STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1037

State of Minnesota,
Respondent,

vs.

Stephen Michael Michuda,
Appellant.

Filed July 28, 2009
Affirmed
Shumaker, Judge

Dakota County District Court
File No. 19-CR-07-000636

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

James Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

SHUMAKER, Judge

In this appeal, appellant challenges the validity of his pleas of guilty, claiming that the court's imposition of a lifetime of conditional release violated an alleged agreement with the state, that the factual basis for his conviction of terroristic threats is inadequate, and raises several additional issues in a supplemental pro se brief. We affirm.

FACTS

On February 12, 2007, police received a phone call from a woman who feared that appellant Stephen Michael Michuda had kidnapped their daughter. Michuda, who was only permitted to have supervised visits with his children, was found the next morning with the girl (Victim 1). The ensuing police investigation revealed that Michuda had been sexually abusing his two daughters—Victim 1 and Victim 2—for several years. Police also learned that Michuda was out of compliance with his obligations under the sex-offender registration laws and that, on the day Michuda took Victim 1, he threatened to kill the children's mother if they called the police and got him in trouble. Michuda was charged with two counts of criminal sexual conduct in the first degree for multiple incidents of penetration against Victims 1 and 2, failing to register as a sex offender, deprivation of parental rights, and terroristic threats.

On March 8, 2007, the state notified Michuda that it would seek sentencing under Minn. Stat. § 609.3455, subd. 3a (2006) (establishing mandatory sentence for certain engrained sex-offenders). In October 2007, Michuda pleaded guilty as charged. His rule 15 plea petition, offered at the time of his plea, reflected that there was "no agreement"

between Michuda and the prosecutor as to sentencing and that he waived his right to a jury determination of aggravating sentencing factors. The district court accepted Michuda's pleas and scheduled an evidentiary hearing for consideration of the state's proposal to sentence Michuda as an engrained sex offender under Minn. Stat. § 609.3455, subd. 3a. Following the evidentiary hearing, the court found that the state had proved that Michuda qualified for sentencing as an engrained sex offender. The court sentenced Michuda and, as is required by Minn. Stat. § 609.3455, sub. 7 (2006), imposed a lifetime period of conditional release after service of prison time.

On appeal, Michuda argues that the district court imposed a lifetime of conditional release in violation of his "agreement" with the state and therefore asks this court to permit him to either withdraw his pleas of guilty or to "correct" his sentence. He also argues that the record provides an insufficient factual basis to support his plea of guilty to the terroristic-threats charge, and therefore his conviction for that offense should be reversed. In his pro se supplemental brief, Michuda makes several other arguments.

D E C I S I O N

Alleged Violation of Plea Agreement

Michuda argues that he should be allowed to withdraw his plea because the district court imposed a lifetime of conditional release in violation of his alleged agreement with the state. Interpretation and enforcement of plea agreements involve issues of law that we review de novo. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000).

The rules of criminal procedure permit a defendant to withdraw a plea of guilty at any time, even after sentencing, if "withdrawal is necessary to correct a manifest

injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if the plea is not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). When a prosecutor's unqualified promise goes unfulfilled, a defendant's plea is rendered involuntary and a manifest injustice results. *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998). Because the record reflects that Michuda did not enter into a plea agreement with the state and because the district court properly sentenced him under Minn. Stat. § 609.3455, subd. 7 (2006), Michuda's argument is without merit.

Michuda points to his plea petition as evidence of the state's alleged "promise" of a ten-year, rather than a lifetime, conditional-release term. The petition does recite that "[i]n this case, the period of conditional release is 10 years." However, immediately following this language is a notation that states, "my attorney and the prosecuting attorney agreed that if I entered a plea of guilty, the prosecutor will do the following: straight plea to complaint—no agreement as to sentence. PSI & Psycho-Sexual Evaluation ordered. Defendant waives right to jury determination of *Blakely v. Washington* sentencing issues." Michuda was also aware that the state was seeking an aggravated sentencing departure in his case. The transcript from the plea hearing reflects at least two instances that Michuda's counsel stated "[t]here is no agreement as to sentence," and "Mr. Michuda understands that there is no agreement as to sentence."

Thus, the record does not support Michuda's claim that he had a sentencing agreement with the state. He could not have reasonably understood "no agreement as to sentence," to be a promise by the prosecutor of a ten-year conditional-release term. *See Brown*, 606 N.W.2d at 674 (stating that courts look to "what the parties to [the] plea

bargain reasonably understood to be the terms of the agreement") (quoting *United States v. Reed*, 778 F.2d 1437, 1441 (9th Cir. 1985)). The caselaw cited by Michuda regarding a prosecutor's broken promises is therefore inapplicable and does not provide a proper basis for Michuda to withdraw his plea.

The district court properly sentenced Michuda, and after finding that Michuda fit the statutory criteria for an engrained sex offender, the district court was required to impose the lifetime-conditional-release term mandated by Minn. Stat. § 609.3455, subd. 7; *see State v. Rhodes*, 675 N.W.2d 323, 326-27 (Minn. 2004) (recognizing mandatory nature of lifetime-conditional-release requirement under statute). Because there was no agreement as to sentence, the court's imposition of lifetime conditional release did not violate Michuda's right to be sentenced consistently with a plea agreement.

Although there was no plea-agreement violation here, and even though we conclude that Michuda understood that there was no agreement of any sort regarding the sentence to be imposed, the potential for confusion was created when counsel added to the plea petition a reference to a ten-year conditional-release term. This reference precipitated this appeal, at least in part. It is a critical attribute of skillful advocacy that both the prosecutor and defense counsel ensure scrupulous accuracy when an accused enters a plea of guilty. Had counsel explained to Michuda on the record that the sentence would necessarily carry a lifetime conditional-release term, perhaps this entire appeal could have been obviated.

Factual Basis

Next, Michuda contends that his plea of guilty to the terroristic-threats charge lacked an adequate factual basis. That charge stemmed from his children's report to law enforcement that he threatened to kill their mother if they told police that he was with Victim 1. "A guilty plea may not be accepted unless there exists a factual basis for concluding that the defendant actually committed an offense at least as serious as that to which he is pleading guilty." *State v. Misquadace*, 629 N.W.2d 487, 491 (Minn. App. 2001), *aff'd*, 644 N.W.2d 65 (Minn. May 9, 2002). The district court is responsible for ensuring that a sufficient factual basis has been established in the record for a plea of guilty. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Although the factual basis laid for Michuda's terroristic-threats charge is less explicit than preferable, it is adequate when viewed in the entire context of the record.

The state must establish three elements to support a conviction of terroristic threats: (1) that the accused made threats, (2) to commit a crime of violence, (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another. Minn. Stat. § 609.713, subd. 1 (2006); *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). Michuda claims that the factual basis for the terroristic-threats charge was insufficient because he never "actually acknowledge[d] having made any of the alleged statements" at the plea hearing, and instead merely acknowledged what the state's evidence would show if he went to trial.

At the plea hearing, Michuda and his counsel engaged in the following exchange with regard to the terroristic-threats charge:

Q. And finally, going on to count 5, the terroristic threats, you understand that the complaint and the reports in this case allege that when you made—with you [sic] left that residence in Dakota County with who is referred to as Victim Number 1, there were other individuals that were present in the home at the time?
A. Yes.
Q. And you understand that they reported to law enforcement that you had made threats to harm their—to harm their mother if—if they told what was happening with you and Victim Number 1 regarding leaving that day?
A. Yes.
Q. And you understand that those threats had the potential of causing terror in those recipients of those threats?
A. Yes.
Q. And they were frightened for the safety of their mother as a result of those threats that were made?
A. Yes.
Q. You understand that that constitutes the offense of terroristic threats?
A. Yes.
Q. Is that why you are pleading guilty to that offense as well?
A. Yes.

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). The factual basis found in a plea petition and colloquy may be supplemented by a summary of the evidence, such as is provided in the complaint. *See State v. Hoaglund,* 307 Minn. 322, 326-27, 240 N.W.2d 4, 6 (1976) (indicating that sworn complaint, transcript of proceedings, and presentence investigation may be reviewed to establish factual basis for plea). Despite the fact that Michuda's admissions

at the time of his plea were awkwardly elicited, the record as a whole provides an adequate factual basis for his plea to terroristic threats.

Contrary to Michuda's claim, he did more than merely acknowledge the state's evidence in his plea colloquy. He agreed that his children "were frightened for the safety of their mother as a result of those threats that were made." Michuda's agreement with his counsel's statement that threats "were made" is an admission that Michuda, indeed, *made* the threats. Further, any lack of specificity regarding the nature of Michuda's threat is clarified in the complaint. Michuda acknowledged at his plea hearing that he and his attorney had discussed the complaint, which reflects that Michuda allegedly told his children "that if the police were called about him leaving and he got in trouble, that he would kill their mother." Michuda's admissions at the plea hearing, together with the complaint, establish that Michuda (1) made threats, (2) to kill his children's mother, (3) with the purpose of terrorizing his children or with reckless disregard of the risk of terrorizing his children.

Michuda compares his case with *Shorter v. State*, 511 N.W.2d 743 (Minn. 1994), and argues that his attorney's use of leading questions invalidates his plea. In *Shorter*, the supreme court found it "troubling that the [district] court did not conduct any questioning of the defendant, particularly after the defense attorney merely asked leading questions requiring only that the defendant acknowledge the state's evidence as to key elements of the crime." 511 N.W.2d at 747. But in holding that withdrawal of a defendant's plea of guilty was necessary under "the highly unusual facts of this case," the supreme court made clear that it had considered "many factors in reaching this

conclusion," including the fact that the Minneapolis Police Department had reopened an investigation into the alleged crime and that Shorter did not have access to some important discovery. *Id.* at 746-47. *Shorter* did not hold that a plea was invalid as a matter of law when leading questions are used.

Here, as in *Shorter*, it would have been preferable for counsel to elicit clear, direct, concrete, affirmative admissions from Michuda as to each essential element of the charge. Furthermore, all admissions should be the product of a nonleading inquiry. The use of extensive leading questions can, depending on all circumstances, jeopardize the voluntariness of a plea of guilty. Such questions should be used sparingly and only to advance or clarify the inquiry; they should not be the sole or principal instrument for obtaining essential admissions.

Pro Se Arguments

Pro se, Michuda raises a number of arguments, but primarily asserts that his counsel was ineffective and that his previous conviction for criminal sexual conduct should be reopened.

To establish ineffective assistance of counsel, Michuda "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Michuda has not met his burden. The record reflects that Michuda was apprised of his rights, and when the prosecutor asked Michuda at the plea

hearing if he was satisfied with his representation, Michuda answered in the affirmative. Similarly, there is no indication that Michuda's appellate counsel "refused" to represent him on appeal. When an appellant and counsel disagree, appellate counsel "has no duty to include claims which would detract from other more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) (citation omitted).

Michuda also requests that we review his 1994 conviction for criminal sexual conduct in the interest of justice. However, that conviction is not currently on appeal, and the time for appeal from that conviction (both as of right and discretionary) has expired. Minn. R. Crim. P. 28.02, subds. 1-3. Absent unique circumstances that are not present here, a criminal defendant's conviction is presumptively valid. *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988).

We have reviewed the remainder of Michuda's claims, none of which merit discussion and all of which are without basis in the law.

Affirmed.