STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1779

David Randy Sabby, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 30, 2012
Affirmed
Cleary, Judge

Grant County District Court
File No. 26-CR-09-42

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Justin Anderson, Grant County Attorney, Elbow Lake, Minnesota; and

Aaron K. Jordan, Assistant County Attorney, Morris, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Stoneburner, Judge; and Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving as judge by appointment pursuant to Minn. Const. art. VI, § 10.

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

CLEARY, Judge

Appellant David Randy Sabby challenges the summary denial of his postconviction petition to withdraw his guilty plea. Appellant argues that the postconviction court erred when it found, without an evidentiary hearing, that his plea was supported by an adequate factual basis and was voluntary. Appellant also argues, for the first time on appeal, that he received ineffective assistance of trial and appellate counsel, that he is innocent, and that his plea was induced by unfulfilled promises. Because the postconviction court did not abuse its discretion in finding that the guilty plea was valid, we affirm.

FACTS

In April 2009, the state charged appellant by amended complaint with 13 counts of third-degree criminal sexual conduct, in violation of Minn. Stat § 609.344, subd. 1(f) (2008) (complainant between 16 and 18, sexual penetration, and significant relationship), and one count of fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(f) (2008) (complainant between 16 and 18, sexual contact, and significant relationship).

Appellant retained private defense counsel. A jury trial was scheduled for September 14, 2009. In mid-April, defense counsel filed a notice of alibi defense. Shortly thereafter, a contested omnibus hearing was held, and the district court found that there was probable cause to support the charges. Approximately two months later, defense counsel filed a motion requesting (1) an order prohibiting the state from

presenting evidence of other conduct, and (2) an order rescheduling the trial until some date after September 25, 2009. On September 2, 2009, almost two weeks before trial was scheduled and before the court ruled on the admissibility of the *Spreigl* evidence or on defense counsel's motion to move the trial date, appellant submitted a petition to plead guilty.

Appellant pleaded guilty to one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(g)(iii) (2008) (complainant between 16 and 18, sexual penetration, and multiple acts over an extended period of time). In exchange for the plea, the state dismissed the remaining charges in the amended complaint; dismissed two other complaints; and affirmed that it would not pursue other charges against appellant in Douglas and Hennepin counties. The state agreed to request a 41-month executed sentence. At the close of the plea hearing, the district court found that there was an adequate factual basis for the plea, ordered a presentence investigation (PSI), and deferred acceptance of the plea until sentencing. At the October 7, 2009 sentencing hearing, the court noted that it had received and reviewed the PSI, accepted appellant's plea, and invited appellant to make a statement. The district court then sentenced appellant to a 41-month executed sentence.

Shortly after the sentencing hearing, appellant fired his private defense counsel. Appellant was appointed a public defender. No direct appeal was initiated. In July 2011, appellant filed a petition for postconviction relief seeking to withdraw his guilty plea. Appellant included a sworn affidavit with the petition in support of his claim that his plea was both inaccurate and involuntary.

The postconviction court summarily denied appellant's petition to withdraw his plea. After considering both the petition and the file, the court concluded that appellant's plea was accurate and voluntary. The postconviction court's findings of fact included the following:

> 3. Although the excerpt of the plea hearing quoted in the defendant's brief arguably supports his claim that the factual basis of the plea is lacking, the transcript of the entire plea hearing establishes an adequate factual basis, including sufficient description of the time period involved. . . .
>
> 4. The defendant/petitioner claims that his plea was also involuntary. The transcript of the plea agreement establishes that the defendant affirmed that he had adequate time to confer with his attorney and that he was motivated to enter the plea agreement not only by his desire [ ] "to take responsibility for [his] acts," but also his desire to receive the benefits of the plea agreement. Specifically, the prosecution dismissed the remaining counts in the complaint, dismissed two other complaints, and affirmed that the State would not pursue charges in Douglas and Hennepin counties. In addition, the defendant received the exact sentence jointly recommended by the defense and the prosecution, thereby avoiding a longer sentence . . . .
>
> 5. The defendant/petitioner, upon questioning by the prosecutor, denied that he was coerced into enter[ing] his guilty plea and affirmed that he was entering his plea "out of [his] own free will."

(Alteration in original.) This appeal follows.

D E C I S I O N

A postconviction petition collaterally attacks the district court's decision, which "carries a presumption of regularity and . . . therefore, cannot be lightly set aside." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). Appellate courts review a

postconviction court's findings to determine whether there is sufficient evidentiary support in the record. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). A court's summary denial of postconviction relief is reviewed for an abuse of discretion. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011).

"A defendant does not have an absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). After sentencing, a defendant is permitted to withdraw a guilty plea only "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A valid guilty plea is one that is accurate, voluntary, and intelligent. *Id.*

I. Accuracy – Factual Basis

Appellant challenges the accuracy of his plea on two grounds. First, he argues that the facts admitted at the plea hearing do not establish all of the elements of his crime. The requirement that a guilty plea be accurate protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). A guilty plea is accurate only when an adequate factual basis is established. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Second, he argues that the form of questioning used during the plea hearing was improper. The Minnesota Supreme Court has emphasized and reiterated that the practice of using solely leading questions to establish the factual basis for a plea is discouraged

and that district courts should both ensure that the defendant expresses what happened in his own words and take an active role in asking direct questions of defendants during plea hearings. *See Raleigh*, 778 N.W.2d at 94–99.

A. Extended Period of Time

When entering a guilty plea, the defendant must present a factual basis sufficient to establish that the elements of the offense to which he is pleading have been met. Minn. R. Crim. P. 15.02, subd. 2; *Ecker*, 524 N.W.2d at 716. Appellant pleaded guilty to a violation of Minn. Stat. § 609.344, subd. 1(g)(iii), which provides that a person who engages in sexual penetration with another person is guilty of third-degree criminal sexual conduct if: (1) the actor has a significant relationship with the complainant; (2) the complainant was at least 16 but under 18 years of age at the time of the act; and (3) the sexual abuse involved multiple acts over an extended period of time. Specifically, appellant now argues that the state failed to establish at the plea hearing that the conduct occurred "over an extended period of time."

Both appellant and the state agree that "extended period of time" is not defined in the criminal code. Appellant correctly argues that courts have determined periods of ten, six, and two years are sufficiently "extended" insofar as third-degree criminal sexual conduct is concerned. *See State v. Suhon*, 742 N.W.2d 16, 22 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). This precedent, however, is not relevant to appellant's appeal. The only relevant time frame in the statute to which appellant pleaded guilty is the 24 months when the complainant is between 16 and 18 years old. Overall, there appears to be no bright line rule as to what qualifies as an "extended period of time," and

the record here contains sufficient evidence to support the postconviction court's finding that appellant's plea was accurate.

During the plea hearing, the following exchange took place between appellant and his counsel regarding the time frame in which the pleaded-to offense occurred:

> DEFENSE COUNSEL: And at some time prior to the filing of these charges in October 2007 through the following year, shortly before or shortly after during that time frame, you had sexual intercourse with her, didn't you?
> APPELLANT: Yes, I did.
> DEFENSE COUNSEL: And you had sexual intercourse with her on more than a couple of occasions. You had sexual intercourse with her at least three times, didn't you?
> APPELLANT: That's correct.
> . . . .
> DEFENSE COUNSEL: And that offense happened either here in Grant – those offenses, those times – were either here in Grant County and/or Hennepin County, right?
> APPELLANT: That's correct.
> DEFENSE COUNSEL: And so, I mean this didn't happen within a week's period of time. It happened over an extended period of time.
> APPELLANT: Yes.

The prosecutor questioned appellant in this regard as well:

> PROSECUTOR: And at the time that the offenses that we're talking about took place, [complainant] was between age – she was at least 16, but she wasn't yet 18 years old; is that correct?
> APPELLANT: That is correct.
> PROSECUTOR: And are we saying that there were three, at least, that happened here in Grant County?
> APPELLANT: That's – over that whole period of time, yes.

The postconviction court determined that these exchanges were sufficient to establish an "extended period of time" under Minn. Stat. § 609.344, subd. 1(g)(iii). We agree.

Moreover, the record beyond the transcript contains further evidence that appellant's criminal sexual conduct took place more than once during the relevant 24 months. The PSI[1] reviewed by the district court before accepting appellant's plea provides that appellant admitted he "had sex with (victim) on 3 occasions since she turned 17 years of age," and "sexually abused the victim on 3 occasions during the summer and fall of 2008." The PSI also provides that the complainant recalled "[i]t didn't start off as sex, but it got that way when I was 13 or 14," and that the abuse occurred on a more frequent basis, "every third time he'd come home, it would happen once or twice," during the "past few years." Where, like here, there is no testimony as to a specific date of abuse but instead references to various acts of sexual abuse occurring "more than once," the "extended period of time" element is sufficiently established. *See State v. Campa*, 399 N.W.2d 160, 162 (Minn. App. 1987) (quotation marks omitted), *review denied* (Minn. Feb. 13, 1987).

Finally, while the questioning during the plea hearing could have been more precise, appellant never said anything to negate an essential element of the charged crime. *See State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003) (holding that the factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty).

[1] If, as here, acceptance of the plea is delayed until after a PSI is completed, the PSI is considered a part of the record both at sentencing and on appeal insofar as fulfilling the accuracy requirement is concerned. *State v. Lyle*, 409 N.W.2d 549, 552–53 (Minn. App. 1987) (stating that the PSI may be assumed to have been considered by the trial court prior to its acceptance of the plea and to have fulfilled the accurateness requirement).

B. Leading Questions

Appellant also alleges that the form of questioning during his plea hearing—only leading questions from counsel, the district court not taking an active role—rendered his plea inaccurate. The practice of using leading questions to establish a plea's factual basis is, on its own, an insufficient ground to invalidate a guilty plea. *See Perkins v. State*, 559 N.W.2d 678, 689 (Minn. 1997). A defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction. *Raleigh*, 778 N.W.2d at 94.

Appellant relies on *State v. Shorter* to support his argument that his plea was inaccurate due to leading questions. 511 N.W.2d 743 (Minn. 1994). The cases are easily distinguishable. Shorter was permitted to withdraw his guilty plea because a number of "highly unusual facts . . . render[ed] his plea suspect," only one of which was the manner in which the factual basis was elicited. *Id.* at 746–47. In addition to the use of leading questions during the plea hearing, Shorter was allowed to withdraw his plea because (1) the police department had reopened its investigation and was prepared to testify before the trial court that the original investigation was incomplete; (2) the defendant had been unable to locate witnesses due to a potential discovery violation; and (3) the defendant had pleaded factual allegations sufficient to have a postconviction hearing to present new evidence and had been denied a hearing. *Id*. Here, no one is arguing, and the record does not contain, evidence that similarly numerous "highly unusual facts" exist.

Indeed, the record does provide sufficient evidence to support the postconviction court's finding of an adequate factual basis, and as such, the fact that leading questions were used during the plea hearing does not result in an invalid plea. The postconviction court did not abuse its discretion when it found that appellant's plea was accurate.

II. Voluntary

The voluntariness requirement ensures that a defendant is not pleading guilty due to improper pressures or inducements. *Trott*, 338 N.W.2d at 251. When determining whether a plea was voluntary, the inquiry is "whether the plea is voluntary and represents a knowing and intelligent choice of the alternative courses of action available." *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). Appellant contends that his plea was involuntary because he experienced undue pressure from his attorney and believed that his attorney was not prepared for trial. The district court disagreed and concluded that appellant's plea was voluntary. We agree. Nothing in the record suggests that appellant's plea was involuntary.

In support of his allegation, appellant submitted his own sworn affidavit with his petition for postconviction relief containing the following assertions: he wanted to have a trial; his counsel filed notice of an alibi defense; and in the weeks leading up to the scheduled trial date, he "did not have any confidence" that his attorney had attempted to verify facts supporting his alibi defense. Specifically, appellant argues that (1) his attorney had not provided him confirmation that appellant's work schedule had been requested, which would have shown when he was out-of-state; (2) the investigator had spoken with a care attendant who lived in appellant's home; (3) family phone records had

been subpoenaed, which would show when appellant's accuser would have been talking or texting on her cell phone; or (4) any request had been made for an *in camera* review of the accuser's medical records, which would have shown when she was ill or in the hospital. Additionally, appellant's affidavit contains the assertion that he did not have "any indication" that his attorney was investigating "the possibility that persons may have improperly influenced" his accuser to report. Appellant alleges that the only reason he pleaded guilty was because he "did not believe" his attorney was prepared for trial. Appellant thought his only alternative to pleading guilty was to proceed to trial with unprepared counsel.[2]

The record, including appellant's affidavit, does not contain evidence tending to suggest that appellant's private defense counsel was in fact unprepared for trial. There is no evidence that appellant's attorney failed to investigate an alibi defense or that appellant even had a viable alibi defense. The presentation of evidence is a matter of trial strategy, and the appellate courts do not review attacks on trial strategy. *Dobbins v. State*, 788 N.W.2d 719, 731 (Minn. 2010). Moreover, at the plea hearing, appellant confirmed that he had sufficient time to talk with his attorney about the case; that his

[2] Typically, as the state recognizes, a defendant presents these types of allegations as "involuntary because of ineffective assistance" of counsel. Appellant did *not* present his involuntary argument as "involuntary because of ineffective assistance" in either his postconviction petition or in his brief on appeal. He did, however, specifically make such a claim in his pro se reply brief to this court. As discussed in section IV of this opinion, appellant's claim of ineffective assistance is barred. Even if the claim was not barred, it likely would have failed on its merits. As the record indicates was the case here, "a defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel." *State ex. rel. Rankin v. Tahash*, 276 Minn. 97, 102, 149 N.W.2d 12, 16 (1967) (quotation omitted).

attorney had been fully informed as to the facts of the case; and that he had adequate time to discuss his own theories and defenses with his attorney.

The record, including appellant's affidavit, does not contain evidence tending to suggest that appellant was subject to any improper pressure or coercion when he entered his plea. When asked whether anybody was forcing or coercing him into entering the plea, appellant replied "[n]o, sir." When counsel stated "[s]o you're doing th[is] out of your own free will," appellant said, "[y]es." Appellant said "correct" when asked to confirm that "[he was] making absolutely no claim that [he is] innocent of these charges, and that's why [he was] pleading guilty." At the sentencing hearing, held weeks after the plea hearing, appellant was told that he could "make whatever statement [he] wish[ed] to." Appellant availed himself of this opportunity, and said nothing indicating that he was dissatisfied with his counsel in any way or that he had felt any pressure whatsoever to plead guilty.

Appellant's professed uncertainties regarding his defense counsel imply that he was afraid a jury would find him guilty at trial. The fact that a defendant pleads guilty because he fears that a jury would find him guilty does not make a plea involuntary. *Barnes v. State*, 489 N.W.2d 273, 276 (Minn. App. 1992), *review denied* (Minn. Nov. 3, 1992). Additionally, the fact that appellant thought he might have a valid alibi defense does not mean that his plea was therefore involuntary. A court may accept a plea as voluntary even if the defendant had an available defense that could have been presented at trial. *State v. Gray*, 300 Minn. 504, 217 N.W.2d 737 (1974). Beyond appellant's own unsupported allegations that his counsel had not prepared an alibi defense, nothing in the

record suggests that the defense would *not* have been available had appellant gone to trial. Counsel had filed a notice of alibi defense five months before the scheduled trial date, thereby reserving the ability to raise such a defense, if it existed, at trial. Also, the record shows that appellant was satisfied that he and his counsel had discussed possible defenses.

The postconviction court did not abuse its discretion in finding that appellant's plea was entered voluntarily.

III. Evidentiary Hearing on a Postconviction Petition

Appellant contends that the postconviction court erred by not holding an evidentiary hearing on his petition.[3] An evidentiary hearing must be set "[u]nless 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 (2010). "Allegations in a postconviction petition must be more than argumentative assertions without factual support." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (quotation omitted). A hearing is "not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990).

Appellant argues that the postconviction court made a credibility determination about the statements in his affidavit, and that to have done so without a hearing was error.

[3] Appellant admits that he did not request an evidentiary hearing. Minn. Stat. § 590.04 does not require a petitioner to request a hearing in order to receive one. Instead, to be entitled to a hearing, the statute requires a petitioner to point to evidence of a certain type ("petition and the files and records of the proceeding") and quality ("conclusively show[ing] that the petitioner is entitled to [ ] relief"). Minn. Stat. § 590.04, subd. 1 (2010). If such evidence is produced, "the court shall promptly set" a hearing. *Id*.

See Opsahl v. State, 677 N.W.2d 414 (Minn. 2004) (holding that the postconviction court misapplied Minn. Stat. § 590.04 and thus committed reversible error when it concluded that affidavits of recanting witnesses were unreliable without holding an evidentiary hearing). However, the record here contains no evidence that the postconviction court made any credibility determinations at all regarding the affidavit.

Instead, this is simply a case where the petition, files, and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1. Even if taken as true, the allegations in appellant's affidavit do not show that his plea was involuntary. The allegations in appellant's affidavit are "argumentative assertions without factual support." *Leake*, 737 N.W.2d at 535. Appellant's petition points to nothing beyond the allegations contained in his own affidavit as evidence supporting a finding of involuntariness.[4] Appellant's assertions began with phrases such as "I did not have any confidence that . . .," "I did not have any information from my attorney . . .," "I did not have any indication that . . .," and "I did not believe . . . ." Appellant's affidavit encompasses his feelings and fears, not facts.

[4] Courts are more likely to find a petitioner's allegations properly supported by facts when there are additional affidavits submitted by third parties. *See Opsahl*, 677 N.W.2d 414 (stating that an evidentiary hearing was required where sworn affidavits were submitted by three recanting witnesses); *Ferguson v. State*, 645 N.W.2d 437 (Minn. 2002) (holding that an evidentiary hearing was required where a notarized statement had been submitted by a witness's father stating that the witness lied at trial); *State v. Rhodes*, 627 N.W.2d 74 (Minn. 2001) (stating that an evidentiary hearing was required where affidavits submitted by a pathologist and two expert defense lawyers went to an ineffective-assistance-of-counsel claim).

It was not an abuse of discretion for the postconviction court to conclude that appellant was not entitled to relief, and therefore it was not an abuse of discretion to deny the petition without an evidentiary hearing.

IV. New Claims

In his pro se brief, appellant argues that he had been promised that prosecution against him in the state of Georgia would be dropped if he pleaded guilty in this case. Appellant's postconviction petition contains no allegation of such an agreement. Not only is the record void of any evidence such a promise was made,[5] but it is also well-settled that a party may not raise issues for the first time on appeal from denial of postconviction relief. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006).

In his pro se reply brief, appellant also raises several new theories to support his claim that his plea was involuntary and alleges that he has evidence that his defense counsel did not adequately investigate an alibi defense. Appellant argues that he received ineffective assistance of both trial and appellate counsel, and that he is innocent. Not only were these factual allegations and legal issues not before the postconviction court and therefore not properly before us here, but issues raised for the first time in an appellant's reply brief in a criminal appeal, having not been raised in the respondent's

[5] During the plea hearing, defense counsel specifically discussed possible prosecution in Georgia:

> DEFENSE COUNSEL: You understand that this agreement, this plea agreement, is independent of and not contingent upon any prosecution in Otter Tail County. It doesn't have anything to do with what may or may not happen in the state of Georgia. You understand that.
> APPELLANT: I understand.

brief, are not proper subject matter for the appellant's reply brief, and may be deemed waived. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009).

Because the postconviction court did not abuse its discretion when it found that appellant's guilty plea was both accurate and voluntary, and because appellant did not allege facts sufficient to entitle him to an evidentiary hearing, there has been no manifest injustice and his postconviction petition was properly denied.

Affirmed.