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1. [State v. Ojogwu, 2003 Minn. App. LEXIS 1236](#)

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## State v. Ojogwu

Court of Appeals of Minnesota

October 7, 2003, Filed

C8-03-329

### Reporter

2003 Minn. App. LEXIS 1236 \*; 2003 WL 22290012

State of Minnesota, Respondent, vs. Daniel Ojogwu,  
Appellant.

**Notice:** [\*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

**Prior History:** Ramsey County District Court. File No. K497202. Hon. Kathleen R. Gearin.

**Disposition:** Reversed and remanded.

### Core Terms

postconviction, withdraw, deposit, factual basis, guilty plea, sentence, argues, issues, direct appeal, judgment of conviction, post conviction relief, district court, constitutes, questioned, defraud, manifest injustice, substantial step, attempted theft, proceedings, admissions, checks

### Case Summary

#### Procedural Posture

Defendant pleaded guilty in the Ramsey County District Court (Minnesota) to felony attempted theft by check. The court denied defendant's motion to withdraw his plea. Defendant appealed.

#### Overview

Defendant argued that the trial court erred by denying his motion to withdraw his plea because it was based on an inadequate factual basis. The court of appeals agreed. Defendant's admissions did not establish all of the elements of the crime charged. The record contained no admissions supporting a finding that on September 5, defendant took a substantial step toward defrauding the bank by issuing a check with intent to defraud and with knowledge that he was not entitled to

draw upon the drawee. Defendant admitted that he was trying to get money from the bank, knowing that he did not have a right to it, but claimed that he did not know what the account's owner had done about closing the account. Because defendant was questioned mostly about the Dakota County incidents, rather than the Ramsey County incident that formed the basis for the charge to which he pleaded, his claim that he believed that he was pleading to the conduct that later gave rise to the Dakota County charges was plausible.

#### Outcome

The judgment was reversed and the case was remanded for further proceedings.

### LexisNexis® Headnotes

Criminal Law &  
Procedure > ... > Appeals > Standards of  
Review > Abuse of Discretion

Criminal Law &  
Procedure > ... > Appeals > Standards of  
Review > De Novo Review

Criminal Law & Procedure > Postconviction  
Proceedings > General Overview

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

Criminal Law & Procedure > ... > Standards of  
Review > De Novo Review > General Overview

[HN1](#) **Standards of Review, Abuse of Discretion**

Postconviction proceedings afford criminal defendants an opportunity for collateral review of the judgment of

conviction and sentence after the time for appeal has expired. Judgments of conviction carry a presumption of regularity and may not, therefore, be lightly set aside. Thus, in reviewing a postconviction order, an appellate court's function is limited to determining whether the record sustains the postconviction court's findings and whether the postconviction court's decision constitutes an abuse of discretion. But, as in other contexts, the appellate court exercises de novo review on issues of law.

Criminal Law &  
Procedure > ... > Reviewability > Preservation for  
Review > General Overview

Criminal Law & Procedure > Postconviction  
Proceedings > General Overview

Criminal Law & Procedure > Appeals > Procedural  
Matters > Time Limitations

### [HN2](#) **Reviewability, Preservation for Review**

When the time for a direct appeal has expired, a criminal defendant who claims that a conviction was obtained in violation of state laws or the federal or state constitutions may challenge the conviction in an action for postconviction relief under [Minn. Stat. § 590.01, subd. 1\(1\)](#) (2002). If a direct appeal from a judgment of conviction has been taken, however, all matters raised on appeal from a judgment of conviction or known at the time of appeal but not raised will not be considered by a postconviction court in a subsequent petition for relief, unless a claim is so novel that its legal basis was not reasonably available to counsel at the time of the direct appeal.

Criminal Law & Procedure > Appeals > Right to  
Appeal > Defendants

Criminal Law & Procedure > Postconviction  
Proceedings > General Overview

Criminal Law &  
Procedure > ... > Reviewability > Waiver > General  
Overview

### [HN3](#) **Right to Appeal, Defendants**

Under Minnesota law, a convicted defendant has a right to at least one substantive review by an appellate or a postconviction court. As a necessary corollary, a convicted defendant does not waive his or her right to seek postconviction relief under [Minn. Stat. § 590.01, subd. 1](#), by failing to pursue a direct appeal. In a postconviction proceeding, relief is to be predicated, not upon a determination as to whether direct appeal from the conviction was taken within the prescribed time limitations, but rather upon compliance with the procedural requirements of [Minn. Stat. § 590.01-.06](#) (2002).

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

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

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 > Voluntariness

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

Criminal Law & Procedure > ... > Standards of  
Review > Abuse of Discretion > Guilty Pleas

### [HN4](#) **Entry of Pleas, Changes & Withdrawals**

An appellate court reviews a district court's decision on whether to permit a defendant to withdraw a guilty plea under an abuse-of-discretion standard. A defendant does not have an absolute right to withdraw a guilty plea. But a defendant may seek to withdraw a plea after sentencing either under [Minn. Stat. § 590.01, subd. 1](#) (2002), which provides an action for postconviction relief when a defendant claims that the conviction obtained violated the person's rights under the Constitution or laws of the United States or of the state, or under [Minn. R. Crim. P. 15.05, subd. 1](#), upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. A manifest injustice occurs as a matter of law if a plea is invalid.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

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

## Guilty Pleas, Allocution & Colloquy

A plea is accurate if it is supported by an adequate factual basis. An adequate factual basis exists when the record reveals specific factual allegations supporting each element of the offense. The conduct to which the defendant admits must constitute the offense charged. Typically, an adequate factual basis is established by questioning the defendant and by asking the defendant to explain in his or her own words the circumstances surrounding the crime. But a factual basis may also be established by a sworn complaint, police reports, or other documents containing a summary of the state's proposed evidence, provided the defendant expressly and specifically acknowledges the truth and accuracy of facts constituting the essential elements of the crime. Although the district court need not personally interrogate the defendant, it bears primary responsibility for ensuring that there is an adequate factual basis for the plea. The court should not accept a plea unless it is satisfied that the plea is supported by an adequate factual basis and was knowingly and intelligently made. The court must be particularly attentive to situations in which a defendant is pleading guilty and is asked only leading questions by counsel.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

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

## Guilty Pleas, Allocution & Colloquy

To support a plea to felony attempted theft by check, the record of the plea hearing must reveal that the defendant: (1) took a substantial step, (2) toward obtaining money from a third party; (3) by intentionally issuing a check; (4) in an amount more than \$ 500; (5) with intent to defraud; and (6) knowing that he was not entitled to draw upon the drawee. [Minn. Stat. §§ 609.52, subs. 2\(3\)\(a\), 609.17, subd. 1](#) (1996). A substantial step is one that involves more than mere preparation for the commission of the crime. [Minn. Stat. § 609.17, subd. 1](#).

**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).

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

**Judges:** Considered and decided by Randall, Presiding Judge, Halbrooks, Judge, and Hudson, Judge.

**Opinion by:** Halbrooks

## Opinion

### UNPUBLISHED OPINION

#### HALBROOKS, Judge

On appeal from the denial of postconviction relief, appellant argues that the district court abused its discretion by denying his petition to withdraw his guilty plea or, alternatively, to vacate his conviction. Appellant claims that the withdrawal of his plea is necessary to prevent a manifest injustice because (1) the plea lacks an adequate factual basis, (2) the plea was not voluntarily or intelligently made, and (3) he is not guilty of the charge to which he pleaded guilty. Alternatively, appellant argues that his conviction should be vacated because (1) it is **[\*2]** barred by double jeopardy, (2) it is barred by the rule precluding punishment for more than one offense resulting from a single behavioral incident, and (3) he is not guilty of the charge. Because we conclude that appellant's plea lacked an adequate factual basis, we reverse and remand.

#### FACTS

Appellant Daniel Ojogwu, a native of Nigeria and a

lawful permanent resident of the United States, worked as a manager for Ma'Cherie until 1996, when the business closed unexpectedly without notifying or compensating its employees. As the business manager, Ojogwu had check-writing authority.

On August 29, 1996, Ojogwu deposited in his account at the Dakota County branch of Midway National Bank a \$ 760 check drawn on the Ma'Cherie account. At the same time, he withdrew \$ 360. On September 4, he deposited a \$ 2,500 check, drawn on the same account, and withdrew \$ 950. That afternoon, the bank informed Ojogwu that the Ma'Cherie account had been closed and that his account was, therefore, overdrawn.

On September 5, Ojogwu went to the Ramsey County branch of Midway National Bank to deposit \$ 650. As he was preparing to make the deposit, a bank officer approached Ojogwu and asked if he [\*3] could assist him. Ojogwu gave him the cash and his deposit slip. The bank officer then told Ojogwu that the Dakota County branch suspected fraudulent activity involving his account. At the bank officer's request, Ojogwu handed him his checkbook. Inside the checkbook, and still attached, the bank officer found a \$ 950 check written out to Ojogwu and drawn on the Ma'Cherie account. For this conduct, Ramsey County charged Ojogwu with one count of felony attempted theft by check.

Ojogwu pleaded guilty to the Ramsey County charge. In May 1997, the court, in accordance with the plea agreement, stayed imposition of sentence, placed Ojogwu on probation for two and one-half years, and ordered him to pay the bank \$ 1,310 in restitution (the amount of money he withdrew from the Dakota County branch). Ojogwu did not appeal from his sentence or the restitution order.

Three days after Ojogwu pleaded guilty to the Ramsey County charge, Dakota County charged him with two counts of theft by check. In August 1997, Ojogwu moved to dismiss the Dakota County charges on double-jeopardy grounds, claiming that the Dakota County prosecution was barred by his conviction in Ramsey County. The court denied [\*4] the motion.

In February 2001, Ojogwu pleaded guilty to the Dakota County charges in exchange for a gross-misdemeanor sentence. Ojogwu did not appeal from the Dakota County conviction or sentence.

After a probation-violation hearing in July 2001, the Ramsey County district court sentenced Ojogwu to a

prison term of one year and one day. To avoid the immigration consequences of a felony sentence, Ojogwu moved to reduce his sentence. The district court denied the motion, and Ojogwu did not appeal.

In August 2002, Ojogwu filed a postconviction petition, seeking to withdraw his guilty plea or, alternatively, to vacate the judgment of conviction. The district court denied the petition summarily, reasoning only that "no new grounds warranting dismissal of [Ojogwu's] Plea and Sentence were introduced." This appeal follows.

## DECISION

[HN1](#) [↑] Postconviction proceedings afford criminal defendants an opportunity for collateral review of the judgment of conviction and sentence after the time for appeal has expired. [Smith v. State, 596 N.W.2d 661, 663 \(Minn. App. 1999\)](#). Judgments of conviction carry a presumption of regularity and may not, therefore, be lightly set aside. [\*5] [Pederson v. State, 649 N.W.2d 161, 163 \(Minn. 2002\)](#). Thus, in reviewing a postconviction order, this court's function is limited to determining whether the record sustains the postconviction court's findings and whether the postconviction court's decision constitutes an abuse of discretion. [Dukes v. State, 621 N.W.2d 246, 251 \(Minn. 2001\)](#); [Rainer v. State, 566 N.W.2d 692, 695 \(Minn. 1997\)](#); [Miller v. State, 531 N.W.2d 491, 492 \(Minn. 1995\)](#). But, as in other contexts, this court exercises de novo review on issues of law. [Butala v. State, 664 N.W.2d 333, 338 \(Minn. 2003\)](#); see, e.g., [Rairdon v. State, 557 N.W.2d 318, 324-25 \(Minn. 1996\)](#).

### I.

As a preliminary matter, the state argues that Ojogwu's postconviction petition constitutes an abuse of process because Ojogwu failed to pursue a direct appeal from adverse rulings on the issues he now raises in his postconviction petition. The state also argues that claims known but not raised in the proceedings leading to the judgment of conviction are similarly barred. We disagree.

[HN2](#) [↑] When the time for a direct appeal has expired, a criminal [\*6] defendant who claims that a conviction was obtained in violation of state laws or the federal or state constitutions may challenge the conviction in an action for postconviction relief under [Minn. Stat. § 590.01, subd. 1\(1\)](#) (2002). If a direct appeal from a judgment of conviction has been taken, however, all matters raised on appeal from a judgment of conviction

or known at the time of appeal but not raised will not be considered by a postconviction court in a subsequent petition for relief, unless a claim is so novel that its legal basis was not reasonably available to counsel at the time of the direct appeal. [Case v. State, 364 N.W.2d 797, 800 \(Minn. 1985\)](#); [State v. Knaffla, 309 Minn. 246, 252, 243 N.W.2d 737, 741 \(1976\)](#).

Relying on the concurring opinion in *Case*, the state argues that Ojogwu's postconviction petition constitutes an abuse of process because he failed to appeal from adverse rulings on the issues he now raises in his postconviction petition. In *Case*, the concurring judge indicated that, although the supreme court overruled [Tyson v. State, 298 Minn. 559, 214 N.W.2d 461 \(1974\)](#), to [\*7] the extent that it limited review in postconviction proceedings to issues of constitutional magnitude, it did not overrule its adoption of the portion of the A.B.A. standards barring a postconviction petitioner from raising factual or legal claims the petitioner raised in the proceedings leading to the judgment of conviction but failed to pursue on appeal. See [Case, 364 N.W.2d at 800](#) (Wahl, J., concurring specially).

[HN3](#) [↑] Under Minnesota law, a convicted defendant has a right to at least one substantive review by an appellate or a postconviction court. [Id. at 799](#) (stating that "a convicted defendant is entitled to at least one appeal to review claimed violations of [rights]"); [Knaffla, 309 Minn. at 252, 243 N.W.2d at 741](#) (stating that "the salient feature of [[Chapter 590](#)] . . . is that a convicted defendant is entitled to at least one right of review by an appellate or postconviction court"). As a necessary corollary, a convicted defendant does not waive his or her right to seek postconviction relief under [Minn. Stat. § 590.01, subd. 1](#), by failing to pursue a direct appeal. [Rairdon, 557 N.W.2d at 322 \[\\*8\]](#) (holding that defendant who filed but did not pursue direct criminal appeal did not waive right to seek postconviction relief, because claims did not receive actual appellate review); see also [Butala, 664 N.W.2d at 338](#) (allowing postconviction relief in case where no direct appeal was taken); [Perkins v. State, 559 N.W.2d 678 \(Minn. 1997\)](#) (same). Indeed, the supreme court has clearly stated that "in a postconviction proceeding, relief is to be predicated, not upon a determination as to whether direct appeal from the conviction was taken within the prescribed time limitations, but rather upon compliance with the procedural requirements of [[Minn. Stat. § 590.01-.06](#) (2002)]." [Knaffla, 309 Minn. at 252, 243 N.W.2d at 741](#).

Because Ojogwu has complied with the procedural

requirements of [Minn. Stat. §§ 590.01-.06](#), this postconviction appeal is properly before this court, even though Ojogwu did not appeal from the district court's rulings on the issues his postconviction petition raises.

## II.

Ojogwu argues that the district court abused its discretion by denying his petition [\*9] to withdraw his guilty plea. Among other things, Ojogwu specifically argues that his plea is invalid because the court failed to establish an adequate factual basis for the crime of attempted theft by check. We agree.

[HN4](#) [↑] This court reviews a district court's decision on whether to permit a defendant to withdraw a guilty plea under an abuse-of-discretion standard. [Barragan v. State, 583 N.W.2d 571, 572 \(Minn. 1998\)](#). A defendant does not have an absolute right to withdraw a guilty plea. [Kaiser v. State, 641 N.W.2d 900, 903 \(Minn. 2002\)](#). But a defendant may seek to withdraw a plea after sentencing either under [Minn. Stat. § 590.01, subd. 1](#) (2002), which provides an action for postconviction relief when a defendant "claims that the conviction obtained . . . violated the person's rights under the Constitution or laws of the United States or of the state," or under [Minn. R. Crim. P. 15.05, subd. 1](#), "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." A manifest injustice occurs as a matter of law if a plea is invalid. See [Kaiser, 641 N.W.2d at 903 \[\\*10\]](#) (stating that manifest injustice occurs when guilty plea is not accurate, intelligent, and voluntary); [Perkins, 559 N.W.2d at 688](#) (same).

Relying on [rule 15.05](#), Ojogwu first argues that the withdrawal of his plea is necessary to prevent a manifest injustice because his plea was not accurate.

[HN5](#) [↑] A plea is accurate if it is supported by an adequate factual basis. [State v. Ecker, 524 N.W.2d 712, 716 \(Minn. 1994\)](#). An adequate factual basis exists when the record reveals "specific factual allegations supporting each element of the offense." [United States v. Adams, 961 F.2d 505, 508 \(5th Cir. 1992\)](#). The record must also reflect that the conduct to which the defendant admits constitutes the offense charged. [McCarthy v. United States, 394 U.S. 459, 467, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418 \(1969\)](#); [In re Welfare of J.J.R., 648 N.W.2d 739, 742 \(Minn. App. 2002\)](#). The requirement that the court examine the relation between the law and the conduct a defendant admits to having committed is designed to protect a defendant from pleading guilty without realizing that his or her conduct

does not actually establish [\*11] the crime charged. [McCarthy, 394 U.S. at 467, 89 S. Ct. at 1171.](#)

Typically, an adequate factual basis is established by questioning the defendant and by asking the defendant to explain in his or her own words the circumstances surrounding the crime. [Ecker, 524 N.W.2d at 716](#); [Kaiser v. State, 621 N.W.2d 49, 55 \(Minn. App. 2001\)](#), *aff'd*, [641 N.W.2d 900 \(Minn. Apr. 18, 2002\)](#). But a factual basis may also be established by a sworn complaint, police reports, or other documents containing a summary of the state's proposed evidence, provided the defendant "expressly and specifically acknowledges the truth and accuracy of facts constituting the essential elements of the crime." [In re J.J.R., 648 N.W.2d at 743](#); see also [Holscher v. State, 282 N.W.2d 866, 867 \(Minn. 1979\)](#) (factual basis for plea supplied by prosecutor's summary of state's evidence); [Kochevar v. State, 281 N.W.2d 680, 686 \(Minn. 1979\)](#) (factual basis established by both the state's proposed evidence and the defendant's testimony). Although the district court need not personally interrogate the defendant, [\*12] it bears primary responsibility for ensuring that there is an adequate factual basis for the plea. [Ecker, 524 N.W.2d at 716](#). The court should not accept a plea unless it is satisfied that the plea is supported by an adequate factual basis and was knowingly and intelligently made. See [State v. Kaiser, 469 N.W.2d 316, 319 \(Minn. 1991\)](#); [State v. Johnson, 279 Minn. 209, 212, 156 N.W.2d 218, 220 \(1968\)](#). The court must be "particularly attentive to situations in which a defendant is pleading guilty and is asked only leading questions by counsel." [Ecker, 524 N.W.2d at 716](#).

**HN6** [↑] To support a plea to felony attempted theft by check, the record of the plea hearing must reveal that the defendant (1) took a "substantial step," (2) toward obtaining money from a third party, (3) by intentionally issuing a check, (4) in an amount more than \$ 500, (5) with intent to defraud, and (6) knowing that he was not entitled to draw upon the drawee. See [Minn. Stat. §§ 609.52, subds. 2\(3\)\(1\)](#) (defining theft by check), [3\(3\)\(a\)](#) (prescribing sentence); [.17, subd. 1](#) (1996) (defining attempt). A substantial step is one that [\*13] involves "more than [mere] preparation for[] the commission of the crime." [Minn. Stat. § 609.17, subd. 1](#). The record in this case lacks specific admissions supporting each element of attempted theft.

When asked if he attempted to cash a check in an amount more than \$ 500 at the Ramsey County branch of Midway National Bank on September 5, Ojogwu responded equivocally as follows:

A. I'm not sure if I was making a withdrawal or a deposit, but I was doing some transactions. It could have been that I was making a deposit and then depositing a check and then withdrawing another one.

Ojogwu's response was followed by the following exchange, which reflects Ojogwu's reluctance to admit wrongdoing:

Q. Okay. I understand. It was a little more complicated than just a forgery. You were trying to get more than \$ 500.00 from Midway National Bank; is that right?

A. It's possible.

Q. Are you having trouble remembering because you were going to different banks; is that what's confusing?

A. No, it's the same bank. It's Midway National.

Q. Okay. Well, I've read the complaint. I think what happened, as I recall it, was he was opening accounts with a small amount [\*14] and then trying to cash checks for a bigger amount.

Ojogwu did not respond.

Without correcting the court's mischaracterization of the events that took place on September 5, defense counsel intervened at that point and began asking Ojogwu about the events that took place in Dakota County on August 29 and September 4:

Q. Mr. Ojogwu, you had opened an account at the Midway Bank, Burnsville branch?

A. That's correct.

Q. And when you opened that account, you made a deposit of \$ 100 cash?

A. That's correct.

Q. And then you subsequently made a deposit with a check from Ma'Cherie?

....

Q. And you, on September 4th, made another deposit, Check No. 1489, in the amount of \$ 2,500 from the same company?

A. That's correct.

Q. Now, when you would deposit those checks, you also made withdrawals?

A. That's correct.

Q. And those checks that you offered into your account, in essence, were not on valid accounts?

A. It's possible. I don't know what you mean by "valid account."

Apparently frustrated by Ojogwu's reluctance to admit that he knew he was not entitled to draw upon the Ma'Cherie account, an element of the offense, counsel continued the plea colloquy with the following **[\*15]** leading questions:

Q. Let me ask again, because I'm not going to spend a whole lot of time on this. Let's be honest. It's late. Were you trying to get money from Midway National Bank that you knew you didn't have any right to get?

A. Yes.

Q. All right. And you had kind of what I would call a scheme. I don't know what you would call it. Did you have a plan that you were working on by trying to trick these banks into giving you money?

A. Well, actually, I made a deposit from a previous employer's account. Ma'Cherie was a manager for the company until they went out of business. I guess when I was managing the company, I had maybe some of the checks that were not disposed [sic].

Q. How about this: Were you trying to cheat Midway Bank out of some money? Do you understand that?

A. Yes.

Q. And were you trying to cheat them out of some money?

A. Yes.

Q. Okay. Do you have any hesitation at all? Because if you think that those checks that you were putting in from Ma'Cherie were good, then you weren't, you know, committing a crime if you felt that what you were doing was just fine, that you had a right to get the money.

A. Well, Ma'Cherie was already out of business. I don't know **[\*16]** what they did with the closing account.

Q. So you knew -

A. I knew they were out of business when I made a deposit.

The court did not ask Ojogwu to specify whether he also knew that he was not entitled to draw upon the Ma'Cherie account. Nor did it ask him to clarify his admission that he was trying to cheat Midway National

Bank or to relate the circumstances surrounding the crime in his own words. Instead, the court continued as follows:

Q. Were you trying to get more than \$ 500 from Midway Bank in St. Paul?

A. I can't remember the actual amount I was trying to withdraw, but I was trying to get some money out. I don't know. It is possible that it is \$ 500 or more. I don't remember the exact amount.

Counsel for the state intervened at that point and advised the court that "the check [Ojogwu] *presented* on September 5 . . . was written to him for cash in the amount of \$ 950." (Emphasis added.) But Ojogwu never presented a check at the Ramsey County branch. Before Ojogwu ever reached a teller, the bank officer interceded and asked him to hand over his checkbook. Instead of asking Ojogwu if he agreed with counsel's characterization of the facts, the court asked him whether **[\*17]** he had any argument with the court's understanding that if Ojogwu's alleged scheme had worked he would have gotten more than \$ 500 from Midway National Bank. Ojogwu replied, "No," and the court then accepted the plea.

Ojogwu's admissions do not establish all of the elements of the crime charged. The relevant portions of the plea colloquy contain admissions relating to the crimes Ojogwu committed in Dakota County on August 29 and September 4. But the record contains no admissions or other evidence supporting a finding that on September 5, Ojogwu took a substantial step toward defrauding the Ramsey County branch of Midway National Bank by issuing a check with intent to defraud and with knowledge that he was not entitled to draw upon the drawee.

While being questioned about the events of August 29 and September 4, Ojogwu admitted that he was trying to get money from Midway National Bank, knowing that he did not have a right to it. Ojogwu also admitted that he knew Ma'Cherie had gone out of business, but claimed that he did not know what Ma'Cherie had done with "the closing account." Ojogwu indicated that he had no argument with the court's allegation that had Ojogwu's scheme worked, **[\*18]** Ojogwu would have gotten more than \$ 500 from Midway National Bank. But these admissions are not sufficiently specific to support a finding that on September 5, Ojogwu took a "substantial step" toward defrauding the Ramsey County branch of Midway National Bank, by issuing a check in an amount more than \$ 500, knowing that he did not have a right to



draw upon the drawee. And we may not assume that simply because Ojogwu defrauded the Dakota County branch of the bank on August 29 and September 4, he intended to defraud the Ramsey County branch on September 5 and took a substantial step toward that end.

Moreover, because Ojogwu was questioned mostly about the Dakota County incidents, rather than the Ramsey County incident that formed the basis for the charge to which he pleaded, his claim that he believed he was pleading to the conduct that later gave rise to the Dakota County charges is plausible. See [Bolinger v. State, 647 N.W.2d 16, 21-22 \(Minn. App. 2002\)](#) (holding that plea lacked required factual basis because appellant questioned about different offense at plea hearing and believed he was pleading to that offense).

In the absence of an adequate factual basis [\*19] for Ojogwu's plea to attempted theft by check, we reverse the district court's order denying his petition to withdraw his plea and remand to vacate the conviction for the Ramsey County charge and for further proceedings.

**Reversed and remanded.**

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