STATE OF MINNESOTA
IN COURT OF APPEALS
A09-424

State of Minnesota,
Respondent,

vs.

Tony Collins,
Appellant.

Filed January 26, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File Nos. 27CR0824846; 27CR085566

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

STONEBURNER, Judge

Appellant challenges the district court's denial of his presentence motion to withdraw his guilty pleas. Because the district court did not err in concluding that the pleas were valid and did not abuse its discretion by denying the motion, we affirm.

FACTS

In February 2008, appellant Tony Collins was charged with failure to register as a predatory offender for not updating his address with the proper authorities. A public defender was appointed to represent him, and he was released on a bond with conditions.

In May 2008, Collins was charged with second-degree assault and terroristic threats. His conditional release in the failure-to-register case was revoked. Bail was set in the assault-and-terroristic-threats case and increased in the failure-to-register case. Collins was not able to post bail.

The public defender who represented Collins on the failure-to-register charge was appointed to represent him on the assault-and-terroristic-threats charge. Further proceedings on both cases were scheduled together before the same district court judge. The record is not clear, but it appears that, for all practical purposes, the cases were consolidated and were to be tried together.

In June 2008, Collins's attorney filed an extensively briefed motion to dismiss the failure-to-register charge on constitutional grounds. For reasons not reflected in the record, no hearing occurred, and the district court never ruled on this motion.

At an August 2008 pretrial hearing, Collins informed the district court that he no longer wanted his attorney to represent him. The district court responded that the attorney would continue to represent him until Collins hired private counsel. Collins then stated that he wanted to represent himself. The district court acknowledged Collins's right to represent himself, told Collins that he would be held to the same standard as an attorney, and appointed, as standby counsel, the public defender who had been representing Collins. Collins neither signed a written waiver of counsel nor formally waived his right to counsel orally on the record. The district court failed to advise Collins as required by Minn. R. Crim. P. 5.02, subd. 1(4), before allowing Collins to represent himself.

On the day that trial was to begin, the district court required the state to make a plea offer to Collins. The district court described how the trial would proceed and asked Collins if he understood. Collins replied, "[n]ot really . . . I heard what you said we're going to do but I don't understand this procedure at all. … I wouldn't know how to . . . I mean what I'm going to say to a juror . . . I wouldn't know how to do it."

The prosecutor, based on her understanding that Collins's criminal-history score was 4, offered that if Collins pleaded guilty to second-degree assault and accepted the presumptive sentence of 45 months, the terroristic-threats charge and failure-to-register charge would be dismissed. Alternatively, if he pleaded guilty to both assault and failure to register, the prosecutor would dismiss the terroristic-threats charge and agree to a sentence of 30 months. Collins said he would "take that deal" and engaged in a colloquy

with the district court about the length of time he would serve in prison and the length of his conditional release under the plea agreement.

Collins then asked if he could be released before sentencing to take care of personal business. The district court agreed to release Collins with a warning that if he failed to come to the scheduled sentencing hearing or was charged with an additional crime while on release, the sentence would be 45 months rather than 30 months. Collins said he understood and stated that he was freely and voluntarily entering guilty pleas. Collins accepted assistance from his standby public defender in completing the plea petition.

After the written plea petition was completed, the prosecutor repeated the plea agreement on the record and Collins agreed that standby counsel had gone through the written petition with him and had answered all of his questions. Collins stated that he wanted to proceed with the plea. He requested that the district court reappoint the public defender to represent him for the plea and sentencing. Collins offered the following factual basis for his plea:

> DEFENSE COUNSEL: Mr. Collins, taking you back to around January 31st of this year. You were living at 2503 Irving Avenue, is that correct?
> COLLINS: No. 3614.
> DEFENSE COUNSEL: Irving?
> COLLINS: Fremont.
> DEFENSE COUNSEL: Fremont. Okay. And back in 2004, I believe you were ordered to register as a predatory offender, correct?
> COLLINS: Yes.
> DEFENSE COUNSEL: And the last address that you had registered was 1010 Currie, is that correct?
> COLLINS: Yes.

> DEFENSE COUNSEL: And you had not registered this Fremont address, is that correct?
> COLLINS: Excuse me, Your Honor, it was that address that I didn't register. I'm sorry.
> DEFENSE COUNSEL: Okay. So you were living at the Irving address?
> COLLINS: Yes.
> DEFENSE COUNSEL: And you had not registered - -
> COLLINS: Yes.
> DEFENSE COUNSEL: - - that as your primary address, is that correct?
> COLLINS: Exactly.
> DEFENSE COUNSEL: And then taking you to May 17 of this year, you were in the city of Minneapolis, correct?
> COLLINS: Yes.
> DEFENSE COUNSEL: And you agree that's Hennepin County, Minnesota?
> COLLINS: Yes.
> DEFENSE COUNSEL: And you were at your house with two other people, correct, two that live in that house?
> COLLINS: Yes.
> DEFENSE COUNSEL: And at some point there was an argument that began, correct?
> COLLINS: Yes.
> DEFENSE COUNSEL: And during that argument you put a knife to one of the other residents, is that correct?
> COLLINS: Yes.

Neither the prosecutor nor the district court asked additional questions about the factual basis for the pleas. The pleas were accepted by the district court, and sentencing was scheduled for October 28, 2008. Collins failed to appear at the sentencing hearing, and a bench warrant was issued for his arrest.

Collins was apprehended, and the sentencing hearing took place on December 8, 2008. Before he was sentenced, Collins moved to withdraw his plea and requested an evidentiary hearing, asserting that, at the time of the plea, the state had withheld information that one of the witnesses against Collins was refusing to testify at trial.

Collins stated that he "was informed" of this information while he was released pending sentencing. The prosecutor denied knowledge of problems with any of the state's witnesses.

The district court denied Collins's request, and found that his guilty pleas were "entered into freely and voluntarily and with full knowledge of [his] rights." The district court imposed a sentence for the second-degree assault charge and a concurrent sentence for the failure-to-register charge. The district court dismissed the terroristic-threats charge. This appeal followed.

D E C I S I O N

Minn. R. Crim. P. 15.05, subd. 2, provides that the district court may, in its discretion, allow a defendant to withdraw a guilty plea at any time before sentencing "if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea." A defendant seeking to withdraw his plea prior to sentencing bears the burden of showing that withdrawal is fair and just. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). This court will reverse the district court's decision on plea withdrawal only if the record shows an abuse of the district court's discretion. *Black v. State*, 725 N.W.2d 772, 775 (Minn. App. 2007).

I. Collins's waiver of counsel was valid.

On appeal, Collins argues for the first time that the district court abused its discretion by denying his motion to withdraw his plea because he never validly waived

his constitutional right to counsel.[1] Minn. R. Crim. P. 5.02, subd. 1(4), requires the district court to "ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record" or, if the defendant refuses to sign a written waiver, to make an oral record of the waiver. The rule further provides that prior to accepting a waiver of counsel, "the trial court shall advise the defendant of" specific factors set out in the rule "and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel."

It is undisputed that the district court in this case did not follow the mandates of the rule. Collins's waiver of counsel was accepted with the sole admonition that he would be held to the same standards as an attorney. But case law establishes that failure to follow the rule does not necessarily invalidate a waiver of counsel. *See State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) (holding that district court did not err in finding that waiver of counsel was valid when the defendant was given counsel but fired the attorney who was then appointed as standby counsel); *see also Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002) (citing *Brodie* and affirming validity of a waiver of the constitutional right to counsel when, like Brodie, the defendant was given a public defender and then released that public defender, knowing she would be expected to

[1]The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to counsel and, reciprocally, the right of self-representation. *See* U.S. Const. amend. VI; amend XIV, § 1; *see also* Minn. Const. art. I, §§ 6, 7; *Faretta v. California*, 422 U.S. 806, 807, 818–19, 95 S. Ct. 2525, 2532–33 (1975); *Gideon v. Wainwright*, 372 U.S. 335, 343–45, 83 S. Ct. 792, 796–97 (1963).

represent herself if she failed to hire private counsel).[2] Whether a waiver of the constitutional right to counsel is valid depends on "the particular facts and circumstances surrounding [a] case, including the background, experience, and conduct of the accused." *Finne*, 648 N.W.2d at 736 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938), *overruled on other grounds*, *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981)).

In this case, the record reflects that: (1) Collins has extensive experience with the criminal-justice system; (2) the district court appointed counsel to represent him in both the failure-to-register and the assault-and-terroristic-threats matters; (3) Collins, without explanation to the district court, after having been represented by counsel for more than six months, rejected representation and asserted his right to represent himself; and (4) the district court appointed standby counsel. Under these circumstances, we conclude that Collins's waiver of counsel was valid, and we find no merit in Collins's claim that he is entitled to withdraw his guilty plea based on invalid waiver of the right to counsel. And

[2] Although *Brodie* predates the 1999 amendment to Minn. R. Crim. P. 5.02, subd. 1(4), that added the relevant prerequisites to acceptance of a waiver of counsel, the supreme court indicated in a subsequent case that, in the context of a criminal case, a defendant's waiver of his constitutional right to counsel could be held valid even when the district court fails to follow a particular procedure. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 724 (Minn. 2000) (citing *Brodie*, 552 N.W.2d at 557). In *State v. Garibaldi*, 726 N.W.2d 823 (Minn. App. 2007), relied on by Collins in this case, the conclusion that Garibaldi did not validly waive his right to counsel was based only in part on the district court's failure to follow the mandates of the criminal rule. *See id*. at 830 (noting that the defendant was not offered the benefit of standby counsel, and that the defendant did not fire his attorney but rather indicated that he "couldn't afford" his attorney who was "supposed to show up" at his hearing).

Collins was represented by counsel at the time that he entered his plea, making his claim of invalid waiver of counsel irrelevant to the plea proceedings.

II. The district court did not abuse its discretion by denying Collins's motion to withdraw his guilty pleas.

Collins argues that the district court abused its discretion by denying his request to withdraw his guilty pleas because he demonstrated that granting the request would have been fair and just. We disagree. Collins based his request primarily on his assertion that, at the time he entered his pleas, the state knew, but failed to disclose, that one of its witnesses would not testify against Collins. Collins asserted that he "was informed" of this information during his release. Collins did not give any information about what impact the lack of this person's testimony would have on the state's case against him. The person to whom Collins referred does not have the initials of the victim or witness named in the assault complaint. Although Collins requested an evidentiary hearing, he did not indicate what the purpose of the hearing would be.

The state did not argue that it would be prejudiced by a plea withdrawal. But the prosecutor denied any knowledge of problems with the state's witnesses, negating the reason Collins asserted for withdrawing his plea. When considering a motion to withdraw a guilty plea, a district court has the discretion to deny a defendant's request for an evidentiary hearing if it is unnecessary. *Saliterman v. State*, 443 N.W.2d 841, 843 (Minn. App. 1989), *review denied* (Minn. Oct. 13, 1989). On this record, we cannot conclude that the district court abused its discretion by failing to hold an evidentiary

hearing on Collins's assertion of hearsay that a witness for the prosecution had told the prosecutor's investigator that he would not testify at trial.[3]

Collins faults the district court for failing to make any findings on Collins's proffered reasons for requesting plea withdrawal or any findings regarding prejudice to the state and implies that the district court may have applied the wrong standard in evaluating his motion. But nothing in the record suggests that the district court applied the wrong standard. Collins does not cite authority requiring specific findings, and the record does not support Collins's claim that he established that it would be fair and just to allow him to withdraw his pleas.

Collins also asserts that the factual bases for his pleas were inadequate and that he is therefore entitled to withdraw the pleas. To be valid, a guilty plea must be intelligent, voluntary, and accurate. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). To be "accurate," a plea must be supported by "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Kelsey v. State*, 214 N.W.2d 236, 237 (Minn. 1974).

It is the district court's responsibility to ensure that an adequate factual basis has been established on the record. *Ecker*, 524 N.W.2d at 716. If a factual basis is found to be lacking, the defendant is entitled to have the guilty plea set aside. *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988). The supreme court has criticized the practice of

[3] At the time of his motion to withdraw his pleas, Collins merely asserted that he had been "informed" that the witness would not testify for the state. On the record, Collins denied that he was in contact with any of the state's witnesses. But in his pro se supplemental brief on appeal, Collins asserts that "James Smith personally told me that he told the [prosecutor's investigator] that he was not going to testify."

establishing a factual basis for a plea solely through leading questions of counsel, but has not held the practice to be per se reversible error. *See Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994) (stating that in *State v. Hoaglund*, 307 Minn. 322, 326, 240 N.W.2d 4, 6 (1976), the supreme court expressed the hope that district court would itself ask open-ended questions regarding the factual basis for a plea to avoid the "inclination of counsel to elicit those facts through leading questions").

In this case, the factual bases for Collins's pleas were established through leading questions by defense counsel. At the time of his motion to withdraw his pleas, the only claim Collins made to the district court regarding the adequacy of the factual bases was that the state failed to establish in the assault case that he possessed any weapons. But the record contains Collins's admission that he "put a knife to" another person "during [an] argument," sufficiently establishing the weapon-possession element of the charge. And Collins's written plea petition confirms that he understood all charges against him; that he had received, read, and discussed the complaints with his attorney, and that he makes no claim that he is innocent. Collins signed each page of the plea petition.

Beyond his challenge to the use of leading questions to establish the factual bases for the pleas, Collins has not briefed any specific deficiencies in the factual bases. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Although we do not approve the manner in which the factual bases for Collins's pleas were established, under the circumstances of this case, we conclude that Collins has failed to demonstrate that the factual bases were so lacking that withdrawal of the pleas is necessary. Collins equates his situation to that

of the defendant in *Shorter*. But Shorter was permitted to withdraw his guilty plea for a number of reasons, only one of which was the manner in which the factual basis was elicited. *Id*. at 747 (stating that "[g]iven the number of procedural irregularities present in this matter, we are prepared to exercise our supervisory powers" to permit Shorter to withdraw his plea).

III. Collins's pro se arguments are without merit.

In his pro se appellate brief, Collins claims that he was not provided with a witness list by the state and that his counsel's representation was ineffective. Because Collins did not raise the discovery issue in the district court, it is waived on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Collins fired his attorney at a pretrial hearing and represented himself until counsel was reappointed for entry of his guilty pleas. Collins's complaints about representation do not encompass any actions of counsel in connection with the plea he now seeks to withdraw, and his complaints of inadequate representation by appointed counsel before entry of the plea are without merit because he was representing himself.

Affirmed.