STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1463

State of Minnesota,
Respondent,

vs.

Russell James Simon, Jr.,
Appellant.

Filed November 16, 2010
Affirmed; motion granted
Kalitowski, Judge

Isanti County District Court
File No. 30-CR-08-684

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

Jeffrey Edblad, Isanti County Attorney, Amy J. Reed-Hall, Chief Deputy County Attorney, Thomas D. Wedes, Assistant County Attorney, Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

KALITOWSKI, Judge

In this appeal from his conviction of one count of making terroristic threats, appellant Russell James Simon Jr. argues that (1) the district court erred in finding that he

waived his right to counsel and (2) his guilty plea must be set aside because it was not made intelligently, voluntarily, and accurately. We affirm and grant appellant's motion to strike parts of the state's brief and appendix.

D E C I S I O N

I.

Appellant challenges the district court's determination that he waived his right to counsel. A district court's finding regarding the validity of a waiver of the right to counsel will be overturned only if it is clearly erroneous. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

A written waiver of the right to counsel is necessary in felony cases unless the defendant refuses to sign such a waiver. Minn. Stat. § 611.19 (2006); Minn. R. Crim. P. 5.04, subd. 1(4). But a factual inquiry into whether a knowing, voluntary, and intelligent waiver of counsel has been made is permissible even if the statute and rule are not satisfied. *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000).

The district court found that appellant waived his right to counsel after (1) failing to hire an attorney when granted three continuances to do so and (2) being provided with a petition to proceed as pro se counsel that outlined the rights and dangers of appearing pro se.

Appellant made his first court appearance on the terroristic-threats charge on June 18, 2008. He appeared five more times in district court before pleading guilty on April 13, 2009, and at each of these appearances, appellant's lack of representation was discussed. Appellant was repeatedly advised to retain counsel or apply for a public

defender. *See State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990) (concluding that the surrounding circumstances, including defendant's refusal to accept representation from the public defender's office, demonstrate he was fully aware of the consequences of proceeding pro se). The district court provided appellant with a petition to proceed as pro se counsel, which clearly outlined the rights and dangers of proceeding pro se. Further, appellant was familiar with the criminal justice system, having appeared in court several times prior to this matter. *See Worthy*, 583 N.W.2d at 276 (taking into account the defendants' previous convictions in determining that they were knowledgeable and that their waivers of the right to counsel were valid). Most importantly, appellant was granted three continuances solely for the purpose of hiring an attorney, yet he failed to do so.

Given appellant's knowledge of the legal system, his refusal to apply for a public defender, the multiple continuances granted to allow appellant to obtain counsel, and his continuing refusal to do so, the district court's finding that appellant waived the right to counsel is not clearly erroneous.

In addition, the supreme court has recognized that "extremely dilatory conduct" can result in forfeiture of the right to counsel, even if a full waiver colloquy has not been conducted. *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) (quotation omitted), *cert. denied*, 130 S. Ct. 3275 (2010). In applying the forfeiture doctrine in *Jones*, the supreme court reasoned that "a balance must exist between a defendant's right to counsel of his choice" and the public interest of "maintaining an efficient and effective judicial system" and that the ability of district courts to conduct trials must be preserved. *Id*. at 505-06 (quotation omitted).

Appellant delayed seeking an attorney for nearly ten months after his first appearance, appeared before the district court without counsel at least five times before pleading guilty, was told repeatedly to retain counsel or apply for a public defender, and was granted three continuances for the specific purpose of hiring an attorney. These circumstances are similar to those present in *Jones*, and its forfeiture doctrine provides additional support for the district court's decision that appellant waived his right to counsel.

II.

There are three basic prerequisites to a valid guilty plea: the plea must be (1) accurate, (2) voluntary, and (3) intelligent (i.e., knowingly and understandingly made). *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). The main purpose of the accuracy requirement is to protect the defendant from pleading guilty to a more serious offense than he could properly be convicted of at trial. *Id*. The voluntariness requirement helps ensure that the defendant does not plead guilty because of any improper pressures or inducements. *Id*. The requirement that the plea be intelligent is designed to ensure that the defendant understands the charges, the rights being waived, and the consequences of the guilty plea. *Id*. If a plea is not accurate, intelligent, and voluntary, a manifest injustice exists, and the plea must be set aside. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997).

Appellant pleaded guilty to terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2006), and now seeks to have his guilty plea set aside on the grounds that it was not made intelligently, voluntarily, or accurately. A defendant is free to appeal

directly from a judgment of conviction against him and contend that the record made at the time the plea was entered "is inadequate in one or more of these respects." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

Accuracy of Plea: Factual Basis

Minnesota law provides: "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . , or in a reckless disregard of the risk of causing such terror . . . may be sentenced to imprisonment . . . ." Minn. Stat. § 609.713, subd. 1. Appellant claims there is an insufficient factual basis to show that he made a threat with the intent to terrorize another, or in reckless disregard of the risk of causing such terror. We disagree.

The district court is responsible for ensuring that a sufficient factual basis has been established for a guilty plea. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "[A]n adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Id*. But an adequate factual basis can be established in other ways. *Holscher v. State*, 282 N.W.2d 866, 867 (Minn. 1979) (holding that a factual basis was sufficient where it consisted of omnibus-hearing testimony and the prosecution's unchallenged summary of its evidence).

Here, appellant was questioned on the record to provide a factual basis for the guilty plea. Appellant responded "yes" when asked whether he was present in the county jail on May 19, 2008, and when asked if he spoke to his son by telephone on that date. He also responded "yes" when asked whether he stated to his son "[i]f [appellant's ex-

father-in-law] yells at you or lays a hand on you, *you tell him* that I will send someone over to the house and f-cking break his neck." (Emphasis added.) *See State v. Schweppe*, 306 Minn. 395, 400-01, 237 N.W.2d 609, 614 (1975) (stating that purpose can be established when defendant knew or had reason to know that threats against victim would be communicated to him or "at the very least recklessly risked the danger" that threats would be communicated to and thereby terrorize victim).

The record shows that appellant made a statement threatening his ex-father-in-law with physical harm and directed his son to communicate the threat to him. We conclude that appellant's admission to this statement and directive to his son is sufficient to establish a factual basis for appellant's guilty plea and satisfy the accuracy requirement.

Voluntary and Intelligent

Appellant argues that his guilty plea is invalid because he was not informed by the district court or counsel as to the nature and elements of the charges against him. The purpose of the intelligence requirement 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." *Trott*, 338 N.W.2d at 251.

Here, the petition to plead guilty was completed in district court, with appellant questioned on the record as to each requirement of the plea. Standby counsel was present, physically seated near appellant, and available for consultation at all times while the plea petition was completed. When questioned on the record, appellant stated he understood the charges that had been made against him, he knew he could consult his standby counsel when needed, and he knew he was giving up his right to go to trial.

The record supports a determination that appellant's guilty plea was voluntary, intelligent, and supported by an accurate factual basis. Accordingly, there is no manifest injustice requiring us to vacate appellant's guilty plea.

III.

Finally, appellant moved to strike parts of the state's brief and appendix on the ground that they pertain to matters outside the record on appeal. "This court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993). Appellant's motion to strike is granted with respect to the handwritten letter dated December 11, 2008, as well as all references to the letter contained in the state's brief, as they were not part of the district court record. We did not consider this non-record information in reaching our decision.

Affirmed; motion granted.