STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1917

Joshua Matthew McMillen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 5, 2010
Affirmed
Halbrooks, Judge

Crow Wing County District Court
File No. 18-K7-06-1700

Jacob T. Erickson, Cynthia Vermeulen, Vermeulen Law Office, P.A., 26 North 7th Avenue, St. Cloud, MN 56303 (for appellant)

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

Donald F. Ryan, Crow Wing County Attorney, 213 Laurel Street, Suite 31, Brainerd, MN 56401 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion to withdraw his guilty plea, arguing that his plea was not accurate or intelligent. Appellant also contends that his sentence is unlawful because the Crow Wing County Attorney's Office should have been disqualified from prosecuting his case after his first public defender began working in that office and that he received ineffective assistance of counsel. Because we conclude that appellant's guilty plea was accurate and intelligent and because the Crow Wing County Attorney's Office was not disqualified from prosecuting appellant's case, we affirm. But because appellant's ineffective-assistance-of-counsel claim is not factually developed in the record, we decline to address this argument, reserving the claim for appellant if he chooses to raise it in a postconviction proceeding.

FACTS

Appellant Joshua Matthew McMillen was charged in Crow Wing County with third-degree criminal sexual conduct after admitting to his probation officer that he had engaged in sexual penetration with a juvenile female. The district court appointed a public defender for appellant, and appellant subsequently entered a guilty plea to the charged offense. During the plea hearing, appellant's counsel stated that appellant agreed to "abide by all predatory offender registration requirements . . . as required by Minnesota statute." Appellant further acknowledged on the record that he (1) understood the terms of the agreement, (2) had sufficient time to discuss his case with his attorney, (3) was satisfied with his representation, (4) had thoroughly read the petition to enter a

guilty plea, (5) had the opportunity to ask questions, and (6) wished to proceed with the plea. Attached to appellant's plea petition was a settlement offer. One of the agreed-to provisions stated that appellant would "[a]bide by all predatory offender registration requirements, which is required by Minnesota Statutes, § 243.166, subd. 1b." Appellant stated on the record that he had reviewed this document before pleading guilty. The district court then accepted appellant's guilty plea.

Following the plea hearing, appellant's attorney left the public defender's office and became an assistant county attorney for Crow Wing County. Appellant was then appointed a second public defender to represent him for sentencing. Appellant was sentenced on April 18, 2008, and the terms of his sentence included compliance with all predatory-offender-registration requirements. Because this was appellant's second offense for criminal-sexual conduct, he was subject to a lifetime registration requirement pursuant to Minn. Stat. § 243.166, subd. 6(d)(1) (Supp. 2005).

Two months later, appellant moved to withdraw his guilty plea on the ground that his plea was not intelligent or voluntary. Appellant argued to the district court that he did not understand at the time of his guilty plea that he would be required to register as a predatory offender throughout his lifetime. Appellant alleged that his public defender told him that he would be required to register for only ten years. He stated that had he been informed of this lifetime requirement, he would not have pleaded guilty. To support these claims, appellant submitted an affidavit that stated: "Before I pled guilty, my attorney told me that I would only have to continue with my current sex offender registration. It was my understanding that I would only have to register for ten years.

My attorney never told me that I would be subject to lifetime registration." Appellant also argued that his sentence was unlawful because the Crow Wing County Attorney's Office should have been disqualified from prosecuting his case after his first public defender became an assistant county attorney.

The district court denied appellant's motion to withdraw his guilty plea. The district court found that appellant was informed of his obligation to comply with all predatory-offender-registration requirements. The district court further concluded that even if appellant was not aware of his lifetime-registration obligation, his argument failed because registration is a collateral consequence of pleading guilty. The district court did not address appellant's disqualification argument but denied his motion in total. This appeal follows.

D E C I S I O N

I.

We first address appellant's argument that the district court abused its discretion by denying his motion to withdraw his guilty plea. "A criminal defendant has the burden of establishing facts warranting the reopening of his case." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). While the right to withdraw a guilty plea is not absolute, *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002), the district court may allow a defendant to withdraw a plea after sentencing if the motion is timely and withdrawal is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if a plea is not accurate, voluntary, or intelligent. *Kaiser*, 641 N.W.2d at 903. A reviewing court will reverse the district court's determination of whether to permit

withdrawal of a guilty plea only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

A. Accurate

Appellant contends that his plea was not accurate. Although appellant did not raise this issue in his motion to the district court, we will consider this claim in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 ("The court may review any other matter as the interests of justice may require."). To be accurate, a plea must be supported by an adequate factual basis, which ensures that the defendant does not plead guilty to a more serious charge than he could be convicted of at trial. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The factual-basis requirement is satisfied if the record contains a showing that credible evidence is available that would support a guilty verdict for a crime at least as serious as that to which the defendant pleaded guilty. *State v. Genereux*, 272 N.W.2d 33, 34 (Minn. 1978).

Appellant's argument is primarily based on a discrepancy between the charging portion of his complaint and the facts that he admitted during his guilty plea. But "[a]n error or omission in a complaint is not reversible error if the defendant understood the charges and did not request a substitute complaint." *State v. Romine*, 757 N.W.2d 884, 889 n.1 (Minn. App. 2008) (citing *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985)). Furthermore, "[t]he 'trial, judgment or other proceedings' based on a criminal complaint shall not be 'affected by reason of a defect or imperfection in matters of form which does not tend to prejudice the substantial rights of the defendant.'" *Id.* (quoting Minn. R. Crim. P. 17.06, subd. 1).

The charging portion of appellant's complaint states 2003 as the year of appellant's offense, while the probable-cause portion of the complaint recites 2005. But appellant's judgment of conviction and the transcripts of his plea hearing and sentencing hearing all refer to 2005 as the year in which appellant's offense occurred. And based on appellant's own admissions and his criminal charge,[1] it is clear that the correct year is 2005. Therefore, we do not accept appellant's assertion that his offense actually occurred in 2003. At no time prior to this appeal did appellant raise any challenge to the year stated in the charging portion of his complaint and this defect cannot now be the basis for withdrawing a guilty plea. The entire record, with this one exception, indicates that appellant's offense took place in 2005. Because there is no showing that this typographical error prejudiced appellant, he is not permitted to withdraw his guilty plea on this basis.

In a related argument, appellant contends that the apparent confusion with regard to the month in which he committed the offense permits him to withdraw his plea. During the plea hearing, appellant admitted to sexual penetration of the victim in the month of December. Appellant's plea petition also states December. But his criminal judgment and warrant of commitment state the month of November, and the complaint states that the offense occurred in August. Where a date is not a material element of a crime, an inaccurate date does not automatically invalidate an otherwise valid guilty plea. *See State v. Fraser*, 277 Minn. 421, 421-23, 152 N.W.2d 731, 731-32 (1967) (holding

[1] Had appellant's offense occurred in 2003, he would likely have been charged with a different offense because the victim would have been less than 12 years old at that time, and appellant would have been a juvenile.

that the defendant was not entitled to a new trial on the ground that the offense could not have occurred on the alleged date). The precise date is a material factor of the crime "only where the act done is unlawful during certain seasons, on certain days or at certain hours of the day." *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984).

Appellant was charged with third-degree criminal sexual conduct, defined as "engag[ing] in sexual penetration with another person . . . [if] the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant." Minn. Stat. § 609.344, subd. 1(b) (2004). Whether appellant's offense occurred in August, November, or December has no bearing on the charges applicable to appellant's conduct. Furthermore, these different months do not correspond to different instances of conduct or different charges that could have confused appellant during his guilty plea. *Cf. Bolinger v. State*, 647 N.W.2d 16, 21-22 (Minn. App. 2002) (holding that the appellant's guilty plea was not accurate because he was questioned about an entirely different incident to establish the factual basis for the plea). Therefore, the fact that appellant pleaded to an act of misconduct occurring in December as opposed to August or November as recited elsewhere in the record does not demonstrate an inaccuracy of the factual basis sufficient to permit appellant to withdraw his plea.

Finally, the facts admitted by appellant establish a sufficient factual basis to support the charge that he pleaded guilty to. The elements of third-degree criminal sexual conduct are: (1) sexual penetration, (2) a victim who was at least 13 years old but had not reached her 16th birthday at the time of the act, and (3) a defendant who was more than 24 months older than the victim at the time of the act. Minn. Stat. § 609.344,

subd. 1(b); *see also* 10 *Minnesota Practice*, CRIMJIG 12.25 (2006). Appellant admitted that he sexually penetrated the victim named in his complaint. He admitted that he was more than 24 months older than the victim and that the victim was at least 13 years of age at the time of the act. And while appellant did not specifically admit that the victim was under age 16 at the relevant time, the victim's birthday was recited in the complaint, and she was younger than 16 at the time of the act. Thus, credible evidence was available to prove that she was younger than 16 years of age when the offense occurred. Therefore, we conclude that appellant's guilty plea was accurate.

B. Intelligent

Appellant further argues that his guilty plea was not intelligent because he did not understand that lifetime predatory-offender registration was a consequence of his plea. "The purpose of the requirement that the plea be intelligent is to [e]nsure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). But the defendant need only be aware of the direct consequences of a plea for it to be intelligent. *See Alanis*, 583 N.W.2d at 578. "[D]irect consequences are those which flow definitely, immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine." *Id.* "[I]gnorance of a collateral consequence does not entitle a criminal defendant to withdraw a guilty plea." *Id.*

The supreme court held in *Kaiser* that predatory-offender registration is a collateral consequence of a plea. 641 N.W.2d at 907. "Consequences flowing from the

plea that are not punishment serve a substantially different purpose than those that serve to punish, as they are civil and regulatory in nature and are imposed in the interest of public safety." *Id.* at 905. The Minnesota Supreme Court has held that the statute is civil and regulatory, and "seeks to increase public safety by requiring a specific class of offenders to provide information to law enforcement authorities to assist in keeping track of them." *Id.* at 905-06. Because predatory-offender registration is a collateral consequence of a plea, the supreme court held that "[f]ailure to advise [an] appellant of the registration requirement does not make the plea unintelligent, and does not constitute a manifest injustice that mandates the withdrawal of his plea." *Id.* at 907.

Appellant alleges that his attorney misinformed him about the length of his predatory-offender-registration requirement. But the record does not demonstrate that appellant's attorney affirmatively told him that he was required to register for ten years. The only evidence in support of appellant's assertion is his own affidavit, where appellant states, "[M]y attorney told me that I would only have to continue with my current sex offender registration. *It was my understanding* that I would only have to register for ten years. My attorney never told me that I would be subject to lifetime registration." (Emphasis added.) Appellant's affidavit only demonstrates that he misunderstood the nature of his requirement. It does not demonstrate that appellant's attorney told him that he would only have to register for ten years. As the district court stated in its order, the fact that appellant was not fully aware of the duration of his predatory-offender registration does not make his plea unintelligent. *See id.* Because appellant's guilty plea

was both accurate and intelligent, we conclude that the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea.

II.

We next address appellant's argument that his sentence is unlawful because the Crow Wing County Attorney's Office should have been disqualified from his case. Appellant contends that the Minnesota Rules of Professional Conduct impute his former attorney's conflict to the entire office, reasoning that the county attorney's office is a law firm under Minn. R. Prof. Conduct 1.10. We are not persuaded that the offices of the county attorneys are law firms as understood in the rules. *See Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987) (holding that a government legal department is not a "firm" under rule 1.10); Minn. R. Prof. Conduct 1.0(d) (defining a law firm as "lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization"). Instead, these offices are more appropriately considered government agencies, and its employees and officers are subject to Minn. R. Prof. Conduct 1.11.

Under Minn. R. Prof. Conduct 1.11(d)(2)(i), "a lawyer currently serving as a public officer or employee . . . shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment." Under rule 1.11(d), a government lawyer's conflicts are not imputed to other lawyers in that government agency. *See McLaren*, 402 N.W.2d at 543; Minn. R. Prof. Conduct 1.10 cmt. "Because of the special problems raised by imputation within a

government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." Minn. R. Prof. Conduct 1.11 cmt.; *see also McLaren*, 402 N.W.2d 543 (discussing the differences between a government attorney and an attorney representing private clients).

After appellant's plea hearing, appellant's first attorney left the public defender's office to work in the county attorney's office. Appellant's first attorney could not work on his case while at the county attorney's office due to the conflict of interest, but this conflict is not imputed to the entire Crow Wing County Attorney's Office as a government agency under rule 1.11. Appellant does not allege that his former attorney shared confidential information with the county attorney prosecuting his case, and any allegation that his first counsel had divided loyalties during the representation is more appropriately considered in an ineffective-assistance-of-counsel claim.

III.

Finally, appellant argues three instances of ineffective assistance of counsel in the stages leading up to his sentencing. Appellant did not raise these claims in the district court, and we decline to address them on this appeal. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (stating that an ineffective-assistance-of-counsel claim is better raised in a postconviction proceeding where an appellant has the opportunity to present additional facts to support the claim). The record does not contain sufficient facts about his counsel's performance, including communications between appellant and his counsel, to permit adequate review. Because the record is not sufficiently developed to review

this claim, we reserve appellant's claim for a postconviction proceeding should he choose to pursue it.

Affirmed.