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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2404**

Ryan Richard Polz, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 23, 2008
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 02088086

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Ryan Polz seeks relief from his conviction of refusal to submit to an alcohol-concentration test. The district court denied his petition for postconviction relief without an evidentiary hearing. Because the district court did not abuse its discretion, we affirm.

FACTS

Police arrested Ryan Polz in 2002 for driving while intoxicated after he apparently lost control of his pickup truck. Richfield police officers Jeffrey Cook and Andrew Gifford found Polz near an overturned Ford truck. Polz admitted driving the truck and officers noticed that he smelled of alcoholic beverages. When one officer asked Polz how much he had to drink, Polz answered candidly: “[P]robably too much.” Polz refused to submit to a test to determine his alcohol concentration.

Polz might not have been the truck’s only occupant. Witnesses saw another man flee the accident scene. Polz identified the man as Rob Larson. The police never found Larson, but there was little need to try since Polz admitted to driving. The state charged Polz with second-degree driving while impaired, second-degree refusal to submit to chemical testing, and driving with a revoked license. Polz pleaded guilty to second-degree refusal to submit to chemical testing. Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 1 (2002). The state agreed that the other charges against him could be dismissed, and they were.

Polz petitioned for postconviction relief in 2007 under several theories. He sought to have his conviction vacated on the grounds that he received ineffective assistance of

counsel, that his guilty plea was not knowing and voluntary, that he uncovered new evidence, and, ostensibly, on “such other grounds . . . that the Court may decide to have litigated even though not specifically raised.” The district court denied Polz relief without holding an evidentiary hearing. Polz appeals.

D E C I S I O N

As an initial matter, we disagree with the state’s contention that Polz’s petition was untimely. Individuals convicted before August 1, 2005, had two years from that date to file petitions for postconviction relief. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. Polz’s petition was filed on July 27, 2007, within the two-year statutory period. Although the district court suggested that Polz’s petition was untimely, it considered the petition’s substance. It did so without holding an evidentiary hearing and explained why Polz was not entitled to postconviction relief. We review the district court’s denial of Polz’s petition on the merits.

We review a summary denial of postconviction relief for an abuse of discretion and to determine whether sufficient evidence supports the district court’s findings. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). Polz asserts that he is entitled to postconviction relief for two reasons: he should be permitted to revoke his guilty plea on the basis of newly-discovered evidence; and he was denied effective assistance of counsel. Neither theory is compelling.

I

Polz’s petition for postconviction relief alleged that new evidence surfaced that “[he] was not the actual driver of the motor vehicle.” On appeal, he explains the nature

of the newly discovered evidence. He claims that police reports that were available to his trial counsel identified witnesses who saw a man run from the truck, “confirming [Polz’s] belief” that he was not the truck’s driver. He asserts that this supposed newly-discovered evidence justifies postconviction relief, or at least entitled him to an evidentiary hearing. The district court denied Polz’s request for an evidentiary hearing because it perceived the evidence to be insufficient and conclusory and because Polz could have known about the claimed “new” evidence of the driver’s identity in 2002 had he been diligent.

A district court does not have a duty to hold an evidentiary hearing on every postconviction-relief petition, but it must conduct a hearing to resolve issues raised on the merits if disputed material facts exist. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). But new evidence is material only if it probably would provoke a different outcome. *State v. Caldwell*, 322 N.W.2d 574, 585 (Minn. 1982). A hearing is unnecessary if “the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief[.]” Minn. Stat. § 590.04, subd. 1 (2006). The district court correctly concluded that Polz’s petition required no hearing.

Polz’s argument depends on his belief that proving that he was not the driver bolsters his claim for postconviction relief; he is mistaken. Polz pleaded guilty to second-degree refusal to submit to chemical testing. “It is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).” Minn. Stat. § 169A.20, subd. 2 (2006). To convict a person under section 169A.20, subdivision 2, the state must prove that the police officer had probable cause to

arrest him for driving under the influence (among other crimes); that administration of the test was justified under the implied consent law; that he was read the implied consent advisory; and that he refused the test. *State v. Ouellette*, 740 N.W.2d 355, 359 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). If an aggravating factor exists at the time of the refusal, the crime is elevated to the second degree. Minn. Stat. § 169A.25, subd. 1(b) (2006). A prior alcohol-related driving violation is an aggravating factor. Minn. Stat. § 169A.03, subd. 3(1) (2006). Whether the person *was actually* driving is irrelevant; what matters is that the arresting officer *had probable cause to believe* that the person was driving. *See State, Dep't of Highways v. Styrbicki*, 284 Minn. 18, 21, 169 N.W.2d 225, 227 (1969) (explaining that the statute does not require actual commission of the associated crime of driving while intoxicated).

The police report alone contains ample evidence to support Polz's conviction on the refusal charge regardless of the "new" evidence that Polz references. Officer Cook arrested Polz reasonably believing that Polz had been driving while intoxicated. At the time, Polz was standing beside his overturned pickup truck. He smelled of alcoholic beverages. He admitted that he was the driver. He admitted that he had drunk too much. When Officer Cook sought to administer a test to determine Polz's alcohol concentration, Polz refused. Officer Cook arrested Polz and read him the implied consent advisory. Polz's refusal to submit to testing after he had been lawfully arrested constitutes a crime regardless of whether he actually drove while intoxicated. And his history of alcohol-related driving incidents elevated the offense to second-degree refusal to submit to chemical testing.

Polz's alleged newly-discovered evidence of the supposed actual driver is therefore immaterial. Even if Polz was not the driver, he could not lawfully refuse to submit to testing once Officer Cook lawfully arrested him on probable cause and read him the implied consent advisory. Because the petition, files, and records conclusively show that the "new" evidence was immaterial, the district court did not abuse its discretion when it refused Polz's request for an evidentiary hearing and for postconviction relief. Because Polz cannot show that the evidence could produce a different outcome at a new trial, we need not address whether he has met his burden to establish that he and his counsel did not know of the evidence before trial, that it would not have been discovered through the exercise of due diligence, and that "it is not cumulative, impeaching, or doubtful." *Schneider v. State*, 725 N.W.2d 516, 524 (Minn. 2007).

Polz also argues he is entitled to withdraw his guilty plea on the basis of the same newly-discovered evidence. A petitioner may withdraw his guilty plea after sentencing only if he establishes "that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice arises when a guilty plea is not "accurate, voluntary and intelligent." *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). Polz asserts that had he been personally aware of the evidence about the actual driver, he would not have pleaded guilty to test refusal. We construe this as an argument that his plea was not made voluntarily and intelligently and that withdrawal therefore is necessary to avoid a manifest injustice. The district court found the contrary, and it had sound basis to do so.

A guilty plea is voluntary if it was not coerced or improperly induced. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A plea is intelligent if “the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.” *Id.* The transcript of Polz’s plea hearing confirms the district court’s finding. Polz testified to the elements of the crime, to his knowledge of his constitutional rights, to his waiver of his right to a jury trial in order to take advantage of the plea agreement, and to his understanding of the nature and consequence of the proceeding. He testified that he was under no pressure to plead guilty. The district court correctly concluded that Polz’s plea was accurate, voluntary, and intelligent.

Because Polz’s plea was accurate, voluntary, and intelligent, the district court did not abuse its discretion when it denied Polz’s request to withdraw his guilty plea on the basis of new evidence. To the extent that Polz’s attorney’s purported ineffectiveness may have contributed to Polz’s decision to plead guilty, it is not evaluated under the manifest injustice standard but a different one, which we turn to next. *See State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (applying the two-part ineffective assistance standard to evaluate a claim that ineffective assistance rendered a guilty plea involuntary).

II

Polz argues that his trial counsel’s ineffective assistance requires that his conviction be vacated. To prevail on a claim of ineffective assistance, Polz must establish that his counsel’s performance was deficient and that, but for the deficient performance, Polz would have obtained a different outcome. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). To show that his counsel’s performance was deficient, Polz must

overcome a presumption that his counsel's actions were within a wide range of reasonable assistance and show that they were instead objectively unreasonable. *Dukes v. State*, 660 N.W.2d 804, 810–11 (Minn. 2003).

Polz's petition alleges that his trial counsel's failure to interview witnesses and failure to either discover or disclose police reports despite Polz's request denied him effective assistance of counsel. Polz argues that his trial counsel's failure to adequately investigate the impaired-driving charge led Polz to plead guilty to refusal to submit to chemical testing. Had the investigation been conducted, the argument goes, Polz's trial counsel would have discovered his client's actual innocence with respect to the two driving charges, and he would have advised a different defense strategy.

Polz does not demonstrate that his trial counsel was objectively ineffective. Polz told his trial counsel that he did not believe he was driving that night, and he told him who he believed had been driving. With that knowledge, Polz and his attorney pursued a defense strategy that resulted in dismissal of the two driving-related charges. Even if Polz's trial counsel had investigated further, the merely corroborative evidence that Polz points to would not necessarily have moved competent counsel to advise any different strategy. The strategy employed successfully avoided prosecution for the crimes Polz claims he did not commit. Polz's trial counsel may not have investigated the circumstances surrounding the events of November 3, 2002, to Polz's satisfaction, but we conclude that Polz has not demonstrated that his counsel exercised objectively unreasonable professional judgment.

Because the records conclusively show that Polz is entitled to no relief, the district court did not abuse its discretion when it summarily dismissed his postconviction petition.

Affirmed.