

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0529**

State of Minnesota,
Respondent,

vs.

Alfred Richard Einberger, III,
Appellant.

**Filed January 4, 2021
Affirmed
Connolly, Judge**

Mower County District Court
File No. 50-CR-18-1961

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

Kristen M. Nelsen, Mower County Attorney, Kea Izabela Maxwell, Assistant County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam S. Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaitas,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that his guilty plea to second-degree controlled-substance crime was not accurate because he did not admit that he possessed a controlled substance and that his guilty plea to driving while impaired (DWI) was not accurate because he did not admit that he knew his body contained a controlled substance or its metabolite while he was driving. Because we see no inaccuracy in appellant's guilty pleas, we affirm.

FACTS

Following a traffic stop in September 2018, appellant Alfred Einberger III was charged with count one: second-degree controlled substance possession—felony; count two: predatory offender failure to register—felony; count three: fifth degree controlled substance possession—felony; count four: fourth-degree driving while impaired (DWI)—controlled substance—misdemeanor; and count five: fourth-degree DWI—any amount schedule I/II—misdemeanor. He pleaded guilty to counts one and five with an agreement that (1) the other charges would be dropped, (2) he would receive the bottom-of-the-box guideline sentence of 95 months in prison for count one, and (3) the state would not oppose his motion for a dispositional departure and a stay of the sentence.

The district court denied appellant's departure motion, and appellant was sentenced to 95 months in prison, executed, for count one and a concurrent 90 days for count five. He challenges his convictions, arguing that his guilty pleas were inaccurate.

DECISION

Standard of Review

The validity of a guilty plea is a question of law that this court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The defendant must show that the plea is invalid. *Id.* A defendant has no absolute right to withdraw a guilty plea, but a court must allow withdrawal if it is necessary to correct a manifest injustice. *Id.* at 93. A manifest injustice exists if a plea is not valid. *Id.* at 94. To be constitutionally valid, a plea must be accurate, voluntary, and intelligent. *Id.* A guilty plea is accurate if it is supported by a proper factual basis. *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007).

1. Plea to Second-degree Controlled Substance Possession

Appellant's plea was supported by testamentary evidence. At the hearing, he responded affirmatively when asked (1) if, for a person with his criminal history, the presumptive disposition for Count 1 would be commitment to prison; (2) if he understood that, while the plea agreement allowed him to seek a departure, there was no agreement that he would receive a departure; and (3) if the district court did not grant the departure, appellant would have no basis to withdraw his guilty plea.

These questions were followed by appellant's attorney providing the factual basis for appellant's guilty plea. Appellant again answered, "Yes" when asked if a deputy had (1) stopped him, (2) had him do field sobriety tests, (3) arrested him for suspicion of DWI, (4) searched his vehicle, and (5) located more than 25 grams of methamphetamine during the search. Appellant was then asked if he knew the methamphetamine was there; if he provided a urine sample when asked; if he understood that the sample had been tested and

indicated that methamphetamine and its metabolite, amphetamine, were in appellant's system when the sample was taken; and if this evidence was the basis for his pleading guilty to Count 5 as well as Count 1. Again, he answered, "Yes" to each question. The district court said it was satisfied there was a factual basis and accepted the plea.

Appellant says he "agreed to plead guilty to controlled substance possession" but "did not admit . . . that he possessed controlled substances" and that his plea is inaccurate because he admitted only to driving a vehicle in which controlled substances were found, which "does not establish that he possessed the substances found somewhere inside the vehicle." We disagree.

Constructive possession requires a showing either that the police found the substance in a place under the defendant's exclusive control to which others did not usually have access or that, if others did have access, there is a strong probability inferable from other evidence that the defendant was at the time consciously exercising dominion and control over the substance. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975); *see also State v. Hunter*, 857 N.W.2d 537, 542 (Minn. App. 2014) (clarifying that constructive possession requires a suspect's exercise of dominion and control over the substance, not over the place where it is found).

Appellant was the driver and sole occupant of a vehicle in which 0.2 grams of liquid methamphetamine and a syringe were found in a compartment near the steering wheel and more than 25 grams of methamphetamine, two ecstasy pills, two syringes with hallucinogenic mushroom spores, \$2,100 in cash, a digital scale, and two methamphetamine pipes were found in the trunk. He testified that he knew the

methamphetamine was in the vehicle when he was driving. It can be inferred that appellant, alone and driving a car he knew contained more than 25 grams of methamphetamine, was exercising dominion and control over the methamphetamine.

Appellant relies on *Hunter* and on *State v. Sam*, 859 N.W.2d 825 (Minn. App. 2015), for his argument that driving a vehicle in which controlled substances were found does not establish that he possessed the substances. His reliance is misplaced because both cases are distinguishable. In *Hunter*, a passenger was in the vehicle with the driver, and an officer testified that he saw the driver drop what the officer believed to be a bag of cocaine onto the passenger seat and the passenger push the bag onto the floor. *Hunter*, 857 N.W.2d at 540. In part because the jury was not properly instructed on constructive possession, the conviction was reversed. *Id.* at 543. *Sam* also involved a vehicle with a driver and a passenger, neither of whom owned the vehicle. *Sam*, 859 N.W.2d at 828. Methamphetamine was found in the glove box and on the passenger's person. *Id.* at 829. “[B]ecause the state failed to prove beyond a reasonable doubt that [the driver] constructively possessed the methamphetamine in the car,” the driver’s conviction of fifth-degree possession of a controlled substance was reversed. *Id.* at 829-30.

Appellant’s guilty plea provided an adequate basis for his conviction of constructive possession of more than 25 grams of methamphetamine.

2. Plea to Fourth-Degree DWI—Any Amount Schedule I/II

The offense of “DWI—any amount Schedule I/II” requires that a person drove or was in physical control of a motor vehicle while that person’s body contained any amount of a Schedule I or Schedule II drug or its metabolite. Minn. Stat. § 169A.20, subd. 1(7)

(2018). Appellant’s urine test following his arrest indicated the presence of amphetamine and methamphetamine in his body. He does not dispute this, but argues that “the statute requires that [he] knew or should have known his body contained a controlled substance or metabolite.” The statute contains no such requirement.

This court recently addressed and rejected appellant’s argument in *State v. Schwartz*, 943 N.W.2d 411 (Minn. App. 2020), *review granted* (Minn. June 30, 2020).¹ After noting that it would be absurd for the analogous statute prohibiting driving with an alcohol concentration of 0.08 or more to require proof that the driver “must have been subjectively aware of his own alcohol concentration in order to be guilty of the crime,” *Schwartz* concluded:

Because Minn. Stat. § 169A.20, subd. 1(7), provides for criminal liability without proof of knowledge or intent, because the statute is a public-welfare offense, and because the legislature specifically provided for a limited affirmative defense for drivers with schedule I or II controlled substances in the driver’s body, [i.e., drivers using the substance with a prescription], *we decline to read into the statute an element not included by the legislature in the definition of the crime.* The state is not required to prove that the motor-vehicle operator knew or had reason to know that a controlled substance was in his body to prove a charge under Minn. Stat. § 169A.20, subd. 1(7). . . .

We conclude that appellant’s guilty plea is supported by a sufficient factual basis.

Schwartz, 943 N.W.2d at 416-17 (emphasis added). “[T]his court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or

¹ We note that unless and until *Schwartz* is reversed, it states the applicable law. See *Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 414 (Minn. 2007) (stating that the law existing when review of a case is pending is generally the law that applies).

inadvertently overlooked.” *Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137, 140 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Apr. 20, 1999).

Neither appellant’s guilty plea to second-degree controlled substance possession, nor his guilty plea to fourth-degree DWI—any amount schedule I/II, was inaccurate.

Affirmed.