STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1834

State of Minnesota,
Respondent,

vs.

Dorothy Shavon Green,
Appellant.

Filed October 30, 2023
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-20-6028

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges her convictions of unlawful possession of ammunition and giving a peace officer a false name, arguing that (1) she is entitled to withdraw her unlawful-possession guilty plea because she did not understand that she faced a mandatory minimum sentence under Minn. Stat. § 609.11 (2018), (2) she is entitled to withdraw her false-name guilty plea because she did not admit an essential element of the offense, and (3) the district court erred by not impaneling a sentencing jury or obtaining a jury waiver with respect to the factors that would deprive it of discretion to depart from the mandatory minimum sentence for unlawful possession. We affirm in part, reverse in part, and remand.

FACTS

Following a traffic stop on March 3, 2020, appellant Dorothy Shavon Green was charged with unlawful possession of ammunition, giving a peace officer a false name, and fifth-degree possession of a controlled substance. The complaint notes that the unlawful-possession offense is subject to a mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(b) (requiring imprisonment "for not less than five years").

In mid-2021, the parties submitted arguments on whether the district court has discretion to depart from that mandatory minimum. The state argued that the court lacks sentencing discretion under Minn. Stat. § 609.11, subd. 8(b), because Green had a prior qualifying conviction involving use or possession of a "firearm or other dangerous weapon." In support of its position, the state submitted: a complaint charging Green with attempted first-degree aggravated robbery based on allegations that, in October 2007, she

kicked, punched, and pulled the hair of a woman while trying to steal her purse; Green's petition to plead guilty to an amended charge of second-degree assault; and a register of actions and judgment of conviction showing that Green was convicted of second-degree assault under Minn. Stat. § 609.222, subd. 1 (2006). Based on that evidence, the district court concluded that Minn. Stat. § 609.11, subd. 8(b), applies and it lacks discretion to depart from the mandatory minimum.

That September, after Green's case was briefly reassigned to a second judge, Green pleaded guilty before a third judge. The district court accepted Green's pleas and stated that it was "considering a departure." Sentencing was scheduled for January 2022 but did not take place because Green absconded from conditional-release supervision; the district court issued a warrant for Green's apprehension. While Green was on warrant status, her case was again reassigned to a new judge. Green was arrested in July 2022.

The following month, Green moved to withdraw her guilty plea to unlawful possession. She asserted that she pleaded guilty because she believed the judge who accepted her plea was considering a mitigated departure, she did not understand a different judge might sentence her or that she might face a 60-month mandatory minimum sentence, allowing another judge to sentence her is prejudicial, and plea withdrawal would not prejudice the state. Green argued that these circumstances indicate her plea is invalid and, alternatively, make plea withdrawal fair and just. The district court denied the motion.

At sentencing, Green renewed her plea-withdrawal motion. She also moved the district court to reconsider its prior decision that it lacks discretion to depart from the mandatory minimum sentence. The district court denied the motion, adopted the earlier

findings as to Green's prior conviction, and imposed the five-year mandatory minimum prison sentence.

Green appeals.

DECISION

I. The record supports the district court's denial of Green's request to withdraw her unlawful-possession guilty plea.

A defendant does not have an absolute right to withdraw a guilty plea. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). But a district court "must" allow a defendant to do so at any time when necessary to "correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a guilty plea is invalid. *Taylor*, 887 N.W.2d at 823. To be valid, a plea must be accurate, voluntary, and intelligent. *Id.* A defendant who seeks plea withdrawal before sentencing need only show that it is "fair and just" to allow withdrawal. Minn. R. Crim. P. 15.05, subd. 2. Green sought to withdraw her plea under both standards and challenges both aspects of the district court's decision.

Manifest Injustice

Green argues that she is entitled to withdraw her guilty plea because it was not intelligent. For a plea to be intelligent, the defendant must understand the direct consequences of the plea. *Taylor*, 887 N.W.2d at 823. Direct consequences mean, principally, "the maximum sentence and fine." *State v. Raleigh*, 778 N.W.2d 90, 96 (Minn. 2010). In determining whether a plea is intelligent, we look to what the defendant knew at the time they entered the plea. *Dikken v. State*, 896 N.W.2d 873, 877 (Minn. 2017). We review the validity of a guilty plea de novo. *Raleigh*, 778 N.W.2d at 94.

Green argues that she did not understand the consequences of her unlawful-possession guilty plea. Specifically, she asserts that she did not know she faced the prospect of a five-year mandatory minimum sentence because the judge who accepted her guilty plea told her that a departure was "a distinct possibility." Green identifies no authority to support this argument, and the record defeats it.

Green was repeatedly informed and confirmed her awareness that she faced a 60-month mandatory minimum sentence. The complaint indicates as much by citing the statute containing that mandate. The district court reinforced the point by ruling—just months before Green entered her guilty plea—that it could not depart from the mandatory minimum sentence. And Green acknowledged in her plea petition that she understood that "[i]f a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than 60 months for this crime." The district court's brief discussion of a departure during the guilty-plea hearing did not contradict any of this. Indeed, the court stated only that it was "considering a departure" and expressly disclaimed any guarantee, saying: "I can't make any promises."

We discern nothing in this record indicating that Green faced a "distinct" chance of a departure rather than simply the opportunity to argue for one despite the earlier sentencing decision. Moreover, Green's awareness of a possible departure confirms her awareness of the departure's reference point—the mandatory minimum sentence. In short, Green knew at the time she pleaded guilty that the direct consequences of her plea included a mandatory five-year prison sentence. Accordingly, her plea was intelligent.

Fair and Just

The "fair and just" standard looks to (1) a defendant's reasons for withdrawal and (2) any prejudice to the state from granting the motion. *Id.* at 97. The defendant bears the burden of presenting fair and just reasons for withdrawal. *Id.* We review a district court's denial of plea withdrawal under this standard for an abuse of discretion. *State v. Nicholas*, 924 N.W.2d 286, 293 (Minn. App. 2019), *rev. denied* (Minn. Apr. 24, 2019).

Green contends the district court abused its discretion by denying plea withdrawal under this standard because (1) she believed she could be sentenced only by the judge who indicated willingness to consider departure, (2) she merely answered leading questions to establish the facts supporting her guilty plea, and (3) the state would not be prejudiced by plea withdrawal. None of these arguments persuade us to reverse.

First, the record supports the district court's finding that Green's claimed belief that she could not be sentenced by a different judge is not credible. Green pleaded guilty before the third judge assigned to her case, making her amply aware that judicial reassignment was a possibility. And while she may have anticipated that the judge who accepted her guilty plea and scheduled her sentencing hearing would be the one to impose sentence, Green's own failure to appear for that hearing thwarted her surest chance of being sentenced by that judge. Under these circumstances, the district court did not abuse its discretion by rejecting Green's contention that facing a new judge at sentencing is a fair and just basis for withdrawing the plea.

Second, the record supports the district court's determination that the use of leading questions does not support plea withdrawal. While the practice is disfavored, it does not

invalidate a guilty plea. *Nelson v. State*, 880 N.W.2d 852, 860 (Minn. 2016). And Green does not dispute the district court's finding that she answered the leading questions affirmatively, establishing the elements of the offense without hesitation or equivocation.

Finally, Green's argument that plea withdrawal would not prejudice the state does not provide a basis for reversal. A defendant's failure to establish a fair and just reason for plea withdrawal may justify denying the motion, even without a showing of prejudice. *See Raleigh*, 778 N.W.2d at 98. Because Green failed to present such a reason, the district court did not abuse its discretion by denying her request to withdraw her guilty plea.

II. Green is entitled to withdraw her false-name guilty plea because it is invalid.

Green next argues that her guilty plea to giving a false name to a peace officer is invalid because it is inaccurate.[1] To be accurate, a plea must have a "proper factual basis." *Bonnell v. State*, 984 N.W.2d 224, 227 (Minn. 2022) (quotation omitted). The factual basis must include "sufficient facts" to support a conclusion that the defendant's conduct "falls within" the charge to which they are pleading guilty. *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotations omitted). The defendant need not "expressly admit each essential element of the crime" so long as the facts they admit "allow the district court to reasonably infer an essential element of the crime from the record." *Bonnell*, 984 N.W.2d at 227. As noted above, we review the validity of a guilty plea de novo. *Id.* at 226.

[1] Green did not present this argument to the district court, but a defendant "may challenge the validity of their guilty plea for the first time on appeal." *State v. Epps*, 977 N.W.2d 798, 800 n.4 (Minn. 2022)

Green argues that the record does not contain a sufficient factual basis for her false-name guilty plea. The state agrees, and so do we. To obtain a conviction of this offense the state must prove the defendant provided law enforcement "the name *and* date of birth of another person." Minn. Stat. § 609.506, subd. 2 (2018) (emphasis added). The complaint alleges both elements. But when Green entered her guilty plea, she admitted only that she gave officers another's name, not that she provided another's date of birth. The transcript of the guilty-plea hearing does not mention the birth-date element or reference the complaint, providing no basis to infer that essential element of the crime. Given this omission, Green's false-name guilty plea is inaccurate and she is entitled to withdraw it.

III. The district court erred by concluding that it lacks discretion to depart from the mandatory minimum sentence based solely on judicial findings as to the required factors.

We generally review sentencing decisions for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). But when a sentencing decision turns on a question of law, such as interpretation of a statute, our review is de novo. *State v. Mayl*, 836 N.W.2d 368, 370 (Minn. App. 2013), *rev. denied* (Minn. Nov. 12, 2013). Absent ambiguity, we construe statutes according to their plain and ordinary language. *Id.*; *see* Minn. Stat. §§ 645.08, .16 (2022).

A defendant convicted of possessing ammunition following a prior violent-crime conviction—the unlawful-possession offense Green was charged with—is subject to a mandatory minimum sentence of five years' imprisonment. Minn. Stat. § 609.11, subd. 5(b) (citing Minn. Stat. § 624.713, subd. 1(2) (2018)). A district court generally has

discretion to depart from this sentence if it finds substantial and compelling reasons to do so. *Id.*, subd. 8(a). But it lacks any such discretion if (1) the defendant was previously convicted of "an offense listed in subdivision 9"; and (2) in the commission of that offense, "the defendant used or possessed a firearm or other dangerous weapon." *Id.*, subd. 8(b).

When the state seeks any type of enhanced sentence, including a mandatory minimum sentence under Minn. Stat. § 609.11, "the district court shall allow the state to prove beyond a reasonable doubt to a jury of 12 members the factors in support of the state's request." Minn. Stat. § 244.10, subd. 5(a) (2018). Or the defendant may waive a jury trial and have the district court determine whether the state proved those factors. *Id.*, subd. 7 (2018). In either case, imposition of a mandatory minimum sentence under Minn. Stat. § 609.11, requires "the fact finder" to determine, "at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty," whether the defendant used or possessed a firearm or other dangerous weapon. Minn. Stat. § 609.11, subd. 7.

It is undisputed that Green neither received nor waived a sentencing jury. Instead, the district court found that Minn. Stat. § 609.11, subd. 8(b), applies because (1) Green's second-degree-assault conviction was for an offense listed in Minn. Stat. § 609.11, subd. 9; and (2) she used a dangerous weapon in the commission of that offense because hands and feet "may be dangerous weapons" and second-degree assault "by definition includes the use of a dangerous weapon."

Green argues, and the state concedes, that this is insufficient to satisfy Minn. Stat. § 609.11, subd. 7.[2] We agree. The plain language of that statute, like Minn. Stat. § 244.10, subd. 5(a), contains no caveats or exceptions. We noted this recently in deciding that "Minn. Stat. § 609.11, subd. 7, requires the jury to determine whether the prior conviction included the use of a firearm or dangerous weapon, even if the conviction is one that necessarily requires the use of a firearm or dangerous weapon." *State v. Ross*, No. A19-2004, 2020 WL 7330591, *6 (Minn. App. Dec. 14, 2020). While *Ross* is not binding authority, it is recent and involves the same current and prior offenses, making it highly persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). Accordingly, we conclude that the district court erred by determining that it lacked sentencing discretion under Minn. Stat. § 609.11, subd. 8(b), without impaneling a sentencing jury to determine whether the state proved the sentencing factors or obtaining Green's jury waiver.

We next consider whether the error was harmless. *See* Minn. R. Crim. P. 31.01. Denial of the statutory right to a sentencing jury is harmless error if there is a reasonable likelihood that a sentencing jury would have reached the same result. *See State v. Robertson*, 884 N.W.2d 864, 876 (Minn. 2016) (requiring "reasonable likelihood" that non-constitutional error affected result); *State v. Reimer*, 962 N.W.2d 196, 199 (Minn. 2021) (stating that denial of constitutional right to a sentencing jury is not harmless if there is reasonable doubt the result would have been different without the error). A sentencing jury

[2] We note that Green cites some cases that address a defendant's constitutional right to a sentencing jury. But her argument focuses solely on statutory language requiring a sentencing jury. Accordingly, we confine our analysis to the statutory argument.

might have reached the same result based on the state's evidence that Green pleaded guilty to and was convicted of second-degree assault, which, by definition, involves a dangerous weapon. *See* Minn. Stat. § 609.222, subd. 1 (2018). But Green committed the prior offense with her hands and feet, which "may be" but are not always dangerous weapons. *See State v. Jorgenson*, 758 N.W.2d 316, 321-22 (Minn. App. 2008), *rev. denied* (Minn. Feb. 17, 2009). Green is entitled to present that information to a sentencing jury, Minn. Stat. § 244.10, subd. 6 (2018), which might reach a different result. On balance, we are satisfied that the denial of a sentencing jury was not harmless error and Green must be resentenced.

Regarding the scope of resentencing, Green contends impaneling a resentencing jury would improperly give the state "another bite at the apple." But she cites only cases involving a different mandatory minimum sentencing provision, *State v. Crockson*, 854 N.W.2d 244, 249 (Minn. App. 2014), a total failure of the state to present the necessary evidence, *State v. Cork*, No. A18-1612, 2019 WL 3886874, at *1-2 (Minn. App. Aug. 19, 2019), and earlier versions of the relevant sentencing statutes, *State v. Barker*, 705 N.W.2d 768, 775 (Minn. 2005). The version of Minn. Stat. § 244.10 (2018) applicable here expressly requires the district court to impanel a jury to decide the requisite sentencing factors, and it contemplates not just a sentencing jury but a "resentencing jury." Minn. Stat. § 244.10, subd. 5(a), (c). And it is undisputed that the state presented documentary evidence of Green's prior conviction to the district court, with sufficient information to support a finding on the requirements of Minn. Stat. § 609.11, subd. 8(b). On this record, impaneling a resentencing jury would not give the state "another bite at the apple" but a first opportunity to have its evidence considered by a jury. If the jury finds that the state

failed to prove both factors in Minn. Stat. § 609.11, subd. 8(b), the district court must still impose the mandatory five-year sentence for Green's unlawful-possession conviction unless it finds substantial and compelling reasons to depart. Minn. Stat. § 609.11, subd. 8(a).

Affirmed in part, reversed in part, and remanded.