

*This opinion is nonprecedential except as provided by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
A20-0545
A20-0547**

State of Minnesota,
Respondent,

vs.

Brian Scott Labs,
Appellant.

**Filed March 1, 2021
Affirmed
Rodenberg, Judge***

Waseca County District Court
File No. 81-CR-18-738

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

Rachel V. Cornelius, Waseca County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Gaïtas, Judge; and Rodenberg,
Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Brian Scott Labs was convicted of operating a motor vehicle while under the influence of alcohol (DWI). At the time, appellant was on probation for a previous DWI. In this appeal, he challenges the accuracy of his guilty plea, the validity of his waiver of his constitutional right to counsel, and the revocation of his probation in the earlier file. We affirm.

FACTS

In April 2017, appellant was charged with two counts of felony DWI and one count of driving after cancellation—inimical to public safety. Minn. Stat. § 169A.20, subd. 1(1), (5) (2016); Minn. Stat. § 171.24, subd. 5 (2016). He was represented by counsel and pleaded guilty to one count of felony driving with an alcohol concentration of 0.08 or more. The remaining counts were dismissed. The district court placed appellant on probation, requiring that he remain law-abiding, consume no alcohol, and successfully complete the Steele-Waseca Drug Court (SWDC) program.

In September 2018, after he had consumed some alcohol, appellant was sitting in his car, with the keys in the ignition. He was noticeably intoxicated. A sheriff's deputy arrested appellant and brought him to the sheriff's office, where appellant took a breath test that registered an alcohol concentration of 0.16. The state charged appellant with two counts of felony DWI, one count of driving without ignition interlock, and one count of open bottle. Minn. Stat. § 169A.20, subd. 1(1), (5) (2018); Minn. Stat. § 169A.35, subd. 3 (2018); Minn. Stat. § 171.09, subd. 1(g) (2018). Appellant requested a public defender,

but did not qualify. He was subsequently discharged from the SWDC program, which was a condition of his earlier probationary sentence, due primarily to the new felony DWI charge.

At a December hearing on the new charge, where appellant appeared pro se, he pleaded guilty to having an alcohol concentration of 0.08 or more within two hours of operating a motor vehicle in violation of Minnesota Statutes section 169A.20, subdivision 1(5)—a felony. The plea colloquy included the following exchange with the district court:

Court: Then to Count 2, a felony operating a motor vehicle with an alcohol concentration of .08 or more as measured within two hours of driving, this is in violation of Minnesota Statute 169A.20, subd. 1 (5), which carries a maximum penalty of seven years in prison and a \$14,000 fine, how do you plead, guilty or not guilty?

Appellant: Guilty your Honor.

Court: So tell me what happened on September 13, 2018, in the County of Waseca that makes you guilty of a felony DWI.

Appellant: I was sitting in my vehicle at St. Olaf Lake parking lot waiting on some friends and I had been drinking.

Court: So you had consumed alcoholic beverages before you got behind the wheel of the vehicle?

Appellant: Yes your Honor.

Court: And tell me about the prior DWI's, how many priors do you have?

Appellant: Three.

....

Prosecutor: Mr. Labs, you went to the sheriff's office and did a breath test, correct?

Appellant: Yes.

Prosecutor: And that breath test came back as .16, does that sound accurate?

Appellant: Yes.

Prosecutor: Do you have any reason to question the validity of that test?

Appellant: No.

The district court accepted appellant's guilty plea and dismissed the remaining charges.

A combined sentencing (on the 2018 conviction) and probation-revocation hearing (on the 2017 conviction) was scheduled the following month, but appellant did not appear. Instead, he went to Colorado, where he stayed until January 2020. Appellant was then arrested on a warrant in western Minnesota. Appellant claimed to be returning to the state to turn himself in.

At a new combined probation-revocation and sentencing hearing, where he was represented by counsel, appellant admitted to violating the terms of his earlier probation. Further, he confirmed that he was not withdrawing his guilty plea for the September 2018 DWI offense. After revoking probation on the 2017 conviction, the district court imposed and executed a 42-month sentence for that conviction, with 40 days of credit for time served and a five-year conditional release period. As for the 2018 conviction, the district court imposed a 54-month sentence with credit for 25 days served, and a five-year conditional release period.

This consolidated appeal from appellant's 2018 conviction and sentence and the revocation of his 2017 probation followed.

DECISION

I. Appellant's 2018 guilty plea is accurate and valid.

First, appellant contends that his guilty plea was not accurate because he did not admit, nor does the record establish, that his alcohol concentration was measured within two hours of his driving conduct.

To be constitutionally valid, a guilty plea must be accurate, and whether a defendant's plea is accurate is a question appellate courts review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "To be accurate, a plea must be established on a proper factual basis." *Id.* While a defendant does not have an absolute right to plea withdrawal, a defendant may be entitled to withdraw an inaccurate guilty plea on the grounds that an inaccurate plea is a "manifest injustice." *Id.* at 93-94.

Establishing a proper factual basis is "typically" accomplished "by asking the defendant to express in his own words what happened." *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012) (quoting *Raleigh*, 778 N.W.2d at 94). The factual basis "must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted). With this standard in mind, we turn to the factual basis provided by appellant in his guilty plea.

The state charged appellant with being in physical control of a motor vehicle while his "alcohol concentration at the time, *or as measured within two hours of the time*, of

driving, operating, or being in physical control of the motor vehicle is 0.08 or more.” Minn. Stat. § 169A.20, subd. 1(5) (emphasis added). Appellant admitted that he was in physical control of his car. He admitted that he had consumed alcohol before assuming physical control of the vehicle. Appellant also admitted that he provided a breath sample after his arrest which showed a 0.16 alcohol concentration, and he acknowledged that this was over the legal limit of 0.08 alcohol concentration. However, appellant argues that, because he did not expressly admit that the test was taken within two hours of his having been in physical control of his car, and because the complaint and plea transcript do not reference the exact time of his testing, he did not admit every element of the charged offense.

We have previously held that the requirement of the phrase “as measured” in section 169A.20, subdivision 1(5) is “the time as of which the driver’s alcohol concentration is accurately ascertained or calculated or determined or measured,” and not the time at which the test is taken. *State v. Banken*, 690 N.W.2d 367, 373 (Minn. App. 2004), *review denied* (Minn. Mar. 29, 2005) (allowing alcohol concentration evidence for a test taken two hours and fifteen minutes after the driver’s arrest). Further, we have held that a retrograde extrapolation from a breath-test result *after* the two-hour window can support that a defendant’s alcohol concentration was above 0.08 *during* the two-hour window. *Id.* at 371-72.

Here, we first observe that there is nothing in the record to suggest that the breath test was administered outside the two-hour window. The record does not indicate a precise time of the test. Yet appellant “bears the burden of establishing the facts that support his claim that the guilty plea is invalid.” *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017).

Moreover, when asked by the district court how he pleads to the charge of “operating a motor vehicle with an alcohol concentration of .08 or more as measured within two hours of driving,” appellant testified that he was “guilty.” That answer—under oath—is adequate proof of the within-two-hours element. Moreover, nothing in the record or in appellant’s plea testimony indicates any post-physical-control alcohol consumption. Appellant was arrested and remained in police custody until he provided a breath sample for chemical testing. Therefore, even if the test was given more than two hours after his arrest, appellant’s alcohol concentration when he was arrested would undoubtedly have been *higher* than the reported 0.16 alcohol concentration.

Ideally, the district court would have inquired of appellant when the breath test was administered, but we are concerned here with whether appellant’s plea as it was entered was accurate. It was and we see no manifest injustice in the plea having been accepted.

Therefore, because there is sufficient evidence in the record that appellant’s alcohol concentration was above 0.08 within two hours of being in physical control of his car, appellant’s guilty plea was accurate and valid.¹

¹ We are mindful of our recent holding in *Rosendahl v. State*, ___ N.W.2d ___ (Minn. App. Feb. 8, 2021) concerning whether courts may properly look outside of the plea record to the complaint for evidence of a plea’s accuracy. This case is not like that one. *Rosendahl* concerned the sufficiency of the record to support the intent element in an assault crime. Appellant’s plea in this case immediately followed after a question from the district court that included specific reference to the within-two-hours element of the charged offense. And appellant was “carefully interrogated” and “freely admitted” during his plea colloquy that he had consumed alcohol before being in physical control of a motor vehicle and that the results of a breath test after appellant’s arrest reported an alcohol concentration of 0.16. *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983). As discussed, even if appellant’s breath sample was provided after two hours—a possibility not supported by anything in the record—appellant’s alcohol concentration at the time he was in physical control of the

II. Appellant’s waiver of his constitutional right to the assistance of counsel was valid and did not constitute a structural error requiring reversal of his conviction.

Next, appellant argues that, when he pleaded guilty to the September 13, 2018 charge, the district court did not conduct an intensive inquiry into whether his waiver of counsel was knowing, voluntary, and intelligent. Consequently, appellant argues he was deprived of his right to counsel and should be permitted to withdraw his guilty plea in that case.

Appellate courts review a district court’s finding that a defendant validly waived his right to counsel for clear error. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). “A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred.” *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). But when the facts are undisputed, we review de novo whether a waiver of counsel was valid. *Id.* The denial of the right to counsel is a “structural error” that requires reversal and is not subject to harmless-error review. *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009).

Generally, a defendant must waive his right to counsel in writing. Minn. Stat. § 611.19 (2018). The decision to waive the right to counsel “must be made knowingly and intelligently.” *Rhoads*, 813 N.W.2d at 885. “[T]o ensure a knowing, intelligent, and voluntary waiver-of-counsel, district courts should comprehensively examine the defendant regarding the defendant’s comprehension of the charges, the possible

motor vehicle would have been higher—not lower—than the reported concentration. We reach this conclusion by looking no further than appellant’s plea colloquy.

punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *Id.* at 885-86.² "A district court's failure to conduct an on-the-record inquiry regarding waiver, however, does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver." *Id.* at 886. "[W]hether [a waiver of the right to counsel] is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 889 (quotation omitted).

One factor affecting how detailed the district court's examination into the validity of the defendant's waiver must be is whether a defendant was represented by counsel before deciding to proceed pro se. *See State v. Garibaldi*, 726 N.W.2d 823, 828 (Minn. App. 2007) (recognizing that in previous cases affirming waiver of counsel despite the district court's failure to conduct on-the-record colloquy on the decision, the defendants had "either extensive contact with defense attorneys or stand-by counsel or both").

Another factor relevant to the analysis is the defendant's familiarity with the criminal justice system. *Worthy*, 583 N.W.2d at 276. A defendant's history of felony convictions and his familiarity with the criminal process may diminish the need for a detailed, on-the-record colloquy regarding the defendant's choice to waive counsel. *Id.*

² The "comprehensive examination" contemplated in *Rhoads* is set forth in Minn. R. Crim. P. 5.04, subdivision 1(4), which requires the district court, before accepting waiver of counsel, to advise the defendant of: (1) the nature of the charges; (2) all offenses within the charges; (3) the range of allowable punishments; (4) that there may be defenses; (5) that mitigating circumstances might exist; and (6) any other "facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel." *Rhoads*, 813 N.W.2d at 886 n.6.

At the outset, it is important to recognize that the district court here did not explicitly follow the requirements of rule 5.04, subdivision 1(4). The oral examination of appellant during the plea hearing consisted of only one question: “And you are you waiving your right to an attorney and wish to represent yourself in this matter?” Appellant answered, “Yes.” While the district court followed up with questions regarding the consequences of pleading guilty, it did not include questions about factors such as the range of allowable punishments or defenses. The district court did not receive a written waiver of counsel as required by Minnesota Statutes section 611.19. A defendant can satisfy the requirement that he waive his right to counsel voluntarily and intelligently in writing by submitting a petition to enter a plea of guilty by pro se defendant. Minn. R. Crim. P. 15 app. C; *see also* Minn. R. Crim. P. 5 cmt. However, in this case appellant instead signed and initialed a petition to enter plea of guilty in felony case pursuant to rule 15, a form intended for use by a defendant represented by counsel. Minn. R. Crim. P. 15 app. A. Appellant did acknowledge to the district court that he reviewed the document “line by line,” that he understood the document, and that he had no further questions regarding its contents. Appellant also specifically initialed lines on the form that indicated his awareness and notification of all of the requirements of rule 5.04, subdivision 1(4).

Critical to our analysis here is that appellant had an extensive criminal history at the time of his plea. He had three prior DWI convictions, one of which was a felony conviction after a guilty plea in the 2017 case. That previous felony DWI was only one year before this case, and appellant was represented by counsel in that earlier case. Therefore, appellant was obviously aware of his right to counsel in a case involving charges similar

to those in this case. Appellant also had five other misdemeanor convictions before his pro se guilty plea here. Appellant's criminal history made him very familiar with the criminal justice system, and this supports the conclusion that appellant's waiver was valid. *Worthy*, 583 N.W.2d at 276.

Appellant appears to have understood the criminal process well, he negotiated a plea agreement with the prosecutor, and he expressed no hesitation or confusion concerning his legal rights when he pleaded guilty. In short, appellant knew that he was entitled to be represented by counsel and voluntarily chose to enter into a plea agreement without counsel. We conclude that, while imperfect, appellant's waiver of counsel was voluntary and intelligent.

III. Because appellant's plea in the 2018 conviction is accurate, and because he validly waived his right to counsel in that case, appellant's probation following the 2017 conviction was properly revoked by the district court.

Lastly, appellant argues that his probation was revoked in the 2017 case because of the 2018 conviction, and that we should remand the probation-violation matter for reconsideration by the district court should we conclude that his 2018 guilty plea was invalid. Because we are not reversing the 2018 conviction, the revocation of his probation in the 2017 case is affirmed. Appellant concedes as much in the briefing on appeal. We therefore decline to remand the probation revocation in the 2017 case.

We think it worthy of note that the district court does not appear to have relied *solely* on the 2018 conviction in revoking appellant's earlier probation. It also relied on appellant's admission to using alcohol in violation of the earlier probation terms, together with his having not completed the SWDC program that was a condition of that probation.

Moreover, appellant left Minnesota after the 2018 charge and was apparently in continuous violation of his earlier probation until he was eventually apprehended in early 2020. Appellant apparently had a period of success in the SWDC program, but his performance on probation after the 2018 offense led to multiple other violations of probation, the confluence of which would be more than sufficient to support revocation of probation even in the absence of the new conviction, which we now affirm.

Affirmed.