lived with C.G. and her mother and had acted as C.G.'s father figure. In entering his plea, Brown acknowledged that the applicable presumptive sentence was 144 months.

The district court approved the agreement and sentenced Brown accordingly. Brown did not appeal but rather petitioned for postconviction relief to correct his sentence. He claimed that the factual basis of his plea did not show that penetration occurred between August 1, 2000 ─ the effective date of the enhanced-penalty statute ─ and November 8, 2000 ─ the day before C.G.'s 16th birthday ─ and, therefore, the 86-month sentence was the sentence from which the departure should have been computed. He requested an evidentiary hearing on his petition.

The district court denied the petition without an evidentiary hearing and this appeal followed.

D E C I S I O N

Brown contends that the factual basis of his plea fails to show that he committed the crime charged after August 1, 2000, but before the victim's 16th birthday, and that he is entitled to the district court's determination of the date of the offense. We review a postconviction petition to determine whether the evidence is sufficient to sustain the district court's findings. *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992). But legal issues raised by the petition we review de novo. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). The district court must hold an evidentiary hearing on a petition for postconviction relief unless the petition, files, and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). We review the postconviction court's summary denial of a petition for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006).

Brown pleaded guilty to a violation of Minn. Stat. § 609.342, subd. 1(g) (2002). Before August 1, 2000, the presumptive guidelines sentence for a violation of that statute was 86 months' imprisonment. The statute was later amended to provide a mandatory minimum sentence of 144 months' imprisonment for offenses committed on or after August 1, 2000. 2000 Minn. Laws ch. 311, art. 4 §§ 2, 10; Minn. Sent. Guidelines II.E.

The plea bargain to which Brown agreed contemplated a sentence of 216 months imprisonment, representing a 1.5 upward departure from the mandatory minimum sentence of 144 months. At the plea hearing, the prosecutor asked Brown about his understanding of the sentence to be imposed:

> Q. You understand that under the plea agreement, the agreement is for one and a half times the guideline sentence. A guideline sentence is 144 months.
>
> A. Yes.
>
> Q. And therefor[e] the plea agreement is for 216 months in prison, you understand that?
>
> A. Yes, I do.

Brown admitted that he was involved in a romantic relationship with C.G.'s mother and that he lived with C.G. and her mother during the period that C.G. was 13 through 17 years of age. During that period, Brown admitted that he had sexual contact with C.G. When she was "13 to 14" years old, much of the contact was fondling her breasts outside her clothing. As C.G. got older, the contact changed, and Brown began to sexually penetrate her:

> Q. And at the time she was 14 to 15 years old it included fondling of her bare breasts under her clothing?

A. Yes.

Q. It included digital penetration of her vagina with your finger?

A. Yes.

The prosecutor then inquired as to when Brown began having sexual intercourse with C.G., noting that Brown told the police that it began when C.G. was 15 years old. Brown stated that the police had misquoted him and that he did not have intercourse with her until she was 16. The prosecutor then returned to his inquiry about digital penetration:

Q. Mr. Brown, you understand that C.G. indicated that you had digitally penetrated her with your finger when she was under 16 years old, at the time she was 14 to 15 years old?

A. Yes, sir, I answered that yes.

Q. You agree you were doing that, you were digitally penetrating her with your finger when she was 14 to 15 years old?

A. I claimed to that, yes, I did.

Noting confusion as to the date on which the sexual intercourse began, the prosecutor continued:

Q. Mr. Brown, do you understand that you are charged with sexual penetration and that even digital penetration with your finger constitutes sexual penetration?

A. Yes, I do, sir, I do.

Q. And Mr. Brown, some of this occurred while C.G. was 15 years old between the period of August and

November 2002, you would agree with that, wouldn't you, you digitally penetrated her with your finger?

A. No.

Q. In other words within the few months prior to her 16th birthday?

A. I wouldn't disagree with that, no.

Q. That is true as well?

A. Yeah.

In addition to this testimony, Brown submitted to the court a petition to plead guilty in which he acknowledged the charge and the sentence to be imposed: "Specifically, I understand that I have been charged with the crime(s) of CSC 1 committed on or about BTWN 11-9-98 and 11-8-2000 . . . PG as charged; Agreement to a sent. of 216 months which constitutes an 1 ½ upward departure."

The factual basis for a plea of guilty is adequate if 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." *State v. Iverson*, 664 N.W.2d 346, 349-50 (Minn. 2003) (quotation omitted). Thus, our inquiry is whether there are sufficient facts in this record to support a conclusion that Brown's digital penetration of C.G. occurred after August 1, 2000, and before C.G. reached age 16 on November 9, 2000. Although neither the language of the charge nor the elicitation of the factual basis for the plea is a model of clarity, when the entire record is considered in context and the pertinent language is given a reasonable construction, we conclude that the factual basis supports Brown's plea.

Although not fatal to the validity of the plea, the lack of clarity that precipitated Brown's petition and this appeal began with the complaint, which charged Brown with having committed a crime against C.G. when she was "14 - 15." Does that mean beginning when she was 14 and continuing through her entire 15th year? Or does it mean from age 14 until she reached 15? If the former, then the conduct encompasses the date of the statutory charge; if the latter, the amended statute is inapplicable.

The imprecision found its way into the prosecutor's questions during the plea hearing when he used the terms "13 to 14" and "14 to 15" years old. Does "to" mean "including" or "ending at"? If the former, the enhanced sentence applies; if the latter, it does not apply. Then there occurred yet another misstep in language when the prosecutor asked: "And Mr. Brown, some of this occurred while C.G. was 15 years old between the period of time of August and November *2002* . . . ?" (Emphasis added.) There was still more vagueness when the prosecutor asked about the digital penetration "within the *few* months prior to her 16th birthday." (Emphasis added.)

If we were to rely solely on these selective gaffes as Brown urges, he would be entitled to a postconviction evidentiary hearing. But that would require us to ignore the full context of the plea.

Brown was represented by counsel, and he acknowledged that he discussed the plea bargain and the sentence with her before pleading guilty. He disclosed in his plea petition an awareness that the enhanced sentence applied to his conduct by computing the departure on the basis of 144 months rather than 86 months under the previous law. The new law had been in effect for three years as of the date of the plea, making it improbable

that there could have been a mistake as to its existence. Furthermore, Brown is presumed to have known the law when he entered his plea. *See State v. Calmes*, 632 N.W.2d 641, 648 (Minn. 2001) (noting that citizens are presumed to know the law). And it is presumed that defense counsel explained the consequences of his plea, which would necessarily entail a recognition that Brown's conduct violated the new law. *State ex rel. Rankin v. Tahash*, 276 Minn. 97, 101, 149 N.W.2d 12, 15 (1967).

During the plea hearing, Brown admitted to a continuous course of sexual contact with C.G. during "the period of time that C.G. was 13 years old through the time she was 17 years old," and that the contacts occurred "repeatedly on multiple occasions." He admitted that his conduct progressed from touching C.G.'s breasts over her clothing, to fondling her breasts underneath her clothing, to penetrating her vagina with his finger, and finally to having sexual intercourse with her, which latter conduct continued "through February or March of 2002" and which resulted in C.G.'s pregnancy. Brown's contention would require the conclusion that, although his sexual acts were multiple and continuous, progressing from mere touching to two types of penetration and were ongoing until early 2002, they did not occur during the period of August 1, 2000, and November 8, 2000, the months during which C.G. was still 15 and the new law was in effect. In the context of the entire record, such a conclusion would be unreasonable, and Brown fails to offer any explanation as to why his penetrations would have stopped for that period and then resumed thereafter.

Furthermore, despite the awkwardness of the prosecutor's inquiry, the only reasonable conclusion to be drawn from the record is that Brown did admit to penetrating

C.G. after August 1, 2000, and before she reached age 16. The prosecutor focused on the "period of time of August and November 2002." It is readily apparent that he misspoke as to the year because, first, he qualified that statement by saying "while C.G. was 15 years old . . . ." C.G. was not 15 years old in 2002, but she was 15 years old in August and early November, 2000. Secondly, any conduct during August and November 2002 would have been irrelevant to the charge or the plea. Thirdly, Brown himself appeared to catch the error by denying any sexual conduct as late as August and November 2002 but admitting such conduct within the "few months" before C.G.'s 16th birthday. In the context of the entire record, the only reasonable conclusion is that the prosecutor meant, and Brown understood, that the period in question included August to November of 2000. Brown admitted that in these months before C.G. turned 16, he penetrated her with his finger.

Reading the record in context and giving the operative words their reasonable import, it has been conclusively shown that Brown is not entitled to the relief he seeks. Furthermore, to obtain an evidentiary hearing, Brown has the burden of alleging facts that, if true, would entitle him to relief. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). He has not done so. The district court did not abuse its discretion in summarily denying Brown's petition for postconviction relief.

In his pro se supplemental brief on appeal, Brown alleges that the police violated his *Miranda* rights when they questioned him about the allegations of sexual conduct with C.G. By pleading guilty, Brown waived his right to challenge any alleged *Miranda* violation, and he expressly acknowledged this waiver in his plea petition. Additionally,

he failed to raise this claim in the district court either at the plea hearing or the sentencing or in his petition for postconviction relief and is barred from raising it for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Affirmed.