20100235

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 15, 2010
STATE OF NORTH DAKOTA

CLIFFORD SCOTT EATON,	
Appellant,	**Supreme Court No. 201000235**
vs.	**District Court No. 09-2009-CV-04970**
STATE OF NORTH DAKOTA,	
Appellee.	

APPELLANT'S REPLY BRIEF

Appeal from Amended Order of Judgment and Amended Judgment Denying Post-Conviction Relief Entered July 21, 2010 in Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Georgia Dawson Presiding

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[¶ 1] TABLE OF CONTENTS

[¶ 2] TABLE OF AUTHORITIES

F. PERSUASIVE AUTHORITY

[¶ 3] ARGUMENT

[¶ 4] The district court erred in denying Eaton post-conviction relief because the factual basis in his criminal case was insufficient. It failed to establish Eaton "willfully" possessed drugs "with the intent to deliver" them. As a result, the court erred in improvidently entering its criminal judgment. Eaton is entitled to post-conviction relief.

[¶ 5] In its brief, the State advances two arguments. First, the State argues Eaton "did not clearly object," which results in an obvious error analysis under N.D.R.Crim.P. 52(b) and State v. Fickert, 2010 ND 61, 780 N.W.2d 670. Appellee's Br.¶¶ 17-18. Second, the State argues the factual basis was sufficient because intent can be inferred under the circumstances. Appellee's Br. ¶¶ 22, 24. Neither argument withstands scrutiny.

A.

[¶ 6] Eaton's counsel lodged a speaking objection to the factual basis, which precluded the application of an obvious error analysis. The State argues the Court should apply an obvious error analysis because Eaton's counsel did not "clearly object to the factual basis...." Appellee's Br. ¶ 17. An insufficient factual basis, however, can never be harmless error. United States v. Williams, 176 F.3d 301, 313 (6th Cir. 1999)

[¶ 7] The issue is whether Eaton's attorney objected to the factual basis. An objection "lets the court know the action the party desires the court to take or the party's objection to the court's action and the grounds for the objection. The

purpose of making an objection to a ruling known is to enable the court to correct its error, if any, or to enable the opposing party to correct an alleged defect." N.D.R.Crim.P. 51(a) cmt. While Eaton's attorney did not say, "I object," he immediately raised the issue to the Court's attention and explained the reason he took issue with the State's factual basis. Cf. State v. Klem, 438 N.W.2d 798, 799 (N.D. 1989) (not requiring strict compliance with the form of an objection under circumstances when the grounds are implied or clear).

[¶ 8] In essence, Eaton's counsel lodged a speaking objection. This Court has recognized speaking objections in Stokes v. Dailey, 85 N.W.2d 745, 751 (N.D. 1957) (holding that, even though the attorney did not formally object, stating "we resist the motion" was sufficient to constitute an "objection."). The State's narrow construction of what it means to "object" frustrates the purpose and construction of the rules of evidence and criminal procedure. N.D.R.Ev. 102 (rules are construed to promote fairness, truth, and just proceedings); N.D.R.Crim.P. 2 (rules to be interpreted to provide just determination of criminal proceedings, simplicity in procedure, and fairness in administration); see also N.D.R.Crim.P. 51(a) cmt.

[¶ 9] Furthermore, reliance on Fickert, 2010 ND 61, 780 N.W.2d 670, for this purpose is misplaced.

[¶ 10] Fickert is distinguishable. In Fickert, the Court held that because the defendant did not object, the Court reviewed the sufficiency of the factual basis for obvious error. Id. at ¶ 13. Fickert admitted the conduct constituting the offense, but stated that he did not understand because "it only happened one time." Id. at ¶

12. Fickert argued he was "confused by the factual basis and did not clearly admit to committing gross sexual imposition in the manner alleged by the State." Id. at ¶ 13. Eaton's case is substantively different. First, Fickert admitted to all of the conduct required to constitute the offense. Eaton did not. Eaton never admitted the drugs were his other than "constructively possessing" them. He never admitted that he possessed them with the intent to deliver. Those facts were never established. Second, Eaton's attorney immediately raised the issue. He clarified that Eaton only admitted to constructive possession. No one ever asked whether Eaton intended to distribute those drugs. Eaton did not admit to all of the necessary facts constituting the offense.

[¶ 11] Even if this Court determines the speaking objection was not effective, an insufficient factual basis is never harmless. Williams, 176 F.3d at 313. The Williams and Fickert decisions are quite harmonious. Williams stands for the proposition that an insufficient factual basis is never harmless. Williams, at 313. In Fickert, the defendant admitted to all of the facts necessary to constitute the offense, but he was confused. 2010 ND 61, ¶ 13, 780 N.W.2d 670. While Fickert was confused, the factual basis was sufficient. Id. Williams applies to insufficient factual basis statements, like the factual basis in Eaton's case.

[¶ 12] If the Court limits itself to an obvious error review, Eaton has met his burden. Obvious error is (1) error, (2) that is plain; and (3) affects substantial rights. Fickert, 2010 ND 61, ¶ 7, 780 N.W.2d 670; see also N.D.R.Crim.P. 52(b). An insufficient factual basis is "error" because it violates well-established law.

The error here is also "plain." In determining the factual basis, "the court must ascertain 'that the conduct which the defendant admits constitutes the offense charged. . . .'" Froistad v. State, 2002 ND 52, ¶ 19, 641 N.W.2d 86 (quoting Libretti v. United States, 516 U.S. 29, 38 (1995)). "The court should compare the elements of the crime charged to the facts admitted by the defendant." Fickert, 2010 ND 61, ¶ 11, 780 N.W.2d 670. Here, the court did not compare the factual basis with the criminal elements. The factual basis did not address any culpability or intent elements. Nowhere did anyone state Eaton acted "willfully" or that he possessed the items "with the intent to distribute." Eaton never admitted those facts. Had the court compared the criminal elements to the factual basis, it would have concluded that it needed more facts and inquired further. Finally, an insufficient factual basis always affects substantial rights because it affects the voluntariness of the plea. See Williams, 176 F.3d at 313; see also Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[¶ 13] Even under the obvious error standard, the factual basis here is insufficient. Eaton is entitled to post-conviction relief.

B.

[¶ 14] Eaton's intent cannot be inferred under the circumstances. The State argues the factual basis was sufficient because Eaton's intent can be inferred under the circumstances. Appellee's Br. ¶¶ 22-25. The State's argument fails.

[¶ 15] A factual basis is essential to ensure the defendant is actually guilty of the crime charged. State v. Bates, 2007 ND 15, ¶ 8, 726 N.W.2d 595. In

determining whether the factual basis is sufficient, "[t]he court should compare the elements of the crime charged to the facts admitted by the defendant." Id. (quotations omitted). Therefore, the court should have compared the elements of the offense: (1) willful (2) possession of a controlled substance (3) with the intent to deliver them—with the factual basis given at the plea hearing. Even a cursory comparison would have established the factual basis was insufficient.

[¶ 16] This requirement is not just a feel-good measure. A sufficient factual basis serves essential functions in the plea procedure. It ensures the accuracy of the plea and provides insight into whether the plea is entered voluntarily, knowingly, and intelligently under Boykin. Without the essential elements openly discussed and admitted to by the defendant, the prophylactic effects of the factual basis are eliminated. Consequently, inferring essential elements in the factual basis affects the voluntariness of the plea.

[¶ 17] By arguing intent should be inferred, the State concedes those elements are, in fact, missing here. Had the factual basis covered Eaton's intent, there would be no reason to infer them now. The State's factual basis failed to provide even the barest assertions that Eaton "willfully" possessed drugs "with the intent to deliver" them. No one—the State, the court, or Eaton's attorney—covered Eaton's culpability or intent. The factual basis is insufficient.

[¶ 18] The State urges this Court to follow United States v. Oleson, 310 F.3d 1085 (8th Cir. 2002). Appellee's Br. ¶ 23. The State cites Oleson because the Court there found sufficient evidence to support a possession with intent

conviction based upon the drug quantity and the additional objects found during the search. The State also cites Oleson, at 1088 (quoting United States v. Ojeda, 23 F.3d 1473, 1474 (8th Cir. 1994)) for the proposition that "'intent to distribute may also be inferred solely from possession of large quantities of narcotics.'" Because these cases address evidence sufficiency after a jury trial, the State's reliance upon them is misplaced.

[¶ 19] Oleson and Ojeda are distinguishable from Eaton's case. In Oleson, evidence was presented at trial that police executed a search warrant on Oleson's property. 310 F.3d at 1088. They recovered twelve guns, a scale, 2.33 grams of amphetamine, 38.15 grams of methamphetamine, and over twenty pounds of marijuana. Id. at 1088-89. Witnesses testified Oleson was engaged in the regular sale of ounce quantities of methamphetamine, sometimes as much as four ounces. Id. at 1088. When the Court noted the intent could be inferred based upon drug quantities alone, it was discussing the quantity of marijuana, not methamphetamine. Id. With respect to the methamphetamine, the Court upheld the verdict because of the guns, scale, and "overwhelming" testimony that Oleson was a drug dealer. Id. at 1089-90.

[¶ 20] In Ojeda, Ojeda and his nephew were driving from California to Illinois to visit a relative. 23 F.3d at 1474. Ojeda was stopped for speeding. Id. Upon approaching the car, the officer noted a strong "pinesol" smell. Id. Neither man owned the car. Id. When asked, neither man knew the telephone number or address of the Illinois relative. Id. The officer, suspicious of drug activity, asked

for and received consent to search the car. Id. He found a black baggie "protruding from a corner wheel well." Id. He then summoned a drug-detecting dog, which confirmed the presence of drugs. Id. Officers found 7.1 kilograms (over 15 pounds) of methamphetamine sealed in plastic baggies in two locked trap doors in the vehicle. Id. The doors opened with pins found in the driver's visor. Id. Ojeda's fingerprints were found on several drug packages. Id. The Court rejected Ojeda's sufficiency argument because a reasonable jury could conclude he possessed the drugs with the requisite intent in light of his fingerprints on the drugs, the pinesol odor, the trap doors opened with pins from his visor, and Ojeda was driving from California to Illinois without knowing the relative's phone number or address. Id. at 1476.

[¶ 21] The State argues "the facts presented to the district court included pay-owe sheets, and scales found at the residence, as well as two thousand dollars ($2000) U.S. Currency[,]" allow an inference of an intent to distribute based upon "circumstantial evidence." Appellee's Br. ¶ 25. The State cites United States v. Johnson, 977 F.2d 457 (8th Cir. 1992) in support. Appellee's Br. ¶ 25. Johnson, like Oleson and Ojeda, is a jury trial case. Johnson, at 458. The State cites no case stating intent can be inferred in the factual basis in a guilty plea.

[¶ 22] On the other hand, the cases cited in Eaton's principal brief are guilty plea cases, directly addressing the sufficiency of the intent elements in the factual basis statements. Appellant's Br. ¶¶ 28-32. In United States v. Mastrapa, 509 F.3d 652 (4th Cir. 2007), the factual basis was insufficient when there was no

evidence—either in the government's factual basis, the plea colloquy or in affidavits from DEA agents—of the defendant's intent. Id. at 658-60. The Fourth Circuit noted that the magistrate was put on notice of the defective factual basis and should have inquired further. Id. at 660.

[¶ 23] In United States v. Tunning, 69 F.3d 107 (6th Cir. 1995), the Court determined the factual basis was insufficient with respect to the defendant's intent, even though the prosecutor made a bare assertion that he could have presented evidence of the defendant's intent. Id. at 112-13. In Tunning, the government requested the Court to infer intent from the circumstances. The Sixth Circuit squarely rejected the government's request, reasoning "[a]lthough we agree that a rational fact finder could infer an intent to defraud from such evidence, in the context of a challenge to the factual basis supporting a guilty plea, we have previously rejected a request by the government to infer a 'critical element' of the offense charged." Id. at 113. The Court further held "a bare statement from the prosecutor that he would have proven that the defendant acted with the intent to defraud does not ensure . . . that the plea is accurate." Id. at 114. As noted in Bates, Froistad, and LaFave's treatise at 5 Criminal Procedure § 21.4(f), the accuracy and voluntariness of the plea is the primary focus.

[¶ 24] In United States v. McCreary-Redd, 475 F.3d 718 (6th Cir. 2007), the Court determined that the stipulated factual basis was insufficient, even though the drugs were individually packaged for resale—a common factor relied upon for

inferring intent to distribute in sufficiency of the evidence jury trial cases—because the packaging was consistent with both personal use and distribution.

[¶ 25] These cases, especially Tunning, are on point and particularly instructive. Here, the State should not be allowed "to infer a 'critical element' of the offense charged." Tunning, 69 F.3d at 113. Allowing such an inference defeats the protective functions of the factual basis—to ensure the defendant is actually guilty. Bates, 2007 ND 15, ¶ 8, 726 N.W.2d 595.

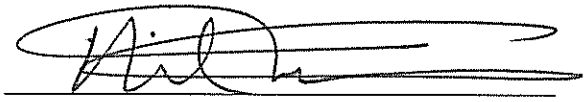
[¶ 26] The State's request to infer Eaton's intent and its reliance on jury trial sufficiency cases overlooks a critical point: unlike in a jury trial, the defendant waives the right to remain silent when he enters his plea. While a jury may never hear direct evidence of the defendant's intent, a judge can always obtain direct evidence of intent by asking the defendant. See Kaiser v. State, 417 N.W.2d 175, 178 (N.D. 1987) (discussing approved methods of obtaining a factual basis). The court here should have asked Eaton questions concerning his conduct, his knowledge and control over the drugs, and his alleged intent to distribute.

[¶ 27] The factual basis was insufficient. Eaton is entitled to post-conviction relief.

[¶ 28] CONCLUSION

[¶ 29] For the reasons stated above, Eaton requests this Court hold that the district court erred in denying him post-conviction relief. Eaton requests this Court reverse and remand the matter for entry of judgment in his favor.

[¶ 30] Dated October 15, 2010.



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