This opinion is nonprecedential except as provided by Minn.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
A21-1008

Herald Edward Liu, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 7, 2022
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-18-5096

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the postconviction court's denial of his request to withdraw his guilty pleas to four counts of theft-by-swindle, arguing that his pleas were inaccurate and therefore invalid. Because the plea-hearing record adequately supports appellant's guilty pleas, and because his pro se arguments do not merit relief, we affirm.

FACTS

Respondent State of Minnesota charged appellant Herald Edward Liu with six counts of theft-by-swindle under Minn. Stat. § 609.52, subd. 2(a)(4) (2012). The complaint alleged that Liu was a "licensed resident insurance producer" and that he obtained personal loans from at least ten of his clients between April 2013 and October 2016. Those clients were mostly elderly persons ranging from 74 to 90 years of age. He was alleged to have obtained over $100,000 from one 90-year-old client alone. The total amount of the loans alleged in the complaint was over $200,000.

According to the complaint, Liu began asking clients for loans "because his business was failing and he needed the money to keep his business going." Clients reported that Liu had asked them "for loans to keep his business afloat" and that he had asked "for loans to help his business." Many clients liquidated investments from retirement savings, trusts, annuities, "and other financial instruments" to make the loans. Some of the clients received promissory notes, but "[n]one of these victims had the money repaid."

Officers spoke to Liu during the investigation, and he admitted to "taking 'loans' from the victims and using the money to pay his mortgage, utilities and other personal expenses." He stated he "used some of the money from certain victims to pay back other victims" and acknowledged "that he has a fiduciary duty to the victims." Investigators obtained Liu's bank statements and discovered that he had used "[m]ost of the money . . . to pay cell phone bills, health insurance, internet provider bills, utility bills and other personal expenses, including groceries and clothing." When he received funds from other sources, "he did not give money to most of the victims but rather, spent it on his own personal expenses." Investigators also found one victim's "check book, tax information and other financial documents" at his home.

Liu reached a plea agreement with the state. He pleaded guilty to counts one through four of the complaint in exchange for the state's agreement to dismiss counts five and six and to recommend a 39-month sentence.[1] During the plea colloquy for count 1, Liu admitted that the individuals identified in the complaint loaned him money. He also admitted that the loans were made "with an understanding" that the "money was to be used solely for business purposes" and that when he obtained the loans, he "in fact, had the intent of using that money not solely for business purposes but for personal reasons as well." He made substantially similar admissions for counts two, three, and four.[2]

Liu also admitted that the amounts he took relating to each count were "in excess of $35,000," and that the victims were "clients" of his "estate planning, insurance" business.

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[1] The complaint itemized the amounts taken throughout months-long increments. Count 1 includes $40,472.45 in unrepaid loans between April 15, 2013 and September 20, 2013. Count 2 includes $40,200 in unrepaid loans between October 25, 2013 and April 25, 2014. Count 3 includes $42,600 in unrepaid loans between February 13, 2015 and July 14, 2015. Count 4 includes $35,500 in unrepaid loans between August 11, 2015 and February 16, 2016. Counts 5 and 6 include $8,000 and $6,300, respectively, for unrepaid loans obtained between March and October 2016. The complaint also listed $41,300 in loans that were not included in any of the six counts.

[2] For example, during the colloquy for count 3, he admitted that "at the time [he] obtained those loans, [he] made the representation to [the victim] that, again, the money was to be used solely for business purposes when, in actuality, [his] intent at the time was to use the money for both business and personal reasons."

He agreed that the victims loaned him money "in part because of the relationship" he had with them. He also affirmed that he had reviewed the complaint and "that the facts contained therein" showed that he was "guilty of theft by swindle against those victims."

The district court accepted Liu's guilty pleas, entered judgment of conviction on each count, and sentenced him to 39 months on count four, with concurrent sentencing on counts one, two, and three. Almost two years later, Liu petitioned for postconviction relief. He sought to withdraw his guilty pleas on the ground that they were inaccurate and therefore invalid, asserting that the plea record does not demonstrate that he had the requisite intent. Liu requested an evidentiary hearing in a pro se affidavit.

The postconviction court denied Liu's request to withdraw his guilty pleas, reasoning that all elements of theft-by-swindle were "established through [Liu's] plea." The postconviction court also denied Liu's pro se request for an evidentiary hearing, reasoning that his pro se submissions contained only argumentative assertions and the record established he was not entitled to relief. Liu appeals.

DECISION

We review the denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017); *see also Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018) (stating the denial of an evidentiary hearing and summary dismissal of a postconviction petition is reviewed for an abuse of discretion). A postconviction court abuses its discretion if it "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson*, 891 N.W.2d at 596 (quotation omitted).

I.

Liu contends that he should be allowed to withdraw his guilty pleas because they were inaccurate and therefore invalid. A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But a court "must allow a defendant to withdraw a guilty plea . . . to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *Raleigh*, 778 N.W.2d at 94. A constitutionally valid guilty plea "must be accurate, voluntary, and intelligent." *Id.* The validity of a guilty plea is a legal issue reviewed de novo. *Id.*

The accuracy requirement "protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial." *Id.* The accuracy of a plea "must be established on a proper factual basis." *Id.* A proper 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." *Kelsey v. State*, 214 N.W.2d 236, 237 (Minn. 1974).

Liu pleaded guilty to theft-by-swindle. A theft-by-swindle occurs when a person "by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person." Minn. Stat. § 609.52, subd. 2(a)(4). The elements of the offense are that "(i) the owner of the property gave up possession of the property due to the swindle; (ii) the defendant intended to obtain for himself . . . possession of the property; and (iii) the defendant's act was a swindle." *State v. Pratt*, 813 N.W.2d 868, 873 (Minn. 2012).

A "swindle" is the act of "defrauding another person by an intentional misrepresentation or scheme." *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). In other words, the statute "punishes any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of his money or property by deceit or betrayal of confidence." *State v. Ruffin*, 158 N.W.2d 202, 205 (Minn. 1968). The swindling statute was designed to "reach cheats and swindlers of all kinds and descriptions," and "[n]o single definition can cover the range of possibilities for the offense." *Id.* (quotation omitted). And it "requires a showing of affirmative fraudulent or deceitful behavior." *Flicek*, 657 N.W.2d at 598.

Liu argues that the factual basis for his guilty pleas was inadequate because "the record does not establish that he acted with intent to defraud, that his misrepresentation was a swindle, or that his alleged victims gave up possession of their property because of the misrepresentation." Liu further argues that the state failed to elicit testimony regarding his intent at the plea hearing.

Obtaining loans based on a false or misleading representation may constitute a "swindle" because "'permanent deprivation' is not an element of theft by swindle." *Pratt*, 813 N.W.2d at 875. At the plea hearing, Liu admitted that he obtained money from his clients in the form of loans and that he told his clients that the funds would be used for business purposes. He also admitted that he actually intended to use the money for personal expenses, and not only for business purposes. Those admissions constitute sufficient evidence that Liu engaged in "affirmative fraudulent or deceitful behavior" in obtaining the loans. *Flicek*, 657 N.W.2d at 598.

Moreover, in determining the accuracy of a guilty plea, a reviewing court may consider allegations in the complaint if the truthfulness and accuracy of the allegations have been expressly admitted to by the defendant. *Rosendahl v. State*, 955 N.W.2d 294, 302 (Minn. App. 2021). We consider the allegations in the complaint in this case because Liu expressly admitted that the facts in the complaint demonstrate his guilt.

The complaint contains statements from victims indicating that Liu asked them for loans "to keep his business afloat," "to help his business," or because "he needed the money to keep his business going." The complaint also states that Liu used the money to pay for personal expenses and did not repay the loans despite giving promissory notes to some of the victims and despite obtaining money from other sources. Those facts demonstrate that Liu intentionally and affirmatively misrepresented his need for the funds, as well as his intended use of the funds, and support a conclusion that Liu thereby perpetrated a fraudulent scheme to deprive the victims of their money "by deceit or betrayal of confidence." *Ruffin*, 158 N.W.2d at 205.

Liu argues that he "must have done more than merely misrepresent what he intended to do with the money" and that he "must have had the specific intent to obtain [the victims'] money and *not pay it back*." Liu asserts that "he demonstrated an intent to repay his debt by making small repayments to some of his clients" and that "[h]is past conduct also demonstrates an intent to repay his debts."

Once again, the essence of our inquiry when considering a challenge to the factual basis for a guilty plea is whether 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." *Kelsey*, 214 N.W.2d at 237. "[I]f an element to an offense is not verbalized by the defendant, a district court may nevertheless draw inferences from the facts admitted to by the defendant." *Rosendahl*, 955 N.W.2d at 299 (emphasis omitted) (reviewing plea record for evidence that would support an inference of intent necessary to support a guilty plea). Here, the record—including the admitted allegations in the complaint—supports an inference that Liu never intended to pay his victims back.[3]

Liu also argues that his convictions violate the Minnesota Constitution's prohibition on imprisonment for failure to repay a debt. *See* Minn. Const. art. I, § 12 ("No person shall be imprisoned for debt in this state . . . ."). But section 12 states that the provision against imprisonment for debt "shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt." *Id.* In the case of fraud, the "imprisonment . . . is for the fraud and not for the debt." *Wojahn v. Halter*, 39 N.W.2d 545, 548 (Minn. 1949). Because Liu's convictions for theft-by-swindle are premised on the misrepresentation he made in procuring the loans, and not for the failure to repay them, the convictions are constitutionally sound. *See Ruffin*, 158 N.W.2d at 205 (stating the theft-by-swindle statute punishes the defendant for the "fraudulent scheme, trick, or device" used to procure money or property).

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[3] Indeed, when Liu informed the district court, at sentencing, that he intended to pay the victims back, the district court responded, "I find it very hard to believe that your intention was always to pay this money back. There's no indication of that. There's indication of a pattern of accumulating additional victims and stringing them along for more and more money."

In sum, the plea-hearing record establishes that Liu's behavior "falls within the charge" of theft-by-swindle. *Kelsey*, 214 N.W.2d at 237. Thus, Liu's guilty pleas are valid, and the postconviction court did not abuse its discretion by ruling that Liu could not withdraw them.

II.

Liu raises additional issues in a pro se supplemental brief. He contends that the postconviction court erred by summarily dismissing his postconviction petition and by denying his pro se request for an evidentiary hearing. He also suggests that the heightened standard used to assess the validity of an *Alford* plea applies to his case. *See Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015) ("An *Alford* plea is a plea in which an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence while not admitting guilt." (quotation omitted)). Finally, he suggests that his trial attorney's representation was ineffective because he did not challenge probable cause for the charges.

As to the summary dismissal, Liu argues that the postconviction court did not properly consider the allegations in his pro se postconviction petition when denying relief without a hearing. When determining whether an evidentiary hearing is required, a postconviction court must consider "the facts alleged in the petition as true and construe[] them in the light most favorable to the petitioner." *Andersen*, 913 N.W.2d at 422-23 (quotation omitted). An evidentiary hearing is not required if "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.* at 422 (quotation omitted). The files and records supporting Liu's guilty pleas conclusively show that he is not entitled to relief on his claim that his pleas were inaccurate, even when the facts in his petition are construed in his favor. He therefore was not entitled to an evidentiary hearing.

Liu's suggestion that the accuracy of his guilty pleas should be analyzed under the heightened standard that applies to an *Alford* guilty plea is similarly unavailing. An *Alford* plea is appropriate when a defendant maintains his innocence, but otherwise "reasonably believes, and the record establishes, the state has sufficient evidence to obtain a conviction." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)). "[C]areful scrutiny of the factual basis for the plea is necessary within the context of an *Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence." *State v. Theis*, 742 N.W.2d 643, 648-49 (Minn. 2007). But the record shows that Liu did not proffer an *Alford* plea and did not maintain his innocence at the plea hearing.

As to Liu's suggestion that his trial attorney was ineffective because he did not challenge probable cause for the charges, a court reviews a claim of ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To obtain relief under the *Strickland* test, a defendant must prove that counsel's assistance "failed to meet the standard of a reasonably competent criminal defense attorney" and that "there is a reasonable probability that, but for counsel's unprofessional errors," a different verdict would have been reached. *State v. Smith*, 476 N.W.2d 511, 514 (Minn. 1991) (quotation omitted). An appellate court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

When assessing whether there is probable cause for a criminal charge, a court determines "whether the evidence worthy of consideration brings the charge against the prisoner within reasonable probability." *State v. Gayles*, 915 N.W.2d 6, 11-12 (Minn. App. 2018) (quotation omitted); *see also State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962) (noting that at a preliminary hearing, the state need not prove guilt beyond a reasonable doubt).

Liu asserts that count two of the complaint should have been dismissed for lack of probable cause based on evidence in his postconviction submissions that purportedly shows that one $6,000 loan falls outside the charged date range. But Liu admitted that the facts in the complaint demonstrated that he was guilty of the charges. He also expressly admitted that the amount of money he swindled from the victims related to each charge was in excess of $35,000. Moreover, our conclusion that the record establishes that Liu's conduct falls within the charged offense shows that the evidence worthy of consideration brought the charges against him within a reasonable probability. Thus, there is no reasonable probability that Liu was harmed by his attorney's failure to challenge probable cause, and his ineffective-assistance-of-counsel claim fails under the second part of the *Strickland* test.

We have reviewed Liu's remaining pro se arguments and conclude that none provides a basis for appellate relief. *See Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (rejecting pro se arguments without detailed discussion). The postconviction court therefore did not err by denying Liu's pro se claims.

Affirmed.