STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0294

State of Minnesota,
Respondent,

vs.

Thai Quoc Ngo,
Appellant.

Filed February 3, 2014
Affirmed
Hooten, Judge

Olmsted County District Court
File No. 55-CR-12-2980

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

Terry L. Adkins, Rochester City Attorney, Lindsay J. Brice, Assistant City Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, F. Richard Gallo, Jr., Assistant Public Defender, Shannon Callahan, Certified Student Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Smith, Judge.

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

HOOTEN, Judge

Appellant, after pleading guilty to misdemeanor fourth-degree driving while impaired, argues that the facts elicited from him during his guilty-plea hearing were insufficient to establish guilt. We affirm.

FACTS

In December 2011, law enforcement officers responded to an accident at Kuehn Motors Dealership in Rochester. Upon arrival, an officer noticed a parked vehicle with visible damage to the left-front fender and door area and a second damaged vehicle, a Toyota Rav 4, located in the middle of the dealership's parking lot, blocking traffic. The officer spoke to two employees of the dealership who witnessed the accident and indicated that the driver of the Toyota, appellant Thai Quoc Ngo, was inside the building.

In speaking with Ngo, the officer believed that Ngo might be under the influence of drugs because he was slurring his speech and had difficulty following and answering questions. Ngo consented to a field sobriety test, which indicated that Ngo was under the influence. Ngo's preliminary breath test registered 0.00. Ngo was arrested for driving while impaired and transported to the Olmstead County jail for further evaluation. Ngo consented to provide a blood sample, which was sent to the Bureau of Criminal Apprehension for analysis. In April 2012, officers received the BCA report, which indicated that Ngo had .83 milligrams of codeine in his blood on the day of the incident and that a schedule I or schedule II controlled substance was identified in the blood sample. In May 2012, officers mailed Ngo a citation for fourth-degree driving while

impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(7), .27, subd. 1, 2 (2010), and illegal possession of prescription drugs in violation of Minn. Stat. § 151.37, subd. 1 (2010).

In December 2012, Ngo pleaded guilty to fourth-degree driving while impaired. The parties agreed that, in exchange for his plea, the illegal possession charge against Ngo would be dismissed and that the state would recommend a stay of imposition, one year of probation, and a $300 fine plus costs. At the plea hearing, Ngo admitted to the following facts: he was driving a motor vehicle within the city of Rochester on December 24, 2011; he pulled into Keuhn Motors' parking lot; Keuhn employees were concerned about his driving and called the police; during his subsequent interaction with officers, the officers believed he was under the influence of drugs; he consented to a field sobriety test and a blood test; a significant amount of codeine was found in his blood sample; the codeine was from a prescription medication he had taken; and, the codeine, along with the fact that he had been up for 30 hours and had an empty stomach, caused his driving to be impaired. These facts are consistent with Ngo's rule 15 petition, which stated:

> On the date in question, namely, December 24th, 2011, at approximately 11:05 a.m., I was in physical control or operated a motor vehicle in the City of Rochester, County of Olmsted, Minnesota. Before I drove a motor vehicle, I had consumed alcohol/ingested a controlled substance or both. [A]s a result of that, my driving ability was impaired.

The district court accepted Ngo's plea and imposed the agreed-upon sentence of a stay of imposition, one year of probation, and a $300 fine plus costs. This appeal follows.

D E C I S I O N

Ngo argues that the district court erred by accepting his guilty plea. Specifically, Ngo argues that his admissions were insufficient to establish guilt of fourth-degree driving while impaired in violation of Minn. Stat. § 169A.20, subd. 1(7).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But a defendant may be entitled to withdraw a guilty plea, even after sentencing, if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Ngo invokes the manifest-injustice standard to argue that his plea is inaccurate, and therefore invalid, because the record does not reflect a sufficient factual basis for his plea. *See State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (stating that, in order to be valid, a guilty plea "must be accurate, voluntary and intelligent"). We review de novo the validity of a guilty plea. *Raleigh*, 778 N.W.2d at 94.

Ngo did not request the withdrawal of this plea on the ground of its factual insufficiency before the district court. Nonetheless, he is permitted to argue such factual insufficiency and the resulting invalidity of the plea on appeal from his conviction and sentence. "[B]y pleading guilty, a defendant does not waive the argument that the factual basis of his guilt was not established." *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003). "A defendant is free to simply appeal directly from a judgment of conviction and contend that the record made at the time the plea was entered is inadequate" to establish the requirements of a valid plea. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

Thus, we may review Ngo's challenge to the factual basis of his plea even though he did not seek to withdraw his plea in district court.

Ngo pleaded guilty to subdivision 1(7) of the driving-while-impaired statute, which makes it unlawful to operate a motor vehicle when one's body "contains any amount of a controlled substance listed in Schedule I or II." Minn. Stat. § 169A.20, subd. 1(7). Codeine is a schedule II controlled substance. Minn. Stat. § 152.02, subd. 3(1)(a) (2010).

The following exchange occurred between Ngo and his attorney at the plea hearing:

> Q: And the result of [your blood test] was that [the] officer found that there was a significant amount of codeine in your system, is that right?
> A: That's correct.
> Q: You also agree that the amount of codeine that was found in your system was sufficient to cause you to be impaired in your driving ability, is that right?
> A: Yes.
> Q: Okay. And I should add that in combination with the codeine you also had been . . . up all night driving?
> A: Yes.
> Q: And you had also not eaten in a very long time and so this was all on an empty stomach?
> A: Yes. Thirty hour[s], yes.
> Q: Okay. So the combination of all of those three things, including the prescription drugs, is what caused your driving to be impaired on that day, is that right?
> A: Yes . . . .

Ngo argues that this testimony does not reflect guilt under subdivision 1(7) of the statute because he never specifically admitted that he had a "schedule I or II" controlled substance in his system. Ngo argues that, instead, his testimony reflects guilt under

subdivision 1(2), which makes it unlawful to operate a motor vehicle while "under the influence of a controlled substance." Minn. Stat. § 169A.20, subd. 1(2).

Ngo's argument is based on the premise that a factual basis must exist for the offense to which he pleaded guilty. But a guilty plea has a sufficient factual basis if "the record supports the conclusion that the defendant actually committed an offense *at least as serious as the crime to which he is pleading guilty*." *State v. Trott*, 338 N.W.2d 248, 251−52 (Minn. 1983) (emphasis added); *see also State v. Goulette*, 258 N.W.2d 758, 762 (Minn. 1977); *State v. Hoaglund*, 307 Minn. 322, 325, 240 N.W.2d 4, 5 (1976); *State v. Gustafson*, 298 Minn. 200, 201−02, 214 N.W.2d 341, 342 (1974). In *State v. Theis*, the supreme court stated that the required factual basis must establish a strong probability that a jury would find the defendant guilty of "the offense to which he is pleading guilty." 742 N.W.2d 643, 649 (Minn. 2007). But *Theis* stated this rule in the context of discussing best practices for ensuring accuracy in *Alford* pleas, which is distinguishable from a standard plea because it requires a heightened duty on the part of the district court to establish an adequate factual basis. *See id.* at 648−49. Thus, the supreme court in *Theis* did not overrule its prior opinion in *Trott*. Ngo stated at the plea hearing that he was operating a motor vehicle under the influence of codeine, and he concedes that his admissions create an adequate factual basis for establishing his guilt under subdivision 1(2) of the fourth-degree driving-while-impaired statute. Therefore, if subdivision 1(2) of the statute is "at least as serious" as subdivision 1(7), then Ngo's plea is valid. *See Trott*, 338 N.W.2d at 251−52.

Subdivision 1(2) and subdivision 1(7) both constitute the same crime: fourth-degree driving while impaired. *See* Minn. Stat. § 169A.20, subd. 1(2), (7). As Ngo points out, the only difference between the two is that subdivision 1(7) presumes impairment and subdivision 1(2) does not. But this distinction does not make one subdivision more serious than the other. Indeed, there are seven different ways to be convicted of fourth-degree driving while impaired, and all equally severe. *See* Minn. Stat. § 169A.27 (2010).

We conclude that Ngo's guilty plea is not invalid on the ground that it is inaccurate because there is an adequate factual basis to establish guilt for fourth-degree driving while impaired under Minn. Stat. § 169A.20, subd. 1(2), which is "at least as serious" as fourth-degree driving while impaired under Minn. Stat. § 169A.20, subd. 1(7). *See Trott*, 338 N.W.2d at 251−52. As such, we need not address whether there is also a sufficient factual basis for guilt under subdivision 1(7). *See id.*

Affirmed.