STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2322

State of Minnesota,
Respondent,

vs.

William Howard Grever,
Appellant.

Filed March 11, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge

Mower County District Court
File No. 50-CR-06-156

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Kristen Nelsen, Mower County Attorney, Mower County Courthouse, 201 First Street Northeast, Austin, MN 55912 (for respondent)

Samuel A. McCloud, Carson J. Heefner, McCloud & Heefner, P.A., Suite 1000, Circle K, Box 216, Shakopee, MN 55379 (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Wright, Judge.

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

MINGE, Judge

Appellant challenges the denial of his request to withdraw his guilty plea to second-degree assault with a dangerous weapon. Appellant further contends that his

constitutional right to a jury trial was violated because his sentence was enhanced on the basis of a judicially determined fact. Because the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea, we affirm the conviction. However, because we conclude that appellant did not waive his right to a jury trial on the sentencing-enhancement factor, we reverse the sentence and remand for proper determination of that factor and resentencing.

FACTS

Appellant William Howard Grever was charged with two counts of second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2004), and one count of attempted kidnapping in violation of Minn. Stat. §§ 609.25, subds. 1(3), 2(1), .17 (2004). At a May 2006 plea hearing, Grever entered, and the district court accepted, an *Alford* plea of guilty to one count of second-degree assault with a dangerous weapon. In return, the state agreed to dismiss the second assault count and the attempted kidnapping charge. This plea was pursuant to a written petition and agreement signed by Grever, defense counsel, and the prosecutor.

In August 2006, Grever moved to withdraw his guilty plea, claiming that he was not able to fully evaluate his defense because his attorney had not allowed him to review a recording of the 911 call made by the victims on the night of the assault. The district court denied the motion.

A sentencing hearing was held in September 2006. Based on Grever's criminal history score and the severity level of the offense, the presumptive guidelines sentence for the second-degree-assault conviction was 39 months. Grever had a prior firearm

offense, and state law provided a minimum sentence of five years if certain subsequent offenses (including second-degree assault) were committed while in possession of a firearm. Minn. Stat. § 609.11, subds. 5, 9 (2004). Grever requested a sentencing-jury determination of whether he had used a firearm. The district court determined that the guilty-plea petition and the record of the hearing made it clear that Grever had a firearm at the time of the offense, denied his request for a jury determination, and sentenced Grever to 60 months. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion in denying Grever's motion to withdraw his guilty plea prior to sentencing. Grever asserts that it would have been fair and just to grant his motion to withdraw his guilty plea because he entered an *Alford* guilty plea and his attorney would not allow him to review all of the state's evidence against him before the plea hearing. At oral argument on appeal, Grever further contended that the district court failed to fully comply with rule 15.01 of the Minnesota Rules of Criminal Procedure and determine that his guilty plea was a knowing, intelligent, and voluntary waiver of his constitutional rights.

"A valid guilty plea 'must be accurate, voluntary, and intelligent (i.e., knowingly and understandingly made).'" *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (quoting *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997)). Minnesota rules provide that:

> In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence 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.

Minn. R. Crim. P. 15.05, subd. 2.[1] Defendants do not have an absolute right to withdraw guilty pleas once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). "[G]iving a defendant an absolute right to withdraw a plea before sentenc[ing] would undermine the integrity of the plea-taking process." *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). "[T]he 'ultimate decision' of whether to allow withdrawal under the 'fair and just' standard is left to the 'sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion.'" *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quoting *Kim*, 434 N.W.2d at 266).

A. Rule 15.05

We first consider Grever's assertion that he should be allowed to withdraw his guilty plea because, at the plea hearing, the district court failed to determine that he knowingly and intelligently waived his constitutional right as required by rule 15.05 of the Minnesota Rules of Criminal Procedure. Grever raised this issue for the first time at oral argument. The issue was not briefed, and no legal references were provided by

[1] A defendant may also withdraw a guilty plea any time before or after sentencing upon a showing of manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Because Grever moved to withdraw his plea prior to sentencing, he is not required to meet the more demanding manifest-injustice standard.

counsel. Although this court may, in the interest of justice, reach issues so raised, Minn. R. Civ. App. P. 103.04, the general rule is that we do not consider issues not raised in or considered by the district court or briefed by the parties, and we decline to do so here, *see State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

B. Alford Pleas

We next consider Grever's claim that his motion to withdraw should be evaluated differently because he entered an *Alford* plea. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). Under an *Alford* plea, a defendant may plead guilty to an offense, even though the defendant maintains his or her innocence, if the defendant reasonably believes, and the record establishes, that the state has sufficient evidence to obtain a conviction. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). As with a direct guilty plea, a valid *Alford* plea must be accurate, voluntary, and intelligent. *See State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (considering the validity of an *Alford* plea).[2]

At the plea hearing, the district court conducted preliminary questioning to ensure that Grever understood the plea agreement and his guilty-plea petition. The district court inquired whether Grever had a chance to ask questions and review the petition with his

[2] As recently stated by our supreme court, "careful scrutiny of the factual basis for the plea is necessary within the context of an *Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence." *Theis*, 742 N.W.2d at 648-49. Although Grever does not directly challenge the accuracy or underlying factual basis supporting his plea, we note that the district court conducted an interrogation of Grever about the underlying conduct and the evidence that would likely be presented at trial, and Grever specifically acknowledged on the record that the evidence the state would offer against him was sufficient for a jury to find him guilty.

attorney. Grever answered affirmatively. When asked about his understanding of the 60-month sentence he would receive, Grever asserted that he understood and then asked the court: "What about my 90 days I just sat here?" The district court responded that Grever would receive credit, then asked Grever if he appreciated that he was giving up his right to a trial. Grever answered, "[y]es, sir, I understand." The district court also inquired whether Grever comprehended the nature of his *Alford* plea, and Grever answered in the affirmative.

The district court then proceeded to take Grever's plea. The district court established the factual basis for the plea by asking Grever whether he understood the evidence and testimony the state would introduce at trial. Grever was not a passive participant during the plea process. The following exchange illustrates Grever's engagement with the district court during the plea colloquy and the underlying facts supporting the district court's acceptance of the plea:

> Q: And it is your concern that the jury, after hearing the testimony of the witnesses in this matter, could well believe that you did . . . threaten each one of them with a black handgun and . . . ma[d]e statements . . . that you were going to forcibly take R.S.J. from the residence.
>
> A: That's more of [defense counsel's] concern than it is mine.
>
> Q: You understand that the State would present that evidence and the jury could well believe it?
>
> A: Yes, I understand that.

Following this exchange, Grever stated that he was prepared for the district court to accept his *Alford* plea to second-degree assault, and the district court did so. Pursuant to

questioning by the district court, Grever acknowledged his understanding of the plea agreement and his petition to plead guilty. Grever stated that he was aware that he faced multiple felony counts that might result in consecutive sentencing or an upward departure, and he acknowledged that he was asking the district court to approve the plea agreement because it was favorable given the charges against him.

While the *Alford* plea allowed Grever to maintain his innocence, the plea also represented Grever's choice to subject himself to the conditions of the plea agreement following his concession that the state's evidence against him was sufficient for a jury to convict him of the charged crime. To be sure, it is especially important that a person claiming innocence be aware of his constitutional rights in pleading guilty. But we note that this was not Grever's first experience in criminal court. The record indicates that Grever had been a defendant in previous criminal proceedings.

Because there is a solid factual basis in the record for Grever's *Alford* plea and for the determination that Grever entered that plea voluntarily, knowingly, and intelligently, we conclude that the district court did not abuse its discretion in denying a motion to withdraw an *Alford* plea solely on the grounds that it was an *Alford* plea. Any other conclusion would risk undermining the integrity of the plea-taking process.

C. The 911 Tape

Next we consider Grever's contention that because his defense counsel refused to allow him to listen to a tape recording of the 911 call made on the night of the assault, there is a fair and just reason for allowing him to withdraw his guilty plea. Grever argues

that because he was unable to review the entirety of the state's evidence against him, he meets the fair-and-just standard.

The district court denied Grever's motion to withdraw his guilty plea, stating that Grever never raised the issue in his plea petition or during his conversation with the district court. The district court stated that Grever was aware of the 911 tape prior to entering his guilty plea. The district court noted that, rather than registering his concerns about his legal representation at the hearing, Grever agreed that his counsel had represented his interests in the plea petition, stated that he had time to ask his attorney the questions he felt were important with regard to the plea, and raised no objection to his representation at the plea hearing.

While we do not treat lightly claims that defense counsel failed to provide evidentiary information to their clients, Grever clearly stated in oral argument before this court that his trial representation was adequate. Although Grever's replacement attorney argued at the district court hearing on withdrawing the plea that the 911 tape omits certain information about the incident, Grever makes no claim or showing on appeal that the 911 tape contained exculpatory evidence or that Grever suffered prejudice by his inability to listen to the tape. Furthermore, the prosecution claimed that it would be prejudiced by withdrawal of the guilty plea and opposed such withdrawal on the ground that one of the victims was a teenage girl and that it would be traumatic for her to have to testify in a case that was supposedly resolved.

Grever has not made a showing of any unfairness or injustice based on his inability to review the 911 tape. Based on this record, we conclude that the district court did not abuse its discretion in denying Grever's motion to withdraw his *Alford* plea.

II.

The second issue is whether the district court sentenced Grever in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), by enhancing that sentence without a specific waiver by Grever of his right to a separate jury determination that he possessed a firearm when he committed the offense.

This court reviews *Blakely* legal issues de novo. *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004). In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court applied *Apprendi* to sentencing guidelines and held that, under the Sixth Amendment, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537 (alteration in original). The Minnesota Supreme Court subsequently held that "under the Minnesota Sentencing Guidelines[,] imposition of the presumptive sentence is mandatory absent additional findings." *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). The district court need not empanel a sentencing jury if the accused "expressly, knowingly, voluntarily, and intelligently

waive[s] his right to a jury determination" of the aggravating sentencing factors. *State v. Dettman*, 719 N.W.2d 644, 650 (Minn. 2006).

Based on Grever's criminal history score, the presumptive sentence for second-degree assault with a dangerous weapon is 39 months. Based on a record that indicated the weapon was a handgun, the provisions of the plea agreement, and the statements at the plea hearing, the district court sentenced Grever to 60 months. This 60-month sentence is the minimum sentence required by law for certain gun offenses committed by a defendant with a felony record. Minn. Stat. § 609.11, subds. 5, 9 (2004).

Grever argues that the district court sentenced him in violation of *Blakely* because he did not separately waive his right to a jury trial on the sentencing-enhancement factor. The state responds that based on this record, the district court did not need to conduct additional fact-finding before imposing the sentence.[3]

Grever pleaded guilty to second-degree assault with a *dangerous weapon*, which carried a presumptive sentence of 39 months. The plea petition has a handwritten entry

[3] Pursuant to Minn. R. Civ. App. P. 128.05 (allowing parties on appeal to provide this court with citation of supplemental authorities), the state refers us to *State v. Jones*, 733 N.W.2d 160 (Minn. App. 2007), *review granted* (Minn. Aug. 21, 2007). The *Jones* court held, in pertinent part, that because a jury verdict of guilty on a lesser offense included a jury finding, beyond a reasonable doubt, of facts that also represented aggravating circumstances on a more serious offense, the district court did not err in relying on that verdict in imposing an upward sentencing departure on the more serious offense. *Id*. at 164. Here, before accepting Grever's guilty plea, the district court's inquiry into the factual basis underlying the plea was limited to establishing that sufficient facts were present to support a conclusion that Grever's conduct fell within the charge of second-degree assault with a dangerous weapon. *See Kelsey v. State*, 298 Minn. 531, 532, 214 N.W.2d 236, 237 (1974). The district court's inquiry in this setting was not the equivalent of a jury determination of particular facts beyond a reasonable doubt.

acknowledging the following: "Minnesota statutes 609.11 will apply, giving a minimum prison term of 5 years. (60 months). I have a prior qualified conviction under 609.11." Grever was sentenced to 60 months for possessing a *firearm* during commission of the designated offense of second-degree assault. Because Grever faced a 21-month sentence enhancement based on a factual finding that a firearm was present, Grever is entitled, unless properly waived, to a jury determination that he possessed a firearm during commission of the assault beyond a reasonable doubt.

We have already determined that Grever knowingly and intelligently pleaded guilty to second-degree assault with a dangerous weapon. However, there is nothing in the record indicating that Grever was specifically informed of his separate right to request a jury determination of this gun-possession enhancement factor. We recognize that the plea petition refers to the imposition of a 60-month sentence pursuant to Minn. Stat. § 609.11, which implies the presence of a firearm, and that the plea-hearing transcript states there will be an enhanced sentence based on the statute. However, the record also reflects some complications and controversy. At no point in the record does Grever clearly state he had a gun. At the hearing on Grever's motion to withdraw his guilty plea, Grever's counsel asserted that Grever told him from the start that he did not have a gun. The record indicates that a gun was never found.

Ultimately, Grever entered an *Alford* plea, which is not an admission of guilt, but an admission that the evidence against him was sufficient to support a finding of guilt for assault with a dangerous weapon. Grever's waiver of his various rights at the plea hearing was not detailed, but was covered in an abbreviated fashion, largely based on a

written plea petition. Thus, in determining the scope of the waiver, the plea petition is a critical document. Although the references to Minn. Stat. § 609.11 and a five-year sentence indicate that Grever knew he was charged with having a firearm, nothing in the plea petition mentions firearms, explains that there is a sentencing enhancement, or explicitly waives the right to a jury determination with respect to that sentencing enhancement.

On appeal, Grever notes that the district court denied his request at the sentencing hearing for a jury trial on the question of the presence of a gun, and Grever asserts that he did not understand or knowingly and intelligently waive his rights generally. Although we have rejected that claim with respect to the basic finding of guilt, rejecting that claim for *Blakely* purposes requires that we read more into Grever's awareness of not only the facts but also his Sixth Amendment rights as they relate to sentencing enhancement. On this record, we conclude that the jury waiver for the underlying plea was not adequate to constitute a waiver of the separate right to a jury determination of the sentence-enhancing fact of possession of a firearm.

We reverse and remand for resentencing. In resentencing, the district court may empanel a sentencing jury to determine enhancement factors.

Affirmed in part, reversed in part, and remanded.

Dated: