STATE OF MINNESOTA
IN COURT OF APPEALS
A10-170

Joel Vaquero Moctezuma, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 17, 2010
Reversed and remanded
Collins, Judge[*]

Hennepin County District Court
File No. 27-CR-06-072581

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

O P I N I O N

COLLINS, Judge

Contending his plea was not voluntary or intelligent, appellant Joel Vaquero Moctezuma challenges the district court's denial of his postconviction petition seeking to withdraw his guilty plea to first-degree controlled substance crime. Because we conclude that the record is inadequate to support a finding that the plea was voluntary or intelligent, we reverse and remand.

FACTS

Appellant was charged with first-degree controlled substance crime, Minn. Stat. § 152.021, subd. 2(1) (2006), for possession of more than 25 grams of cocaine. He appeared in district court on February 5, 2008, for the purpose of entering a guilty plea. Appellant was represented by an attorney, and a Spanish-language interpreter translated for him. There was no plea agreement, and appellant's attorney noted that there was a time constraint with the interpreter and that there had not yet been an opportunity to go over a plea petition with appellant. The district court granted the attorney's request to review appellant's rights on the record, enter the plea, and then return with a completed plea petition at sentencing.

Appellant entered a plea of guilty to the first-degree controlled substance crime and his attorney inquired as to appellant's rights:

> [Attorney]: Mr. Moctezuma, you understand that by pleading guilty you are giving up your right to have a jury trial?
>
> Appellant: Yes.

[Attorney]: And you understand that there are certain rights that go along with that, and I will be going over those [rights] in more detail with you when you come back to court for sentencing, but, basically, they include your right to cross-examine witnesses who testify against you, your right to have a jury consider all the evidence and assume that you are innocent until the end of the case, and then they have to decide whether the State has proven you guilty beyond a reasonable doubt. The State has to prove that you are guilty, we do not have to prove that you are not guilty so we don't have to present any evidence at trial, but we do have the right to bring in witnesses, if there are any, to testify for you.

At trial, you would have to decide whether you wanted to be a witness for yourself. You have the right not to incriminate yourself at trial just as when the police want to talk to you, so the decision would be yours at trial. Do you understand those basic rights?

Appellant: Yes.

[Attorney]: Do you have any questions about them?

Appellant: No.

[Attorney]: And you still wish to go forward with your plea of guilty?

Appellant: Yes.

Appellant then admitted to possessing over 25 grams of cocaine. The district court granted appellant's request to have a few weeks to get his affairs in order before returning for sentencing but warned him to "[k]eep in mind that the sentence could be as high as 86 months in prison," adding that, "I'm inclined at this point to put you on probation, but if you did not come back to court, you would, in all likelihood, go to prison." This was the

first and only reference to the possible consequences of appellant's plea. The district court ordered appellant to return for sentencing on February 20, 2008.

Appellant did not appear for sentencing as scheduled. On October 14, 2008, appellant appeared with his attorney for sentencing. Appellant stated that he did not appear on February 20 because his sister was dying in Chicago and, since that date, he entered chemical dependency treatment on his own initiative in Albert Lea. Without any further inquiry as to appellant's prior understanding of the rights he gave up by pleading guilty and without receipt of a plea petition, the district court sentenced appellant to 54 months' imprisonment. Appellant then stated, "But if I only got six months why am I getting sentenced for 54? That was the deal that we had last time." The district court stated that it did not know anything about a six-month deal, and appellant responded that "[his attorney] was the one who told me. . . . That's why I plead guilty."

Appellant's attorney stated that she informed appellant in February that "if he was on probation, he would do a year in the Workhouse, and with his credit, I think we figured out that it would be six months, more or less, but that was again only if he showed up for sentencing." After reminding appellant of the warning he had been given at the end of the February plea hearing, the district court observed that despite appellant's failure to appear his sentence was less than the presumptive duration under the sentencing guidelines. Appellant subsequently petitioned the district court seeking to withdraw his guilty plea on the grounds that it was not knowing, voluntary, or intelligent. The district court denied relief without a hearing, and this appeal followed.

D E C I S I O N

This court reviews a district court's postconviction decision whether to permit withdrawal of a guilty plea for an abuse of discretion. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). Review of the district court's findings is limited to determining whether there is sufficient evidence in the record to support those findings. *Id.* We review questions of law de novo. *Cuypers v. State*, 711 N.W.2d 100, 103 (Minn. 2006).

A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). But a district court must permit a defendant to withdraw a guilty plea upon a showing that withdrawal is necessary to correct "manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists where a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A plea is invalid if the plea does not comply with requirements that the plea be accurate, voluntary, and intelligent. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). "The purpose of the requirement that the plea be intelligent is to insure 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).

The district court concluded that appellant's plea was accurate, voluntary, and intelligently made notwithstanding that appellant had not been questioned as prescribed under Minn. R. Crim. P. 15.01, subd. 1, before the acceptance of the plea and despite the absence of a plea petition. Appellant argues that the record demonstrates that his plea was not intelligent because (1) his attorney did not have time to review a plea petition with him before entering the plea; (2) he was only asked on the record four questions

about the rights he was waiving; and (3) no plea petition was ever completed despite his attorney's assurance that it would be done prior to sentencing.

Rule 15.01, subd. 1, sets out the questions that a district court, with the assistance of counsel, "must" ask before accepting a guilty plea. The rule requires questions to elicit whether the defendant: understands the crime charged; has had enough time to discuss the case with his attorney; has been fully advised of his rights; admits guilt; understands the plea agreement or lack thereof; is pleading voluntarily; and understands the consequences of conviction. Although the rule states that these questions must be asked of a defendant before accepting a plea of guilty, a district court's failure to do so does not automatically invalidate a plea. *State v. Wiley*, 420 N.W.2d 234, 234 (Minn. App. 1988), *review denied* (Minn. Apr. 26, 1988). If the "record reveals careful interrogation by the trial court and the defendant had full opportunity to consult with his counsel before entering his plea, the court may safely presume that the defendant was adequately informed of his rights." *Hernandez v. State*, 408 N.W.2d 623, 626 (Minn. App. 1987) (citing *State v. Propotnik*, 299 Minn. 56, 58, 216 N.W.2d 637, 638 (1974)). However, a "waiver of constitutional rights will not be presumed from a silent record." *Id*.

In concluding that appellant's plea was valid, the district court relied heavily on *Wiley*, 420 N.W.2d 234, and *State v. Doughman*, 340 N.W.2d 348 (Minn. App. 1983), *review denied* (Minn. Mar. 15, 1984). The district court read *Wiley* to hold that a plea will not be found invalid simply because the requirements of rule 15.01 were not followed precisely. 420 N.W.2d at 234. But Wiley's attorney had discussed the rule 15

plea petition with him for 20 to 30 minutes and affirmed on the record that they reviewed the petition just prior to entering the plea; Wiley stated that he understood the rights that had been explained to him and had had sufficient time to discuss his case with his attorney; and the district court questioned Wiley concerning his understanding of the possible sentences for his charges. *Id*. at 235-36. In determining that Wiley entered a valid plea, we noted those facts and further took into account the fact that Wiley had "extensive exposure to the criminal justice system." *Id*. at 237 (citing *State v. Bryant*, 378 N.W.2d 108, 110 (Minn. App. 1985), *review denied* (Minn. Jan 23, 1986), for the proposition that exposure to the criminal justice system is a factor that may be considered in determining if a guilty plea is knowing and intelligent).

Here, in contrast to *Wiley*, appellant's attorney specifically stated that she had not had time to go over a plea petition with appellant prior to the entry of the guilty plea and, with the court's permission, she would "simply do the rights on the record and do a petition when we come back on the day of sentencing." However, she did not present a plea petition at the time of sentencing, and there is nothing in the record to suggest that a plea petition was ever reviewed with appellant. Further, unlike Wiley, there is nothing in the record to suggest that appellant had previous exposure to the criminal justice system that would have independently informed him of his rights. Although *Wiley* stands for the proposition that a plea will not be found invalid simply because the requirements of rule 15.01 were not followed precisely, we reached that conclusion supported by a record that provided a firm basis to conclude the defendant's plea was valid. 420 N.W.2d at 236-37. Such is not the case here.

In *Doughman* this court held that it is "desirable, but not mandatory, for a trial court to interrogate a defendant and to require the defendant to sign a 'Petition to Plead Guilty' as suggested in the Minnesota Rules of Criminal Procedure before accepting a guilty plea." 340 N.W.2d at 350. There, we noted that there are "other means of building an adequate record on which to evaluate a guilty plea." *Id*. We considered several factors that supported a finding that Doughman's guilty plea was intelligent, including: (1) Doughman had recently entered guilty pleas in two other cases and in each case had signed a plea petition; (2) Doughman had discussed his legal rights and potential options with an attorney before entering his plea; (3) the prosecutor "spelled out the terms of the plea bargain for the record before [Doughman] entered his plea"; and (4) Doughman was questioned substantially although not precisely as required by rule 15.01. *Id*.

Here, however, there is no indication that appellant discussed his rights, the nature of the charge, or the potential consequences of his plea with his attorney prior to entering the guilty plea. Further, as discussed above, there is no evidence that appellant had any previous exposure to or interaction with the criminal justice system. While, as in *Doughman*, this record confirms that appellant was questioned and expressed his understanding of some of the rule 15.01 criteria, the record in *Doughman* continued with substantial questions that were not asked of appellant, including whether Doughman (1) understood the charges against him, (2) had enough time to discuss the matter with his attorney, (3) understood all aspects of the plea bargain, (4) had been fully advised by his attorney, (5) understood what was happening in the proceedings, (6) had recently taken any pills or medications, (7) understood he was waiving his right to a probable cause

hearing, (8) understood that a jury of 12 would have to unanimously find him guilty, (9) understood that that no one could comment on his failure to testify, and (10) understood the maximum penalty that the district court could impose. *Id*. at 351-53. We concluded in *Doughman* that "[s]uch questioning provided an adequate record for evaluating appellant's plea, particularly when supplemented by testimony on appellant's discussions with counsel and by appellant's criminal history." *Id*. at 353. But here, the questioning was woefully abbreviated and there is no indication that appellant had independent knowledge of his rights or the consequences of his plea.

Relying on *Hernandez*, the state argues that because appellant was represented by an attorney it may be presumed that he was adequately informed of his rights. 408 N.W.2d at 626. But again, the record in *Hernandez* provided a more extensive basis to determine that Hernandez intelligently entered his plea. Hernandez testified that he reviewed a Spanish-language translation of the plea petition and had a full opportunity to consult with his attorney prior to entering the plea, and he then engaged in "careful interrogation" by the district court regarding his rights. *Id*. at 624, 626. Here, however, appellant's attorney admitted that she had not had time to review a plea petition with appellant prior to the entry of the plea or before sentencing. The presumption that an attorney will inform a defendant of his rights cannot survive an explicit admission by the attorney that there had been inadequate time to discuss a plea petition in advance of entering the guilty plea.

Although this court has held that "failure to interrogate a defendant as set forth in Rule 15.01 or to fully inform him of all constitutional rights does not invalidate a guilty

plea," in such cases we have evaluated the validity of the plea based on a much more developed record than we see here. *Doughman*, 340 N.W.2d at 351 (relying on extended questioning, testimony of conversations with attorney, and defendant's prior guilty pleas and completed plea petitions); *see also Wiley*, 420 N.W.2d at 236-37 (relying on defendant's 20 to 30 minute review of a plea petition, testimony that he discussed his rights with his attorney, acknowledgement on the record that he understood his rights in the plea petition, and extensive experience with the criminal justice system); *Hernandez*, 408 N.W.2d at 626 (relying on careful interrogation by the district court, full opportunity to consult with counsel, and review of a plea petition). When a record is "so incomplete that there is no way of determining if defendant properly waived all of his rights" the plea must be vacated. *State v. Casarez*, 295 Minn. 534, 536, 203 N.W.2d 406, 408 (1973). The record before us today does not provide a sufficient basis to determine that appellant's plea was valid, and we cannot presume that appellant's attorney fully informed him of his rights and the consequences of his plea from such a record. Accordingly, the plea must be vacated.

Reversed and remanded.