STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1011

State of Minnesota,
Respondent,

vs.

Jeremy Scot Crockett Tubbs,
Appellant.

Filed June 24, 2013
Affirmed
Peterson, Judge

Blue Earth County District Court
File No. 07-CR-11-3384

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

Ross E. Arneson, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Jeremy Scot Crockett Tubbs, North Mankato, Minnesota (pro se appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

PETERSON, Judge

In this appeal from his conviction of first-degree driving while impaired (DWI), pro se appellant argues that because a prior implied-consent license revocation was caused by the ineffective assistance of counsel, the revocation could not be used to enhance the current DWI offense to a felony. Therefore, appellant contends, because he never made a factual admission to a felony-level DWI, his guilty plea lacked an adequate factual basis and the district court erred by denying his motion to withdraw the plea before sentencing. We affirm.

FACTS

Following an incident on September 18, 2011, appellant Jeremy Tubbs was charged with first-degree DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1); 169A.24, subd. 1(1) (2010) (drives, operates, or is in physical control of motor vehicle when under the influence of alcohol and commits violation within ten years of first of three or more qualified prior impaired-driving incidents). The three prior impaired-driving incidents that provided the basis for the first-degree charge occurred in 2003, 2006, and 2010.

There is no dispute about the incidents that occurred in 2003 and 2006, which resulted in appellant being convicted of misdemeanor and gross-misdemeanor DWI offenses. But appellant disputes whether the 2010 impaired-driving incident may be used as a basis for charging him with first-degree DWI for the current offense. To understand appellant's claim, it is necessary to understand some facts about the 2010 incident.

In June 2010, appellant was involved in a one-car rollover accident, and, because appellant's alcohol concentration was .08 or more, his driver's license was revoked. Notice of the revocation was mailed to appellant on June 23, 2010. The notice stated that the revocation became effective on July 3, 2010. On July 22, appellant notified his attorney that his driver's license was suspended as of July 3. The attorney filed a petition for judicial review of the revocation within 30 days after July 3. But, because the implied-consent law requires that a petition for judicial review be filed within 30 days after receiving notice of revocation, rather than 30 days after the revocation becomes effective, the petition for judicial review was untimely and, therefore, it was dismissed. *See* Minn. Stat. § 169A.53, subd. 2(a) (2012) (permitting person to petition for judicial review within "30 days following receipt of a notice and order of revocation"). In a September 17, 2010 letter, appellant's attorney explained to appellant that he could seek administrative review of his license revocation, but appellant did not do so. The state did not pursue a criminal prosecution following the June 2010 incident, and appellant was not convicted of DWI for that incident.

After he was charged with first-degree DWI for the current offense, appellant moved to dismiss the felony charge, arguing that the 2010 license revocation is not a qualified prior impaired-driving incident that can be used to support a first-degree charge. Appellant contended in his motion that there was no evidence that he was driving at the time of the 2010 incident, which is why he was not criminally prosecuted, and that he should not now be convicted of a felony because his attorney incompetently filed the petition for judicial review one day late.

Before the district court ruled on appellant's motion to dismiss, appellant reached a plea agreement with the state, and in January 2012, he pleaded guilty to first-degree DWI. At the plea hearing, appellant testified that he understood that the DWI was a felony-level offense because he had three prior impaired-driving incidents: the 2003 DWI conviction, the 2006 DWI conviction, and the 2010 license revocation. Appellant also testified that he signed a petition to plead guilty after going over the petition paragraph by paragraph with his lawyer.

At the sentencing hearing on March 26, 2012, appellant asked the district court to delay sentencing in light of a recent decision of the United States Supreme Court. The district court delayed sentencing for three weeks. On April 12, appellant's attorney wrote a letter to the court:

> I did not believe that I could ethically bring a collateral attack on the 2010 Implied Consent against [appellant] based upon my reading of *Schmidt*.[1] However, since the [United States] Supreme Court has come out with *U.S. v. Jones*,[2] I believe it may be incompetent of me not to attack the prior implied consent.
>
> As a result it would be my suggestion that we reopen the Omnibus hearing for this issue only.

[1] We believe that counsel was referring to *State v. Schmidt*, 712 N.W.2d 530 (Minn. 2006), in which the Minnesota Supreme Court discussed *Custis v. United States*, 511 U.S. 485, 496, 114 S. Ct. 1732, 1738 (1994), and explained that the United States Supreme Court concluded that "outside of the right to appointed counsel . . . , lesser violations of the federal Constitution (specifically, ineffective assistance of counsel, entry of a plea that was not knowing and intelligent, or agreement to a stipulated facts trial without being adequately advised of trial rights) did not rise to the level of a jurisdictional defect that could be raised by collateral challenge when the conviction was used to enhance the defendant's sentence." *Schmidt*, 712 N.W.2d at 534.

[2] Appellant has not provided a citation for *U.S. v. Jones*, and we have not found any United States Supreme Court opinion that appears to be the opinion referred to by appellant's attorney.

At the continued sentencing hearing on April 16, appellant's attorney argued that

> a new decision from the United States Supreme Court indicates that we can attack in a collateral manner the prior competency of a lawyer and in that situation it was a criminal case and all be it, in this situation, we've got an Implied consent that was filed a day late and we want to attack the lawyer because that was the basis for the . . . conviction here.

Appellant moved to withdraw his guilty plea.

The state opposed the motion, arguing that the 2010 license revocation resulted from appellant's failure to give his attorney accurate information about the revocation notice, not from an error by the attorney. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

A criminal defendant does not have an absolute right to withdraw a plea of guilty once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). The district court has discretion to allow a

> defendant to withdraw a plea at any time before sentence if it is fair and just to do so. The court must give 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. "The defendant bears the burden of proving that there is a fair and just reason for withdrawing his plea." *Farnsworth*, 738 N.W.2d at 371 (quotation omitted). The decision whether to allow withdrawal under the fair-and-just standard is committed to the district court's discretion and will not be reversed absent an abuse of that discretion. *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991).

Collateral Attack of License Revocation Used for Enhancement

A person who drives while impaired is guilty of first-degree DWI if the person "commits the [current] violation within ten years of the first of three or more qualified prior impaired driving incidents[.]" Minn. Stat. § 169A.24, subd. 1(1). Qualified prior impaired driving incidents include "prior impaired driving convictions" and "prior impaired driving-related losses of license." Minn. Stat. § 169A.03, subd. 22 (2010). A prior impaired driving-related loss of license includes a driver's license revocation. *Id.*, subd. 21 (2010). Appellant's license was revoked in 2010 after testing indicated an alcohol concentration of .08 or more following an arrest for DWI. *See* Minn. Stat. § 169A.52, subd. 4 (2010) (providing that test indicating alcohol concentration of .08 or more as basis for license revocation). Therefore, under the plain language of the statute, appellant's 2010 license revocation may be used to enhance his current DWI charge.

But, citing *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, ___ U.S.___, 132 S. Ct. 1399 (2012), appellant argues "that a defendant is entitled to competent representation throughout the criminal proceeding, which likewise should include any events that have an impact on a criminal proceeding." Appellant contends that his felony conviction in this case was "based on the existence of an un-reviewed implied consent revocation because of a failure of [his] counsel to properly file the review of the revocation, thus denying [him] the opportunity to challenge that revocation," and "the District Court mistakenly believed that [appellant] could not challenge, collaterally, [his] prior implied consent proceeding."

In *Frye*, the Supreme Court held that a criminal defendant's "Sixth Amendment right to effective counsel in criminal prosecutions extends to the consideration of plea offers that lapse or are rejected." 132 S. Ct. at 1402. In *Lafler*, the Supreme Court addressed how to apply the *Strickland* prejudice test when defense counsel's ineffective representation resulted in the rejection of a plea offer and the defendant was convicted at trial. 132 S. Ct. at 1380. Neither *Frye* nor *Lafler* involved a collateral challenge to a previous proceeding that affected the current proceeding. Appellant has not presented any argument explaining how either *Frye* or *Lafler* provides a basis for him to collaterally challenge his 2010 implied-consent license revocation. "[I]f a brief fails to make or develop any argument at all, the issue asserted is considered waived." *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). "Pro se litigants are generally held to the same standards as attorneys." *Id.* Appellant has waived any claim that under *Frye* and *Lafler* the district court erred in determining that appellant could not collaterally challenge his 2010 license revocation.

Appellant also argues that denying him an opportunity to present evidence at his plea hearing to establish that his 2010 license revocation may not be used for enhancement because it was the result of ineffective assistance of counsel appears to be contrary to *State v. Mellett*, 642 N.W.2d 779 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). In *Mellett*, a driver whose two prior license revocations were used to enhance her test-refusal charge claimed that the revocations may not be used for enhancement because she was not given a full opportunity to consult with an attorney. *Id.* at 788-89. This court stated:

> Under the Minnesota Constitution, an individual has a limited right, upon request, to obtain legal advice before deciding whether to submit to chemical testing, provided the consultation does not unreasonably delay administration of the test. But it is well settled that there is no *Sixth Amendment* right to consult with counsel before deciding whether to consent to chemical testing. Therefore, appellant's right-to-counsel argument must be based on the statutorily granted right and not on the Sixth Amendment right to counsel.
>
> . . . .
>
> To properly raise the constitutionality of a prior license revocation and shift the burden of proof to the state, an appellant must (1) promptly notify the state that her constitutional rights were violated during a prior license revocation; and (2) produce evidence in support of that contention with respect to each challenged revocation. . . .
>
> Here, appellant provided an affidavit stating that she did not have a full opportunity to consult with an attorney during her prior license revocations. [A]lthough the defendant does not have the ultimate burden of proof, the defendant is obligated to come forward with some evidence indicating that the defendant was deprived of the right to counsel before the state must assume its burden of proof. The statutorily granted right to counsel in the implied consent context is, by its own definition, limited. Appellant has only claimed the lack of a full opportunity to consult with an attorney and has provided no other evidence. Given these two facts, we hold that appellant has not met her obligation here, and therefore has not shifted the burden of proof to the state.

Id. at 789-90 (citations and quotations omitted).

Like the appellant in *Mellett*, appellant does not claim that the 2010 license revocation violated his limited right under the Minnesota Constitution to obtain legal advice before deciding whether to submit to chemical testing. Instead, appellant claims that his constitutional right to the effective assistance of counsel was violated when his

attorney failed to timely file a petition for judicial review. But appellant has not cited any authority for his claim that he had a right to the effective assistance of counsel when petitioning for judicial review of the 2010 license revocation. In *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 600 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003), this court explained that both the United States Constitution and the Minnesota Constitution guarantee a right of legal representation that attaches in criminal proceedings and held that "given the civil nature of the implied consent proceeding, [a driver] may not bring a claim of ineffective assistance of counsel." Consequently, denying appellant an opportunity to present evidence at his plea hearing to establish that his 2010 license revocation was the result of ineffective assistance of counsel is not contrary to *Mellett*.

Factual Basis for Guilty Plea

Appellant argues that because he refused to accept his 2010 license revocation as a factual basis for an element of his offense, the district court "had no alternative but to not formally accept his plea, and to remand the case for trial." To be valid, a guilty plea "must be accurate, voluntary, and intelligent." *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (quotation omitted). To be accurate, a plea must be supported by an adequate factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "The usual way in which the factual basis requirement is satisfied is for the court to ask the defendant to express in his own words what happened." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). During appellant's January 24, 2012 plea hearing, the district court elicited the following testimony from appellant:

Q. The reason that this is a felony level offense is - is that you've got three prior - what are called qualified driving incidents or impaired driving incidents. Looking at your record, it looks like you had a DWI in Lyon County back in 2003. Is that right?
A. That's correct.
Q. You had a DWI here in Blue Earth County in 2006. Is that right?
A. That is correct.
Q. And then you were picked up for DWI and given an Implied Consent in Scott County in June of 2010 and ended up having your license revoked as a result of that Implied Consent violation where you had a blood alcohol concentration of over .08. Is that right?
A. That is correct.

Although appellant attempted to challenge the validity of the 2010 license revocation, he explicitly acknowledged that the revocation occurred, which provided the necessary factual basis for appellant's guilty plea.

The district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Affirmed.