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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1316**

State of Minnesota,
Respondent,

vs.

Pierre Lemar Burgess,
Appellant.

**Filed June 24, 2019
Affirmed
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-17-5662

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this direct appeal from a judgment of conviction, appellant Pierre Lemar Burgess argues that his guilty plea to driving while impaired (DWI)—test refusal was invalid because it was not supported by an adequate factual basis. We affirm.

FACTS

In July 2017, Saint Paul police responded to a report of gunshots fired, apparently involving a white Lincoln sedan. Police thereafter encountered a white Lincoln sedan driven by Burgess. Police determined that Burgess's driving privileges were canceled¹ and noticed a strong odor of alcohol coming from him. His eyes were bloodshot, and his speech was slurred. Burgess refused a preliminary breath test. At the law-enforcement center, police read him the implied-consent advisory and let him call an attorney. After Burgess made several phone calls, police requested that he submit to a breath test. Burgess refused. Respondent State of Minnesota charged Burgess with felony DWI—refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.20, subd. 2(1) (Supp. 2017).

On January 16, 2018, Burgess agreed to enter a plea of guilty. At the plea hearing, Burgess agreed that, once he was taken into custody, the officers noticed that he had a strong odor of alcohol and that his speech was slurred. He agreed that he refused to submit to a breath test and that he had three prior DWI-related offenses. The district court found

¹ Burgess's most recent prior convictions include a 2013 conviction for careless driving (resulting in the revocation of his driving privileges), a 2015 conviction for DWI, and a 2016 conviction for test refusal.

the factual basis adequate to support the plea. On May 15, 2018, the district court held a sentencing hearing. The district court denied Burgess's motion for a dispositional departure but agreed to a durational departure, imposing a sentence of 36 months' imprisonment and five years of conditional release.

This appeal follows.

DECISION

Appellant seeks to withdraw his guilty plea, arguing that he did not admit to sufficient facts to support a conviction for test refusal.

Burgess did not make this argument to the district court before entry of judgment. However, the supreme court has stated that, "by pleading guilty, a defendant does not waive the argument that the factual basis of his guilt was not established." *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003). Accordingly, "[a] defendant is free to simply appeal directly from a judgment of conviction and contend that the record made at the time the plea was entered is inadequate" to establish the requirements of a valid guilty plea. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). Thus, we consider Burgess's argument even though he did not present it to the district court.

"To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Nelson v. State*, 880 N.W.2d 852, 858 (Minn. 2016) (quotation omitted). If a guilty plea fails to meet any of these three requirements, the plea is invalid. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007). We review the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010)

To be accurate, a guilty plea must be supported by a factual basis. *Id.* A factual basis exists if there are “sufficient facts on the record to support a conclusion that defendant’s conduct falls within the charge to which he desires to plead guilty.” *Iverson*, 664 N.W.2d at 349 (quotation omitted). The factual-basis requirement is satisfied if the record contains credible evidence that would support a jury verdict that the defendant is guilty of the crime to which he pleaded guilty. *Nelson*, 880 N.W.2d at 859.

Burgess pleaded guilty to test refusal under Minn. Stat. § 169A.20, subd. 2 (Supp. 2017). That statute provides: “It is a crime for any person to refuse to submit to a chemical test of the person’s breath under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).” Minn. Stat. § 169A.20, subd. 2. The statute also incorporates two requirements. First, an officer must have had probable cause to believe the person was driving while impaired and, second, one of the following four conditions must exist:

- (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
- (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
- (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
- (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2016); *see also State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (“Refusing a chemical test is not a crime, therefore, unless it can be proven beyond a reasonable doubt that an officer had probable cause to believe the person was

driving, operating, or in physical control of a motor vehicle while impaired.” (quotation omitted)). Burgess argues that neither requirement was satisfied.

During the relevant portion of Burgess’s plea colloquy, Burgess answered the county attorney’s questions as follows:

Q. Did you make contact with police officers that night?

A. Yes, I did.

Q. And, in fact, they were investigating a shots fired call, is that right?

A. Yes.

Q. And they talked to you and determined that you had been driving a vehicle while your driver’s license had been cancelled as inimical to public safety, is that right?

A. Yes.

Q. And they placed you under arrest?

A. Yes.

Q. Once you were in custody the officers observed that you had a strong odor of alcohol coming from you and that your eyes were bloodshot and watery and your speech was slurred, is that right?

A. Yes.

Q. When they took you down to the Law Enforcement Center did they read you the Implied Consent Advisory?

A. Yes.

Q. And they gave you an opportunity to make a phone call to call an attorney?

A. Yes.

Q. And after that did they ask you to take a breath test?

A. Yes.

Q. Did you refuse to take that breath test?

A. Yes, I did.

Q. And Mr. Burgess, this is a felony because you have three prior DWI related offenses on your record, is that right?
A. Yes.

Before turning to the two requirements, we acknowledge Burgess's concern about the leading nature of the inquiry. The supreme court has discouraged district courts from permitting a factual basis for a guilty plea to be established through leading questions by counsel. *Raleigh*, 778 N.W.2d at 94. Rather, district courts should ask defendants to express in their own words what happened. *Id.* But "a defendant may not withdraw his plea simply because the [district] court failed to elicit proper responses" if the record is sufficient to support the conviction. *Id.* The supreme court has "never held that the use of leading questions automatically invalidates a guilty plea." *Nelson*, 880 N.W.2d at 860.

Turning to the two requirements of Minn. Stat. § 169A.51, subd. 1(b), Burgess first argues that the record does not establish that the officers had probable cause to believe that he was driving while impaired. He asserts that he did not explicitly admit to the police's belief that he was driving while impaired and that he did not implicitly concede it by testifying about his arrest, since he only acknowledged being arrested for driving on a canceled driver's license, not being arrested for DWI. We are not persuaded. Burgess acknowledged in the plea colloquy that he was driving a car and that police thereafter observed his bloodshot and watery eyes, his slurred speech, and the strong odor of alcohol coming from him. His admission to those facts, including the multiple indicia of intoxication, establishes that police had an objective basis to believe he was driving under the influence. *See State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (finding police officer's observation of driver's bloodshot and watery eyes, slurred speech, and strong odor

of alcohol sufficient to establish probable cause). Moreover, Burgess acknowledged that police read him the implied-consent advisory and asked him to take a breath test. Together with his admission that police observed indicia of intoxication, Burgess’s testimony gives rise to the reasonable inference that the police believed they had probable cause he was driving while impaired. *See Barnslater v. State*, 805 N.W.2d 910, 914-15 (Minn. App. 2011) (holding that intent element of crime can be inferred from other facts admitted by the defendant in plea colloquy).

Burgess also argues that the record does not establish the second requirement—that one of four statutory conditions was met. The state relies on the condition that Burgess refused to take a preliminary breath test (PBT). *See* Minn. Stat. § 169A.51, subd. 1(b)(3). Burgess correctly points out that the colloquy is silent about his PBT refusal. But the state urges us to consider the complaint, which states that Burgess “refused a preliminary breath test.” Burgess disputes that the complaint may be considered, contending that the record in his case is limited to the plea transcript.

We disagree. “[T]he plea petition and colloquy may be supplemented by other evidence to establish the factual basis for a plea.” *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012); *see also State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (concluding that the record as a whole, which included the complaint and photos of the victim’s injuries taken at the hospital, was sufficient to establish factual basis for guilty plea); *State v. Hoaglund*, 240 N.W.2d 4, 6 (Minn. 1976) (looking to the record as a whole, including the presentence investigation, in evaluating factual basis for guilty plea); *Burnett v. State*, 195 N.W.2d 187, 188 (Minn. 1972) (noting that the presentence investigation contained

defendant's version of crime in detail and, while its use is disapproved, constituted an adequate factual basis for guilty plea); *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015) (looking to the complaint for factual basis to support guilty plea). While we would not consider the statement in the complaint regarding refusing the PBT if Burgess had negated that fact during his plea, *see State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017) (holding that plea lacked factual basis when the defendant negated an essential element of the crime), Burgess did not negate that he refused to take a screening test. The complaint therefore establishes that Burgess refused to take the screening test, satisfying one of the four statutory conditions. *See* Minn. Stat. § 169A.51, subd. 1(b)(3).

In sum, based on the plea colloquy and the facts in the complaint, a sufficient factual basis exists to support Burgess's guilty plea. His plea is therefore accurate and valid.

Affirmed.