STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0926

John E. Arradondo, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 21, 2009
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CR-05-077434

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, 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 55101-2134; and

Michael E. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, 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

Appellant appeals from a postconviction order denying his petition to withdraw his plea of guilty. He contends that his plea is invalid because it lacked an adequate factual basis. We affirm.

FACTS

During the night of December 3, 2005, C.K. and her 15-year-old daughter, L.K., were asleep in separate rooms in their apartment unit in Bloomington. Appellant John Arradondo, a neighbor living in the apartment complex, entered the apartment without permission. C.K. woke up and realized that Arradondo had his fingers in her vagina. She yelled at him and he left her room. Then L.K. woke up to find Arradondo performing oral sex on her. She also yelled at him and he left her room.

After an investigation, the state charged Arradondo with two counts of burglary in the first degree and two counts of criminal sexual conduct in the third degree. He pleaded not guilty and demanded a jury trial.

The trial began and the prosecutor gave an opening statement, which she described as "a brief outline of what I expect the evidence to show, what the witnesses will testify to in this case." She then indicated, among other things, that

> [a]round midnight [L.K.], who was sleeping in her room, and the door had been closed when she went to sleep, woke up to find the defendant performing oral sex on her. He was holding her hands, and he was performing oral sex. She woke up, saw who it was, and ordered him out of her room.

The prosecutor explained that the police found a beer bottle and a cigarette in an ashtray in L.K.'s room, and that an analysis revealed the presence of Arradondo's DNA on the bottle and the cigarette. Defense counsel followed with a brief opening statement in which he indicated that Arradondo did not commit the crimes and that the state would be unable to prove otherwise.

After the opening statements, Arradondo conferred with his attorney. Then the prosecutor told the court that the parties had reached a plea agreement under which Arradondo would plead guilty to criminal sexual conduct in the third degree against L.K. and would receive an executed sentence of 36 months rather than the presumptive sentence of 48 months.

Defense counsel acknowledged the agreement and stated that Arradondo would enter his plea as a *Norgaard* plea.

Arradondo then pleaded guilty to one count of criminal sexual conduct and defense counsel, the prosecutor, and the court conducted inquiries. Arradondo responded that he was aware of his right to continue with the trial and of related trial rights, and that he wanted to take advantage of the state's offer. He agreed that he had been drinking quite a bit before the incident and did not specifically recall his actions on that day. He admitted that he had an opportunity to review all police reports and witness statements and that, if the evidence shown in those sources were presented at trial, the jury could find him guilty of the crime to which he had pleaded guilty.

The prosecutor asked about the contents of the reports and statements, and the court followed up with an additional question:

[PROSECUTOR:] And what you are telling the court today is that you don't remember what happened but you believe that based on all of those reports that what [L.K.] says happened is exactly what happened?

[ARRADONDO:] I'm saying that I believe that with the (inaudible) of the evidence that I could be found guilty of a much more serious crime and I would like to take advantage of the state's offer.

[THE COURT:] That's not quite the same. That's more like an Alford plea. A Norgaard plea requires that you admit that the facts, although you don't recall what happened, that you were so intoxicated that you don't recall what happened, that you do not deny in any respect the accounts given by the witnesses.

[ARRADONDO:] Correct.

[THE COURT:] All right.

[PROSECUTOR:] Is that in fact true what the judge just recited?

[ARRADONDO:] Yes.

The court accepted the plea and ordered a presentence investigation. During that investigation, Arradondo denied committing the crime to which he pleaded guilty. The court allowed him to withdraw his plea; but after the state moved for reconsideration, the court reinstated the plea and sentenced Arradondo in accordance with the plea agreement. Arradondo made a new motion to withdraw his plea after he was sentenced. The court

later denied his petition for postconviction relief without an evidentiary hearing, and he appealed.

D E C I S I O N

Arradondo's claim on appeal is that his plea of guilty was not accurate and he should be allowed to withdraw it because it was unsupported by an adequate factual basis. He contends that the district court erred in denying his petition for postconviction relief without an evidentiary hearing. This court reviews the district court's denial of postconviction relief for an abuse of discretion. *Hale v. State*, 566 N.W.2d 923, 926 (Minn. 1997). We review the postconviction court's factual findings to determine whether they are supported by sufficient evidence, but review legal issues de novo. *Cuypers v. State*, 711 N.W.2d 100, 103 (Minn. 2006).

The postconviction court noted that Arradondo's assertion "that he was not specifically questioned about the details of the crime, including its location, and that the factual basis was therefore insufficient . . ." would be "a colorable argument were it not for the context in which the plea was entered . . ." and the fact that this was a *Norgaard* plea. The court pointed out that Arradondo "entered his '*Norgaard* plea' after he had sat through jury selection and opening statements of counsel . . . ," and had listened to the prosecutor assert that the evidence would show the location and nature of the criminal sexual conduct against 15-year-old L.K. The court indicated that "[i]n this context, and having heard in some detail the allegations the state expected to prove, the defendant entered his plea of guilty."

The district court must allow a defendant to withdraw his plea of guilty if withdrawal is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1; *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). Manifest injustice exists if the plea is invalid. *Theis*, 742 N.W.2d at 646. A plea is valid only when it is supported by an adequate factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The establishment of an adequate factual basis is essential to ensuring the accuracy of the plea. *Beaman v. State*, 301 Minn. 180, 221 N.W.2d 698 (1974).

Arradondo entered a so-called *Norgaard* plea. *State ex rel Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961). Unlike an *Alford* plea, by which a defendant maintains his innocence but wishes to plead guilty to avoid the possibility of a harsher penalty after trial, in a *Norgaard* plea the defendant does not claim he is innocent but rather contends that he does not remember the circumstances that gave rise to the crime. "A defendant may also plead guilty even though he or she claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense." *Ecker*, 524 N.W.2d at 716. "In such cases, the record must establish that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged." *Id.* An adequate factual basis consists of two components: (1) a strong factual basis, and (2) defendant's agreement that the evidence is sufficient for jury to find him guilty beyond a reasonable doubt. *Theis*, 742 N.W.2d at 648-49.

The essence of Arradondo's claim on appeal is found in his brief: "Appellant did acknowledge that the evidence would be sufficient for a jury to find him guilty and that

he did not dispute the evidence. Unlike *Ecker*, no evidence, testimony, or facts describing the crime *was discussed at appellant's plea hearing*." (Emphasis added). It is apparent that Arradondo knew of the existence of evidence against him and that he and his defense attorney thought that the evidence was sufficient to result in a conviction if he continued with the trial. But, he argues, there was no disclosure of that evidence at the plea hearing; no facts were presented. He argues that, without the presentation of relevant facts at the time of the plea, there cannot be an adequate factual basis for the plea.

It is indisputable that before a *Norgaard* plea can be said to be accurate inculpatory evidence must exist; the defendant must know of that evidence; and the defendant must acknowledge the sufficiency of that evidence to persuade him of his guilt or of the likelihood of a conviction if he goes to trial. *Ecker*, 524 N.W.2d at 716. "Moreover, the trial court must affirmatively ensure an adequate factual basis has been established in the record." *Id.* at 717.

What, then, was the "record" as it existed at the time of Arradondo's plea? It was, in part, possibly the police reports and witness statements, which Arradondo admitted under oath that he had read. But those items were not presented at the plea hearing, nor were they made part of the record on appeal. We are left to speculate as to their contents, and a mere reference to reports and statements without a disclosure of particular facts contained therein would be inadequate to ensure a proper factual basis for a *Norgaard* plea.

During the plea hearing, Arradondo admitted under oath that he did "not deny in any respect the accounts given by the witnesses." The only disclosure of the accounts of the witnesses occurred during the prosecutor's opening statement. The relevant details disclosed were that 15-year-old L.K. was sleeping in her room in the apartment she shared with her mother in Bloomington when she "woke up to find [Arradondo] performing oral sex on her. He was holding her hands, and he was performing oral sex. She woke up, saw who it was, and ordered him out of her room." Similarly, L.K.'s mother, C.K., reported that on the same night she was awakened by someone's fingers in her vagina. "[S]he looked at who had his fingers in her vagina and saw that it was [Arradondo], her neighbor. She yelled at him to leave the apartment."

Arradondo heard the prosecutor's opening statement. He heard the prosecutor say that witnesses would testify to various details. He knew that L.K. would be one of those witnesses because only she could describe what happened in her room when only she and Arradondo were present. And he stated under oath that he did not deny the accounts given by the witnesses.

In denying Arradondo's petition for postconviction relief, the district court ruled that the disclosure of facts in the prosecutor's opening statement satisfied the factual-basis requirement. Arradondo argues that, because the opening statement is not evidence but rather is merely a recitation of what the prosecutor expects the evidence will be, it cannot satisfy the factual-basis requirement. Furthermore, he contends that "[a] factual basis must be established at the time of the guilty plea, not carried over from the opening statements of a trial."

We hold that the opening statement, under the facts of this case, was part of the "record" upon which Arradondo's plea was based; that it contained sufficient disclosure of what the witnesses would testify to; that the disclosure contained the essential elements of the charge to which Arradondo pleaded guilty; and that he admitted that, despite his loss of memory, he did not dispute anything L.K. would say. Although Arradondo is correct that an opening statement is not evidence but rather only an allegation of what the evidence will be, the factual bases presented for virtually all pleas of guilty are allegations rather than established evidence; all are disclosures of what the evidence will be if there is a trial.

Arradondo's claim on appeal relates more to the timing of the disclosure of the factual basis than to the content of that disclosure. It is significant that Arradondo's plea followed immediately after the opening statements. He was thus freshly aware of what facts the state intended to present against him, and a record was made of those facts.

We find no abuse of discretion in the court's denial of Arradondo's petition. Furthermore, because there are no facts in dispute, there was no reason for an evidentiary hearing.

We must, however, comment on the procedure counsel and the court employed in taking Arradondo's plea of guilty, a procedure that unnecessarily precipitated this appeal. The better practice requires the disclosure of the factual basis for the plea at the time of the plea hearing. If that basis depends on reports and statements, the particulars should be disclosed on the record. Although counsel and the court followed some of the

procedures outlined in *Ecker* for *Norgaard* pleas, they jeopardized the accuracy of the plea by failing more specifically to detail the inculpatory facts at the plea hearing.

Affirmed.