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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1008**

State of Minnesota,
Respondent,

vs.

Timothy Thomas Ogris,
Appellant.

**Filed May 7, 2018
Reversed and remanded
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-12-9365

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

Lyndsey Olson, St. Paul City Attorney, Laura Pietan, Deputy City Attorney, Steven Heng,
Tamara Larsen, Assistant City Attorneys, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of gross-misdemeanor domestic assault, arguing that the district court erred by denying his motion to withdraw his guilty plea. Because the factual basis for appellant's guilty plea supports a conviction of misdemeanor domestic assault, and not a conviction of gross-misdemeanor domestic assault, we reverse the judgment of conviction for gross-misdemeanor domestic assault and remand for entry of judgment of conviction on the lesser-included offense of misdemeanor domestic assault and for resentencing on that offense.

FACTS

On November 26, 2012, respondent State of Minnesota charged appellant Timothy Thomas Ogris with two counts of gross-misdemeanor domestic assault and one count of attempted fifth-degree assault. On November 29, 2012, Ogris pleaded guilty to one count of gross-misdemeanor domestic assault pursuant to a plea agreement in which the state agreed to dismiss the remaining charges. During the plea hearing, the following exchange occurred between the prosecutor and Ogris:

Q: Mr. Ogris, I have a few questions: Is it true that on November 22nd of 2012 you were in St. Paul, Ramsey County, Minnesota, when you were involved in a fight in which you punched [Z.S.], your ex-girlfriend?

A: [Z.S.], yes.

Q: And you had been involved in a significant romantic relationship with that person?

A: For the last seven years, yeah.

Q: You punched her in the head?

A: Yes.

Q: And you also have a prior conviction from Florida for aggravated battery from 2011; is that right?

A: Yes.

Ogris submitted a petition in support of his guilty plea, in which he indicated that he “punched [his] ex-girlfriend in the head not in self defense causing her physical pain” and that he “was convicted of battery in [Florida] in 2010.”

Ogris did not appear for his scheduled sentencing hearing on January 9, 2013, and the district court issued a warrant for his arrest. In December 2016, Ogris was arrested pursuant to the warrant. On February 27, 2017, Ogris moved to withdraw his guilty plea. At a hearing on his motion, Ogris argued that his guilty plea was invalid because his prior Florida conviction was not a qualified domestic-violence-related-offense conviction as required under the domestic-assault statute. Ogris argued that “[t]he out of state case [did] not [involve] a family or household member” and instead involved “two individuals at a bar.” The district court denied Ogris’s motion to withdraw his guilty plea, reasoning that he had made “a knowing and intelligent waiver before pleading guilty.” The district court sentenced Ogris to a 91-day jail term, with credit for time served. Ogris appeals.

D E C I S I O N

“A defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). However, withdrawal is permitted in two circumstances. *Id.* First, “[a]t any time the court must allow a defendant to withdraw a guilty plea 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. Second, “[i]n its discretion the court may allow the defendant to withdraw a plea at any time before

sentence if it is fair and just to do so.” *Id.*, subd. 2. Although Ogris moved for withdrawal of his guilty plea under both the manifest-injustice and fair-and-just standards in the district court, he argues for relief only under the manifest-injustice standard on appeal.

A manifest injustice results if a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). An assessment of the validity of a guilty plea presents a question of law that this court reviews de novo. *Raleigh*, 778 N.W.2d at 94. To be valid, a guilty plea must be “accurate, voluntary, and intelligent.” *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002). “The main purpose of the accuracy requirement is to protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial.” *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). “A proper factual basis must be established for a guilty plea to be accurate.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Ogris contends that “[b]ecause the factual basis for [his] guilty plea failed to establish he has a prior domestic violence-related conviction against a family or household member as required by the charging statute in effect at the time he committed the charged offense,” the district court erred by denying his motion to withdraw his guilty plea.

Ogris pleaded guilty to gross-misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 2 (2012). Under subdivision 1 of that statute, whoever “(1) commits an act with intent to cause fear . . . of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm” against a “family or household member” is guilty of misdemeanor domestic assault. Minn. Stat. § 609.2242, subd. 1 (2012). Under subdivision 2 of section 609.2242, a person who violates subdivision 1 of the statute

“within ten years of a previous qualified domestic violence-related offense conviction . . . against a family or household member” is guilty of gross-misdemeanor domestic assault. “Family or household members” include “persons involved in a significant romantic or sexual relationship.” Minn. Stat. § 518B.01, subd. 2(b)(7) (2012).

During the plea hearing, Ogris admitted that he had a prior conviction in Florida for aggravated battery. Ogris’s plea petition also states that he “was convicted of battery in [Florida].” But Ogris did not admit that the prior conviction involved an assault against a family or household member, and the record does not otherwise establish that the victim of the prior offense was a family or household member. Indeed, the state agrees that Ogris’s “guilty plea was not accurate and did not support a gross-misdemeanor sentence due to its reliance on a prior enhancing conviction that was not a qualified domestic violence-related offense against a family or household member.” Because Ogris’s factual basis does not establish that he committed gross-misdemeanor domestic assault, his guilty plea to that offense is inaccurate and therefore invalid.

Although the parties agree that Ogris’s guilty plea was inaccurate, they disagree regarding the proper remedy. Ogris argues that the inaccuracy of his plea renders his plea invalid and that “[t]o correct this manifest injustice, this court must reverse [his] conviction and remand so he may withdraw his guilty plea.” The state counters that under Minn. R. Crim. P. 28.02, subd. 12, “the appropriate remedy is to reduce the conviction to the lesser-included offense of misdemeanor domestic assault and to remand the case to the district court for resentencing.”

Minn. R. Crim. P. 28.02, subd. 12, provides that if an appellate court reverses a judgment, it must: “(a) direct a new trial; (b) vacate the conviction and enter a judgment of acquittal; or (c) reduce the conviction to a lesser included offense or to an offense of lesser degree, as the case may require.” “If the court reduces the conviction, it must remand for resentencing.” Minn. R. Crim. P. 28.02, subd. 12(c). A defendant may be “convicted of either the crime charged or an included offense.” Minn. Stat. § 609.04, subd. 1 (2016). “A lesser degree of the same crime” and a “crime necessarily proved if the crime charged were proved” constitute included offenses. *Id.* Misdemeanor domestic assault is a lesser degree of gross-misdemeanor domestic assault. The only difference between the elements of misdemeanor domestic assault and gross-misdemeanor domestic assault in this case is that gross-misdemeanor domestic assault requires a prior qualified domestic-violence-related-offense conviction against a family or household member. Minn. Stat. § 609.2242, subds. 1-2.

Ogris opposes application of rule 28.02, subdivision 12(c). Ogris argues that he “is entitled, as a matter of right, to withdraw his guilty plea.” Ogris relies on rule 15.05, subdivision 1, which states that “the court *must* allow a defendant to withdraw a guilty plea” if “withdrawal is necessary to correct a manifest injustice.” (Emphasis added.) He also relies on caselaw that generally describes the appropriate remedy for an invalid plea as mandatory plea withdrawal. *See, e.g., Theis*, 742 N.W.2d at 651 (holding that, because a defendant’s guilty plea was not accurate and was therefore invalid, withdrawal of that plea must be allowed under rule 15.05, subdivision 1); *Hirt v. State*, 298 Minn. 553, 557, 214 N.W.2d 778, 782 (1974) (“[A] defendant who can show manifest injustice is entitled

as a matter of right to withdraw his plea of guilty whether or not his sentence has been imposed.”).

However, rule 15.05, subdivision 1, also states that a motion for withdrawal of a guilty plea based on a manifest injustice must be timely. It provides that the “court must allow a defendant to withdraw a guilty plea upon a *timely* motion.” Minn. R. Crim. P. 15.05, subd. 1 (emphasis added). Thus, under the plain language of the rule, the existence of a manifest injustice alone does not mandate plea withdrawal: the request for plea withdrawal must also be timely. This court has stated that “[t]he factors to be considered when determining whether a motion for plea withdrawal is timely are: (1) the district court’s interest in preserving the finality of convictions; (2) the defendant’s diligence in seeking withdrawal; and (3) whether the delay causes undue prejudice to the state’s prosecution of the case.” *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007) (citations omitted).

Ogris’s argument that he is “entitled, as a matter of right,” to withdraw his invalid guilty plea under rule 15.05, subdivision 1, ignores the timeliness requirement. Arguably, Ogris was not diligent in seeking plea withdrawal: he waited over four years after he failed to appear for sentencing. Depending on the degree of prejudice to the state, Ogris’s plea-withdrawal motion could be denied as untimely. In which case, Ogris’s gross-misdemeanor conviction would stand, even though it is not supported by an adequate factual basis. In sum, the timeliness requirement in rule 15.05 undercuts Ogris’s contention that every invalid guilty plea must be withdrawn.

In addition, rule 15.05, subdivision 1, also requires “proof to the satisfaction of the court that withdrawal is *necessary* to correct a manifest injustice.” (Emphasis added.) If application of rule 28.02, subdivision 12(c), could correct the manifest injustice resulting from Ogris’s inaccurate guilty plea, withdrawal of that plea would not be necessary.

The plain language of rule 28.02, subdivision 12(c), does not preclude its application to a conviction resulting from a guilty plea. We are not aware of any case holding that the alternative relief proposed by the state is unavailable under Minn. R. Crim. P. 28.02, subd. 12(c), as a remedy for an invalid guilty plea under the circumstances here. Ogris admitted to conduct constituting misdemeanor domestic assault, specifically, that Z.S. was his ex-girlfriend and that he “punched [her] in the head not in self defense causing her physical pain.” These admissions establish that Ogris “intentionally inflict[ed] . . . bodily harm” against a “family or household member” under Minn. Stat. § 609.2242, subd. 1. Ogris does not claim that his factual basis was inadequate to establish misdemeanor domestic assault or that he is not guilty of misdemeanor domestic assault. And the difference in the required elements of misdemeanor and gross-misdemeanor domestic assault in this case is unrelated to the facts regarding the assault itself; it is based on the offender’s prior record. See Minn. Stat. § 609.2242, subds. 1-2. Thus, entering judgment of conviction on misdemeanor domestic assault instead of mandating plea withdrawal is not inconsistent with the purpose of the accuracy requirement: “protect[ing] a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial.” *Trott*, 338 N.W.2d at 251.

Moreover, reducing Ogris's conviction to a lesser-included misdemeanor domestic assault is consistent with the general public policy favoring the finality of convictions based on guilty pleas. "The tender and acceptance of a plea of guilty is and must be a most solemn commitment." *Chapman v. State*, 282 Minn. 13, 16, 162 N.W.2d 698, 700 (1968). "Because of the presumption of finality, the setting aside of a plea should be done only for substantial and compelling reasons" *State v. Spraggins*, 742 N.W.2d 1, 5 (Minn. App. 2007).

Given the unique circumstances of this case, in which Ogris waited four years to request plea withdrawal, he does not claim that his plea was unintelligent or involuntary, he admitted conduct constituting misdemeanor domestic assault, he does not claim that he is innocent of misdemeanor domestic assault, and the state does not object to a reduced conviction in lieu of plea withdrawal, we apply rule 28.02, subdivision 12(c), instead of mandating plea withdrawal. Because the manifest injustice in this case can be corrected by entry of judgment for the lesser-included offense of misdemeanor domestic assault, plea withdrawal is not necessary. We therefore reverse the judgment of conviction for gross-misdemeanor domestic assault and remand for entry of judgment of conviction on the lesser-included offense of misdemeanor domestic assault and for resentencing on that offense.

Reversed and remanded.