This opinion is nonprecedential except as provided by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
A23-0108

State of Minnesota,
Respondent,

vs.

Sonny James Drury,
Appellant.

Filed December 18, 2023
Reversed and remanded
Slieter, Judge

Pine County District Court
File No. 58-CR-22-311

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

Reese Frederickson, Pine County Attorney, Lauren R. Dwyer, Assistant County Attorney, Pine City, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from a judgment of conviction for second-degree possession of a controlled substance, appellant argues that he should be permitted to withdraw his guilty

plea because it is inaccurate. Because appellant pleaded guilty to a more serious offense than he could be convicted of at trial, his plea is inaccurate. We reverse and remand.

FACTS

Following a traffic stop in April 2022, respondent State of Minnesota charged appellant Sonny James Drury with second-degree possession of a controlled substance for possessing 25 grams or more of methamphetamine, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2020), as well as two other offenses. Drury pleaded guilty to second-degree possession of a controlled substance and the other two charges were dismissed. The following facts derive from Drury's testimony during the August 2022 plea hearing.

Drury was one of two passengers in a car stopped by a Mille Lacs Tribal Police officer in April 2022. Additional law enforcement officers arrived, and a sheriff's deputy conducted a pat search of Drury and found two bags of methamphetamine in Drury's mouth. Officers later discovered other bags of methamphetamine in the vehicle.

The prosecutor first inquired about Drury's possession of methamphetamine:

> Prosecutor: Thank you. So, Mr. Drury, the officer went to conduct a pat search of your person. Is that correct?
>
> Drury: Yes, he did.
>
> Prosecutor: Um, and after some- some resistance as the Court described, did he ultimately um pull some baggies of methamphetamine out of your mouth?
>
> Drury: Yes, he did.
>
> Prosecutor: Um and you agree that you possessed that methamphetamine um that was in your mouth?
>
> Drury: Yeah, I do agree with that.

. . . .

> Prosecutor: Oh, okay. And there was other methamphetamine um found in the vehicle also. Correct?
>
> Drury: Yes, there was.

The prosecutor then asked Drury whether he agreed with the Bureau of Criminal Apprehension's determination of the weight of the methamphetamine. Drury responded with agreement that the methamphetamine found in his mouth and the car had a total weight of 23.1 grams. The prosecutor next asked,

> Prosecutor: Um, and do you agree that you possessed the methamphetamine that was found in the pocket of the car?
>
> Drury: Yes, I do.
>
> Prosecutor: Um, so, Mr. Drury, you- the total wrights [sic] that we- that I just put on the record, the 23.1 grams that were weighed, as well as the 1.8 field weight, that would be, so 23.1 plus 1.8, I'm sorry to make you do math, would be 24.9 grams. Correct?
>
> Drury: Yes, it would.

The prosecutor then inquired whether Drury had any additional methamphetamine:

> Prosecutor: Did you have additional methamphetamine that would make the weight over 25 grams to be a second-degree amount?
>
> Drury: Yup.
>
> Prosecutor: Where was that methamphetamine?
>
> Drury: It was in my mouth or something.

Drury's attorney then made a similar inquiry:

> Defense counsel: All right. But you'd agree that at some point when this happened you had ingested or consumed some amount of that methamphetamine that you didn't weight, [sic] but you were trying to get rid of it. Is that fair to say?
>
> Drury: That's right.
>
> Defense counsel: Okay. And you understand that that, in addition to the uh 24.9 grams would put the total amount of 25 grams. Correct?
>
> Drury: Yes, sir.

The district court then inquired of defense counsel:

> The court: Okay. Are you comfortable with that factual basis, Mr. Johnson? I mean, with your client admitting that he had consumed at least 0.1 grams of methamphetamine.
>
> Defense counsel: Your Honor, we talked about this. I know the factual basis is less than ideal. Uh, it was a kind of a chaotic scene.
>
> . . . .
>
> Defense counsel: . . . We've talked about a straight plea and arguing for a durational departure. We've talked about possibly getting into boot camp. And his first offer to me was, "Can we get me into treatment?"
>
> The court: Okay.
>
> Defense counsel: "Can we give me a chance to be on paper?" And we've got that opportunity. The State wants a little bit more leverage in exchange for that. That's why the State's asking for the second-degree.
>
> . . . .
>
> The court: [What w]as the amount that was in the back of the- of the pocket of the car?
>
> Prosecutor: Was 12.6, I believe.

> The court: And the amount that the BCA weighed the substance in his mouth was?
>
> Prosecutor: 10.5.
>
> The court: Oh, 10.5. Okay.
>
> Prosecutor: And then there was a third baggie that wasn't tested that was 1.8 field weight.
>
> The court: I see. I think [it] would be close to an impossible case to prove to a jury.

The district court then addressed Drury,

> The court: So, let me just um make sure that you understand, Mr. Drury, that um you, based solely on what you're testifying to today, the Court will find that you had ingested 0.1- at least 0.1 grams of methamphetamine prior to the methamphetamine being removed from your mouth by law enforcement. Is that what you want me to decide today? That's what you're saying happened? You actually ingested some methamphetamine?
>
> Drury: Yes, Your Honor.
>
> The court: And I'm only saying that because that's not something that could ever go to a jury. I would never let a jury hear that testimony because it's so speculative, and furthermore, you can't be forced to testify against yourself, and the State has no evidence about that 0.1 grams.

Drury's attorney clarified with the district court that he had discussed the state's evidence with Drury:

> Defense counsel: We did talk about this last Friday, and I did explain to him [Drury] that the ultimate amount that the State would be able to introduce at trial was 24.9 grams.
>
> The court: Absolutely. They're never going to get the 0.1.

The district court ultimately found that a sufficient factual basis supported Drury's guilty plea:

> The court: All right. Then what I am going to do today is find that the defendant has waived his rights knowingly and voluntarily. I'll find that there has been a factual basis to support his plea of guilty to the charge under Count 1. Based upon his testimony that the State- or that um he was in possession of 23.1 grams, excuse me, 24.9 grams of methamphetamine that was weighed, with field weighted or um tested by and weighed by the BCA, and his testimony today that he ingested at least 0.1 grams of methamphetamine that he was then also in possession of that day, which would put the total amount of 24- 25 grams of methamphetamine, putting him at the second-degree level.

At the sentencing hearing, the district court entered a conviction for the second-degree controlled substance possession and imposed a sentence of 58 months' imprisonment, within the middle of the presumptive range for an individual convicted of a third-degree controlled substance offense. Therefore, this sentence was a downward durational departure from the presumptive range for second-degree possession. The district court explained that it granted a durational departure because the state did not have direct evidence of Drury's possession of the 25 grams of methamphetamine necessary for a second-degree possession. Drury appeals.

DECISION

"A defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). Nevertheless, a defendant may seek plea withdrawal, including in a direct appeal. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

"To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Raleigh*, 778 N.W.2d at 94 (citations omitted). We review the validity of a plea *de novo*. *Id.*

"The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he could properly be convicted of at trial." *Munger v. State*, 749 N.W.2d 335, 337 (Minn. 2008) (citation omitted). "Accuracy requires an adequate factual basis to support the charge. The factual basis must establish sufficient facts on the record to support a conclusion that [a] defendant's conduct falls within the charge to which he desires to plead guilty." *Id.* at 337-38 (citation and quotation omitted).

Drury argues, for the first time in this direct appeal, that he should be permitted to withdraw his guilty plea because it is inaccurate.[1] *See Brown*, 449 N.W.2d at 182 (stating that a defendant may seek plea withdrawal in a direct appeal). For the state to prove that Drury committed second-degree possession of methamphetamine, the state must demonstrate that Drury possessed 25 grams or more of methamphetamine. Minn. Stat. § 152.022, subd. 2(a)(1). During the plea hearing, Drury admitted that the state had evidence that he possessed 24.9 grams of methamphetamine comprised of the 23.1 grams of BCA-weighed methamphetamine and the 1.8 grams of field-weighed methamphetamine, an amount sufficient for third-degree possession. The basis for finding the additional 0.1 grams of methamphetamine necessary to reach the second-degree

[1] In a *pro se* supplemental brief, Drury also argues that his plea was neither voluntary nor intelligent. Because we determine that his plea was not accurate, we do not reach these arguments.

controlled-substance threshold, came from Drury's admission that he had that much remaining methamphetamine either in his mouth or that he may have ingested.

As the district court stated during the plea hearing, this evidence would not be available at trial to prove Drury possessed 25 grams or more of the controlled substance. Although Drury agreed that he had "ingested or consumed some amount" of methamphetamine, "[a]fter a controlled substance is within a person's system the power to exercise dominion and control necessary to establish possession no longer exists." *State v. Lewis*, 394 N.W.2d 212, 217 (Minn. App. 1986), *rev. denied* (Minn. Dec. 12, 1986). And, it is axiomatic that, had this case gone to trial, the state could not have compelled Drury's testimony on the weight. *See* U.S. Const. art. V; Minn. Const. art. I, § 7.

The state argues that the "record" supports Drury's guilty plea by pointing to the arresting officer's previous omnibus hearing testimony regarding the methamphetamine that remained in Drury's mouth. The state relies on *Lundin v. State*, 430 N.W.2d 675 (Minn. App. 1998), *rev. denied* (Minn. Dec. 21, 1998), stating that a plea is valid if "the record supports the conclusion that the defendant committed an offense at least as serious as the crime to which the defendant is pleading guilty." *Id.* at 679. But this misconstrues what comprises the record in a standard guilty plea.

In a standard guilty plea, it is not proper for a court to consider "evidence not expressly acknowledged and admitted by the defendant during the colloquy." *Rosendahl v. State*, 955 N.W.2d 294, 301 (Minn. App. 2021) (reviewing a string of cases including *State v. Nace*, 241 N.W.2d 101 (Minn. 1976), *State v. Trott*, 338 N.W.2d 248 (Minn. 1983), *State v. Ecker*, 524 N.W.2d 712 (Minn. 1994), *State v. Raleigh*, 778 N.W.2d 90 (Minn.

2010), *Lussier v. State*, 821 N.W.2d 581 (Minn. 2012), and *Nelson v. State*, 880 N.W.2d 852 (Minn. 2016)). Drury, during his plea colloquy, did not expressly acknowledge or agree to the admission of any evidence other than the BCA test amount of 23.1 grams and the field-tested weight of 1.8 grams. Therefore, the officer's omnibus hearing testimony is not part of the guilty plea record and cannot be considered as part of this accuracy analysis.

Drury's plea was not accurate because he pleaded guilty to a more serious offense than he could be convicted of had he gone to trial. We therefore reverse and remand with instructions to allow Drury to withdraw his guilty plea.[2]

Reversed and remanded.

[2] Drury also argues that the district court abused its discretion by denying him a downward dispositional sentencing departure. Because we remand to the district court to allow his plea withdrawal, we do not reach this issue.