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1. [State v. Levkovich, 2003 Minn. App. LEXIS 854](#)

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State v. Levkovich

Court of Appeals of Minnesota

July 22, 2003, Filed

C4-03-232

Reporter

2003 Minn. App. LEXIS 854 *; 2003 WL 21694582

State of Minnesota, Respondent, vs. Alexander Levkovich, Appellant.

Notice: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Subsequent History: Review denied by [State v. Levkovich, 2003 Minn. LEXIS 609 \(Minn., Sept. 24, 2003\)](#)

Prior History: Ramsey County District Court. File No. K0011823. Hon. Edward J. Cleary.

Disposition: Reversed and remanded.

Core Terms

guilty plea, consequences, deportation, misinformed, withdraw, terroristic threats, immigration, district court, intelligent, collateral, factual basis, removal proceedings, manifest injustice, police officer, sentencing

Case Summary

Procedural Posture

Defendant pleaded guilty to making terroristic threats, in violation of [Minn. Stat. § 609.713, subd. 1](#) (2000). The Ramsey County District Court (Minnesota) accepted his plea and sentenced him. Defendant filed a postconviction motion to withdraw his plea, and the district court denied the motion. Defendant appealed.

Overview

Defendant claimed that his counsel affirmatively misinformed him about the deportation consequences of his guilty plea. The district court denied the motion to withdraw his plea based solely on Alanis. Denial of

defendant's motion to withdraw his plea was reversed and remanded, as: (1) the district court erred in basing its denial of defendant's motion solely on Alanis, in that Alanis did not apply to a situation where the defendant was misinformed about the deportation consequences of his guilty plea; and (2) even though deportation was only a collateral consequence of defendant's plea, being affirmatively misinformed about the collateral consequences of a plea by an attorney could have warranted grounds to withdraw that plea. Further, the appellate court found that: (1) defendant's guilty plea was accurate, as defendant admitted that he threatened to kill a police officer on at least two occasions and that he made those statements to scare the officer; and (2) defendant failed to show that his counsel rendered ineffective assistance.

Outcome

The district court's order was reversed and remanded for a determination as to whether defendant's guilty plea was voluntary and intelligent in light of any alleged misinformation from his attorney.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of

Review > Abuse of Discretion > Guilty Pleas

[HN1](#) **Entry of Pleas, Changes & Withdrawals**

The appellate court will reverse the district court's decision on a motion to withdraw a guilty plea only if the district court abuses its discretion. The ultimate decision to allow a defendant to withdraw a guilty plea is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abuses its discretion.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

Evidence > Burdens of Proof > General Overview

[HN2](#) **Entry of Pleas, Changes & Withdrawals**

Under [Minn. R. Crim. P. 15.05, subd. 1](#) (2000), a defendant may withdraw a guilty plea after sentencing only if the defendant can show that withdrawal is necessary to correct a manifest injustice. If a guilty plea is not accurate, voluntary, and intelligent, i.e. knowingly and understandingly made, manifest injustice occurs and the plea may be withdrawn. In a postconviction proceeding, the burden is on the petitioner to prove by a preponderance of the evidence that withdrawal of a guilty plea is warranted. [Minn. Stat. § 590.04, subd. 3](#) (2000).

Criminal Law & Procedure > ... > Entry of Pleas > Role of Court > Factual Basis

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Role of Court

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

[HN3](#) **Role of Court, Factual Basis**

A proper factual basis must be established for a guilty plea to be accurate. An accurate plea protects the defendant from pleading guilty to an offense more serious than that of which he could be convicted if he goes to trial. It is the responsibility of the district court to ensure that a sufficient factual basis for a guilty plea is on the record. The factual-basis requirement is satisfied if the record contains a showing that credible evidence is available that would support a guilty verdict for a crime at least as serious as that to which the defendant pleads guilty.

Criminal Law & Procedure > ... > Terrorism > Terroristic Threats > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

[HN4](#) **Terrorism, Terroristic Threats**

The State must establish three elements to support a conviction of making terroristic threats in violation of [Minn. Stat. § 609.713, subd. 1](#) (2000): (1) that the accused makes threats; (2) to commit a crime of violence; (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Coercion

Governments > Courts > Court Personnel

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Role of Court > Factual Basis

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

[HN5](#) **Guilty Pleas, Coercion**

A court may make use of law enforcement investigation reports in establishing a factual basis for a guilty plea.

Criminal Law & Procedure > ... > Terrorism > Terroristic Threats > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

[HN6](#) **Terrorism, Terroristic Threats**

The test of whether words or phrases are threats is the context in which they are used.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

[HN7](#) **Mens Rea, General Intent**

Intent is an inference drawn from the totality of the circumstances.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of

Pleas > Role of Court > Factual Basis

[HN8](#) **Entry of Pleas, Changes & Withdrawals**

Even though an appellant's attorney uses leading questions to establish a factual basis for appellant's guilty plea, the use of such leading questions does not alone provide grounds for withdrawing a guilty plea.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Coercion

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > Not Guilty

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

[HN9](#) **Guilty Pleas, Coercion**

The intelligent requirement of a valid plea ensures that a defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty. The voluntariness requirement of a valid plea ensures that a defendant does not plead guilty because of improper pressures or inducements.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN10](#) **Entry of Pleas, Changes & Withdrawals**

Although deportation is only a collateral consequence of appellant's plea, being affirmatively misinformed about the collateral consequences of a plea by an attorney may warrant grounds to withdraw that plea. In some cases a defendant may be permitted to withdraw a guilty plea when the defendant is misinformed about the deportation consequences of that plea. A defense attorney's misstatements about the collateral consequences of his plea deprive the defendant of the opportunity to make an informed, self-determined choice and thus vacates the guilty plea. Although the issue of parole eligibility is a collateral matter, the distinction between direct and collateral consequences is unimportant and a different rule applies where counsel misinforms his client regarding a particular consequence and the client relies upon the misrepresentation in deciding to plead guilty. While the government may not be required to inform defendants of collateral plea consequences such as deportation, the government does have an obligation not to mislead defendants about those consequences.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

Evidence > Burdens of Proof > General Overview

[HN11](#) [↓] **Entry of Pleas, Changes & Withdrawals**

Where an appellant is seeking to withdraw his guilty plea, the burden is on appellant to establish by a preponderance of the evidence that he is affirmatively misinformed and that any misinformation affects whether the plea is accurate, voluntary, and intelligent.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN12](#) [↓] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To prevail on a claim of ineffective assistance of counsel, an appellant must show two elements. First, he must show that his counsel's performance is deficient. This requires a showing of errors so serious that counsel's representation falls below an objective standard of reasonableness. Second, an appellant must show prejudice.

Counsel: Mike Hatch, Attorney General, St. Paul, MN; and Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, MN (for respondent).

David L. Wilson, Herbert Igbanugo, Blackwell Igbanugo P.A., Minneapolis, MN (for appellant).

Judges: Considered and decided by Kalitowski, Presiding Judge, Randall, Judge, and Schumacher, Judge. ROBERT H. SCHUMACHER, Judge (dissenting).

Opinion by: Kalitowski

Opinion

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Alexander Levkovich argues that he should be permitted to withdraw his guilty plea to terroristic threats on the grounds of (1) manifest injustice, or (2) ineffective assistance of counsel. We reject appellant's argument that there was not a sufficient factual basis for his plea but reverse and remand to the district court for a determination as to whether appellant's guilty plea was voluntary and intelligent.

DECISION

I.

[HN1](#) [↑] *This court will reverse the district court's*

decision on [*2] a motion to withdraw a guilty plea only if the district court abused its discretion. [Kim v. State, 434 N.W.2d 263, 266 \(Minn. 1989\)](#).

The ultimate decision [to allow a defendant to withdraw a guilty plea] is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion.

[Id.](#)

[HN2](#) Under [Minn. R. Crim. P. 15.05, subd. 1](#) (2000), a defendant may withdraw a guilty plea after sentencing only if the defendant can show "that withdrawal is necessary to correct a manifest injustice." If a guilty plea is not "accurate, voluntary, and intelligent (i.e. knowingly and understandingly made)," manifest injustice occurs and the plea may be withdrawn. [Perkins v. State, 559 N.W.2d 678, 688 \(Minn. 1997\)](#) (citation omitted). In a postconviction proceeding, the burden is on the petitioner to prove by a preponderance of the evidence that withdrawal of the guilty plea is warranted. [Minn. Stat. § 590.04, subd. 3](#) (2000). **1. Accurate**

[HN3](#) "A proper factual basis must be established for a guilty plea to be accurate." [State v. Ecker, 524 N.W.2d 712, 716 \(Minn. 1994\)](#) [*3] (citation omitted). An accurate plea protects the defendant from pleading guilty to an offense more serious than that of which he could be convicted if he were to go to trial. [Id.](#) It is the responsibility of the district court to ensure that a sufficient factual basis for a guilty plea is on the record. [Id.; Vernlund v. State, 589 N.W.2d 307, 310 \(Minn. App. 1999\)](#). The factual-basis requirement is satisfied if the record contains a showing that credible evidence is available that would support a guilty verdict for a crime at least as serious as that to which the defendant pleaded guilty. [State v. Genereux, 272 N.W.2d 33, 34 \(Minn. 1978\)](#).

[HN4](#) The state must establish three elements to support a conviction of making terroristic threats in violation of [Minn. Stat. § 609.713, subd. 1](#) (2000): (1) that the accused made threats, (2) to commit a crime of violence, (3) with the purpose to terrorize another or in reckless disregard of the risk of terrorizing another. [State v. Schweppe, 306 Minn. 395, 399, 237 N.W.2d 609, 613 \(1975\)](#). Appellant argues that his plea was not accurate because his attorney failed to establish [*4] a sufficient factual basis showing terroristic threats. We disagree.

At the guilty plea hearing, appellant admitted that he threatened to kill the police officer on at least two occasions and that he made those statements to scare the officer. Moreover, [HN5](#) a court may make use of law enforcement investigation reports in establishing the factual basis. [State v. Stewart, 360 N.W.2d 463, 465 \(Minn. App. 1985\)](#). Here, the investigation reports reveal that appellant and the police officer were involved in a physical altercation that resulted in the officer sustaining a bleeding lip and abrasions near his left eye, elbow, forearm, knee, and shin.

Therefore, given appellant's physical resistance, his statements were terroristic threats because they had a reasonable tendency to create great apprehension in the officer. See [State v. Lavastida, 366 N.W.2d 677, 680 \(Minn. App. 1985\)](#) (stating that [HN6](#) the test of whether words or phrases are threats is the context in which they are used). In addition, appellant's physical resistance, combined with his admission that he intended to scare the police officer, established that appellant acted with the purpose to terrorize [*5] another or in reckless disregard of the risk of terrorizing another. See [State v. Raymond, 440 N.W.2d 425, 426 \(Minn. 1989\)](#) [HN7](#) (intent is an inference drawn from the totality of the circumstances).

Finally, [HN8](#) even though appellant's attorney used leading questions to establish a factual basis for appellant's guilty plea, the use of such leading questions does not alone provide grounds for withdrawing a guilty plea. See [Perkins, 559 N.W.2d at 689](#).

2. Voluntary and Intelligent

[HN9](#) The intelligent requirement ensures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty. [Brown v. State, 449 N.W.2d 180, 182 \(Minn. 1989\)](#). The voluntariness requirement of a valid plea ensures that a defendant did not plead guilty because of improper pressures or inducements. [Id.](#)

Appellant argues that his plea was not voluntarily or intelligently made because his attorney misinformed him about the deportation consequences of his guilty plea. Appellant was charged with one count of making terroristic threats and one count of fourth-degree assault. Appellant claims in his affidavit that his [*6] attorney advised him to plead guilty to one count of making terroristic threats because that would increase appellant's chances of receiving a misdemeanor sentence. Appellant then states in his affidavit that his

attorney informed him that a guilty plea would not hurt his case in the immigration removal proceedings that were already underway prior to appellant's arrest. Based on this information from his attorney, appellant states that he agreed to plead guilty to one count of making terroristic threats. Following the plea, appellant received a misdemeanor sentence.

But the record indicates that appellant's conviction for making terroristic threats against a police officer did hurt him in his immigration removal proceedings. The court presiding over the immigration removal proceedings denied appellant's request for relief, stating that appellant's conviction for terroristic threats against a police officer was a serious negative factor in his removal case. Because appellant claimed to be misinformed about the deportation consequences of his guilty plea, appellant brought a motion requesting to withdraw his guilty plea.

The district court acknowledged in its memorandum denying appellant's [*7] motion that both appellant's attorney and the sentencing judge "were under the impression that by handling the plea as a gross misdemeanor they were helping to prevent the petitioner from being deported" and that "in this they were apparently mistaken." Then, citing [Alanis v. State, 583 N.W.2d 573 \(Minn. 1998\)](#), the court concluded that the fact that neither judge nor defense counsel advised the defendant accurately that he could be deported if convicted of even gross misdemeanor terroristic threats does not render defendant's plea to the charge involuntary.

But the holding in [Alanis](#) does not apply to the facts here. [Alanis](#) determined that because deportation did not flow definitely, immediately, and automatically from a criminal defendant's conviction arising from a guilty plea, it was only a collateral, not a direct, consequence of a criminal defendant's conviction. [Id. at 578](#). Therefore, [Alanis](#) held that the failure of an attorney to advise a criminal defendant of deportation consequences which might arise from a conviction resulting from a guilty plea did not create a manifest injustice warranting withdrawal of the guilty plea. [Id. at 579](#). [*8]

Here, appellant does not argue that his attorney failed to advise him about the possibility of deportation. Rather, appellant claims, and the district court appears to accept, that he was misinformed about the deportation consequences of his guilty plea. And [HN10](#) [↑] although deportation is only a collateral consequence of

appellant's plea, being affirmatively misinformed about the collateral consequences of a plea by an attorney may warrant grounds to withdraw that plea. See [Barragan v. State, 583 N.W.2d 571, 572 \(Minn. 1998\)](#) (suggesting that in some cases a defendant may be permitted to withdraw a guilty plea when the defendant is misinformed about the deportation consequences of that plea); see also [Meier v. State, 337 N.W.2d 204, 207 \(Iowa 1983\)](#) (holding that the defense attorney's misstatements about the collateral consequences of his plea deprived the defendant of the opportunity to make an informed, self-determined choice and thus vacated the guilty plea); [Beal v. State, 51 S.W.3d 109, 112 \(Mo. Ct. App. 2001\)](#) (observing that although the issue of parole eligibility is a collateral matter, the distinction between direct and collateral [*9] consequences is unimportant and a different rule applies where counsel misinforms his client regarding a particular consequence and the client relies upon the misrepresentation in deciding to plead guilty); [United States v. Russell, 222 U.S. App. D.C. 313, 686 F.2d 35, 41 \(D.C. Cir. 1982\)](#) (stating that while the government may not be required to inform defendants of collateral plea consequences such as deportation, the government does have an obligation not to mislead defendants about those consequences).

Here, although appellant stated at the guilty plea hearing that he understood that his guilty plea may have some immigration repercussions, he claims by affidavit that in a private conversation he had with his attorney off the record, he was informed by his attorney that his guilty plea would not hurt his case in the immigration removal proceedings. And importantly, the district court erred in basing its denial of appellant's motion solely on [Alanis](#). We therefore remand this matter to the district court to determine, in such proceedings as the district court deems appropriate, whether appellant's plea was voluntary and intelligent in light of any alleged misinformation [*10] from his attorney. [HN11](#) [↑] Because appellant is seeking to withdraw his guilty plea, the burden is on appellant to establish by a preponderance of the evidence that he was affirmatively misinformed and that any misinformation affected whether the plea was accurate, voluntary, and intelligent.

II.

[HN12](#) [↑] To prevail on a claim of ineffective assistance of counsel, appellant must show two elements. First, he must show that his counsel's performance was deficient. [Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct.](#)

[2052, 2064, 80 L. Ed. 2d 674 \(1984\)](#). This requires a showing of errors so serious that counsel's representation fell below an objective standard of reasonableness. [Id. at 687-88, 104 S. Ct. at 2064-65](#). Second, appellant must show prejudice. [Id. at 692, 104 S. Ct. at 2067](#).

Appellant argues that he received ineffective assistance of counsel because his attorney misinformed appellant about the deportation consequences of his guilty plea. But appellant fails to establish that the [Strickland](#) standards are met. Moreover, if appellant is able to establish on remand that he was affirmatively misinformed, this may provide sufficient [*11] grounds to vacate the guilty plea to correct a manifest injustice. Therefore, we need not determine whether misleading or misinforming appellant about the deportation consequences of his plea could result in conduct that falls below the standards established in *Strickland*.

Reversed and remanded.

Dissent by: ROBERT H. SCHUMACHER

Dissent

ROBERT H. SCHUMACHER, Judge (dissenting)

I respectfully dissent. Appellant claims that in a private, off-the-record conversation with his attorney, he was advised that a guilty plea would not hurt him as far as his immigration removal proceedings were concerned. But there is no affidavit from the attorney that substantiates appellant's claim that any such advice was given. Moreover, at the guilty plea hearing, appellant's attorney specifically discussed the immigration consequences of a plea.

Q: Now, do you also understand that your plea today may have some immigration repercussions in this case?

A: Yes.

Q: And that maybe Judge Campbell can't do anything about that because it may be something that we can argue at the time of sentencing?

A: Yes.

Q: Do you have any questions about that?

A: No.

Clearly, appellant was aware of the possible [*12]

immigration consequences of his plea. Given his own on-the-record admissions, appellant had the burden of presenting more than his own affidavit to establish that he was actively misinformed by his attorney. Appellant has not met his burden of proving by a preponderance of the evidence that his plea was not accurate, voluntary, and intelligent. The postconviction court did not abuse its discretion in denying the motion.

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