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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

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 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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[¶ 5] STATEMENT OF THE CASE

[¶ 6] This is an appeal arising from an amended order of judgment and amended judgment, in which Eaton's amended application for post-conviction relief and cross-motion for summary disposition was denied and the State's motion for summary disposition was granted. Eaton acknowledges there are no material issues of fact, but asserts that the Court erred in entering judgment denying him post-conviction relief. Specifically, Eaton contends there was not a sufficient factual basis to support a guilty plea to the possession with the intent count. Eaton requests this Court reverse and remand the matter for entry of judgment in his favor.

[¶ 7] STATEMENT OF FACTS

[¶ 8] In the underlying criminal case, file 09-04-K-01989, Eaton was charged with (1) possession of a controlled substance (methamphetamine) with the intent to deliver, a class AA felony; (2) possession of drug paraphernalia (methamphetamine), a class C felony; (3) possession of drug paraphernalia (marijuana), a class A misdemeanor; and (3) possession of less than one-half

ounce of marijuana, a class B misdemeanor. After the initial appearance, the Court held a contested preliminary hearing where the district court bound Eaton over for arraignment. At the arraignment, Eaton entered pleas of not guilty to all charges. Shortly thereafter, Eaton filed a motion to suppress.

[¶ 9] On August 30, 2004, the district court held what was supposed to be a hearing on the suppression motion. (App. at 14:7-8).[1] Instead of the motion hearing, however, Eaton abandoned his motion, entered guilty pleas to the felony counts—possession of methamphetamine with intent to deliver and possession of drug paraphernalia—and the State moved the Court to dismiss the misdemeanor counts. (App. at 15:24 – 16:2; 16:16-20). The parties agreed to recommend the minimum mandatory five-year straight time sentence on the possession with intent count, and a five-year straight time sentence on the possession of drug paraphernalia count, concurrent with count one. (App. at 21:22-22:1). There were some arguments made with respect to the typically imposed financial obligations. The plea agreement was not reduced to writing and the Court did not discuss on the record whether the agreement was binding or nonbinding in nature. The State offered a factual basis. (App. at 18:1-22). Immediately thereafter, Eaton's attorney lodged a speaking objection to the factual basis, noting that the facts only supported constructive possession of the controlled substances. (App. at 19:3-

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[1]Eaton will refer to materials in the Appendix by (App. at ___). If there is a specific paragraph or line, the pinpoint citation will follow the Appendix page number after a colon.

20:2). Nevertheless, the court accepted the guilty pleas and imposed judgment. (R. at 16).[2] The court sentenced Eaton to five years' imprisonment on each count, each count running concurrent with each other, and waived the typically imposed legislative fee. (R. at 16) (State v. Eaton, No. 09-04-K-01989, criminal judgment and commitment).

[¶ 10] On December 24, 2009, Eaton filed a pro se application for post-conviction relief. (R. at 1). Eaton's application was amended by counsel, primarily for form, on February 22, 2010. (R. at 9). Eaton generally alleged his conviction and sentence was obtained in violation of the law, and specifically alleged the factual basis given with respect to the possession with the intent count was insufficient in that it did not address whether Eaton had the "intent to deliver" a controlled substance. (App. at 8: ¶¶ 10-12). Consequently, Eaton argued he is entitled to post-conviction relief and the district court should vacate the criminal judgment and commitment. (App. at 8: ¶ 15).

[¶ 11] The State filed its answer, denying the factual basis in Eaton's underlying conviction was insufficient. (App. at 10) The State also filed a motion for summary disposition under N.D.C.C. § 29-32.1-09. (R. at 11). In support of its motion, the State attached the affidavit of probable cause filed in case 09-04-K-01989. (R. at 11). Eaton responded with a cross-motion for summary disposition. (R. at 14).

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[2]Eaton will refer to materials in the record by (R. at ___).

[¶ 12] A hearing on the parties' cross-motions was held on June 15, 2010, the Honorable Georgia Dawson presiding. On July 21, 2010, the district court entered an amended order for judgment and amended judgment, which stated denied Eaton post-conviction relief and entered summary disposition in favor of the State. (App. at 26-29).

[¶ 13] On July 21, 2010, Eaton timely filed his notice of appeal. (App. at 30).

[¶ 14] The district court had jurisdiction over the post-conviction relief matter under N.D. Const. art. VI, § 8; N.D.C.C. § 29-32.1-03; and N.D.C.C. § 29-32.1-07(1). The Supreme Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6; N.D.C.C. § 29-32.1-14; and N.D.R.App.P. 4(a).

[¶ 15] ARGUMENT

[¶ 16] The district court erred in denying Eaton's amended petition for post-conviction relief because the factual basis was insufficient to support a plea of guilty to the possession with intent count. The factual basis failed to adequately set forth facts to establish that Eaton "willfully" possessed controlled substances "with the intent to deliver" them. As a result of the insufficient factual basis, the district court erred in improvidently entering a criminal judgment against Eaton without further inquiry. Eaton is entitled to post-conviction relief.

[¶ 17] Generally, N.D.R.Crim.P. 11 governs the entry and acceptance of pleas in North Dakota. Rule 11(b) instructs the Court in what must be done before accepting a plea of guilty. Rule 11(b) provides in pertinent part:

(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally . . . , informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty [and] to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel . . .

(D) the right . . . to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(E) the defendant's waiver of these trial rights . . . ;

(F) the nature of each charge to which the defendant is pleading;

(G) any maximum possible penalty. . . . ;

(H) any mandatory minimum penalty; and

(I) the court's authority to order restitution.

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must . . . determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

N.D.R.Crim.P. 11(b). The explanatory note to Rule 11 makes it clear that N.D.R.Crim.P. 11(b)(3) "requires that the court not enter judgment on a plea of guilty without making an inquiry to ensure that there is a factual basis for the plea." Explanatory Note, N.D.R.Crim.P. 11 (emphasis added).

[¶ 18] "A factual basis is a statement of facts to assure the defendant is guilty of the crime charged." State v. Bates, 2007 ND 15, ¶ 8, 726 N.W.2d 595. "To establish a factual basis for the plea, 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)). 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." State v. Fickert, 2010 ND 61, ¶ 11, 780 N.W.2d 670 (citing Froistad, at ¶ 19). The factual basis may be given in a number of ways:

> First, the court could inquire directly of the defendant concerning the performance of the acts which constituted the crime. Secondly, the court could allow the defendant to describe to the court in his own words what had occurred and then the court could question the defendant. Thirdly, the court could have the prosecutor make an offer of proof concerning the factual basis for the charge. ABA Standards for Criminal Justice, Receiving and Acting Upon a Plea, § 14-1.6(b), at 14.35.

Kaiser v. State, 417 N.W.2d 175, 178 (N.D. 1987).

[¶ 19] Determining whether there is a sufficient factual basis is critical in accepting and receiving a guilty plea because it ensures the accuracy of the plea and provides further insight into whether the plea is entered voluntarily,

knowingly, and intelligently. As Professor LaFave has noted, the factual basis for a plea serves a number of important functions:

> Most importantly, [the factual basis] should protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. As the cases indicate, this does happen on occasion. In addition, the inquiry into the factual basis of the plea provides the court with a better assessment of the defendant's competency and willingness to plead guilty and his understanding of the charges, increases the visibility of charge reduction practices, provides a more adequate record and thus minimizes the likelihood of the plea being successfully challenged later, and aids correctional agencies in the performance of their functions.

5 LaFave et al., Criminal Procedure § 21.4(f) (footnotes and quotations omitted).

[¶ 20] Here, Eaton was under the mistaken impression that mere constructive possession was sufficient to establish the factual basis for the charge. The factual basis in this case failed its most essential function: it failed to protect Eaton from pleading guilty to a crime without realizing that his conduct did not fall within the scope of the charge.

[¶ 21] In the underlying criminal case, the prosecutor provided the following factual basis to the district court:

> MS. PETERS: Your Honor, on May 21st of 2004, a search warrant was executed at the residence of the defendant, Mr. Eaton, that residence at 1405 – 25th Avenue South in Fargo. Officers entered on the search warrant. There was also an arrest warrant connected to it, and there was a gentleman that was arrested who had a federal warrant out for his arrest. His name was Ernest Thomas.
>
> Mr. Thomas was taken into custody by the U.S. Marshal, and the officers proceeded to search the residence for drugs, at which

time they found over 80 grams of methamphetamine paraphernalia. Mr. Eaton also had over $2,000 in cash in his possession at the time.

The information that they had was that he was going to various locations in Arizona, purchasing methamphetamine, and shipping it back to his residence. The officers also found shipping documents and plane tickets, hotel reservation, that kind of stuff, that would corroborate that that's, in fact, what was going on.

And that is essentially the factual basis.

(App. at 18:2-22). The court asked Eaton's attorney whether took exception with the State's factual basis. (App. at 19:3-7). Eaton's attorney stated that he did, arguing the following:

MR. OLSON: Other than the fact that there was drugs found in the – in the apartment that Mr. Eaton was the leaseholder on, we think there would be a sufficient factual basis to say that drugs were found there and that he had possession of those drugs or constructive possession. There's two other situations in there – two other people, excuse me – in the apartment. One was the target of the –

THE COURT: Federal investigation.

MR. OLSON: — arrest warrant. The drugs just happened to be found on a computer table where he was arrested while Mr. Eaton was answering the front door, which this Court heard at the preliminary hearing.

We do believe that there is sufficient evidence that he would be convicted of at least constructive possession for having that material in his apartment, coupled with the fact that there was paraphernalia there. I think those facts alone the jury could construe that he knew they were there; therefore he's in possession of it. I think that would be sufficient factual basis for that particular charge as well as the paraphernalia charge.

THE COURT: You concur, Mr. Eaton?

MR. EATON: I do.

(App. at 19:8-20:4). The district court found the factual basis provided was sufficient even though it never addressed the intent to distribute the controlled substance element of the offense. (App. at 20:5-8).

[¶ 22] In determining whether the factual basis is sufficient, the district court must first determine the essential elements of the crimes compare them with the facts admitted to by the defendant. Fickert, 2010 ND 61, ¶ 11, 780 N.W.2d 670 (citing Froistad, 2002 ND 52, ¶ 19, 641 N.W.2d 86). Section 19-03.1-23(1)(a), N.D.C.C., the operative criminal statute, provides in pertinent part:

> [I]t is unlawful for any person to willfully. . . possess with intent to . . . deliver, a controlled substance. . . . Any person who violates this subsection with respect to: A controlled substance[, including . . .] methamphetamine, is guilty of a class A felony and must be sentenced:
>
> a. For a second offense, to imprisonment for at least five years.
> . . . .

N.D.C.C. § 19-03.1-23(1)(a). The essential elements of possession of a controlled substance with intent to deliver are (1) On or about the date alleged in the Information, in Cass County, North Dakota, the Defendant; (2) willfully possessed with the intent to deliver a controlled substance. N.D.C.C. § 19-03.1-23(1)(a); see also N.D.J.I. § K-22.2 (pattern jury instruction for possession with intent to deliver). For drug crime purposes, "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship. N.D.C.C. § 19-03.1-01(8).

[¶ 23] The State's factual basis provided in this case failed to provide even the barest assertions that Eaton willfully possessed the items or that he intended to possess controlled substances with the intent to deliver them. It did not mention—even in passing—the words "willful," "intent," "intent to distribute," "intent to deliver," or "intent to manufacture." The factual basis did not assert that Eaton was actually selling methamphetamine. It did not incorporate the affidavit of probable cause by reference. It did not attribute the purported pay/owe sheets or the quantity of methamphetamine to Eaton rather than the fugitive temporarily staying in his home, Thomas. It did not allege the money came from the sales or distribution of controlled substances. It did not mention that the quantity of methamphetamine found in the residence exceeded personal use quantities. In light of the paraphernalia found in the residence, it seems as though the drugs being consumed rather than distributed.

[¶ 24] Immediately after the State's factual basis, Eaton's attorney lodged an immediate speaking objection, noting the factual basis given by the State only supported constructive possession. To paraphrase, Eaton's attorney acknowledged Eaton knew or should have known the drugs were in his residence and acquiesced in their presence. The attorney's statements, however, did not cover the mens rea elements.

[¶ 25] For factual basis purposes, constructive possession clearly applies in simple possession cases, but not necessarily possession with intent cases. Consider the following example: Assume two people share an apartment. Both

are drug users. One is actively engaged in selling drugs, but the other is just a mere user. The mere user does not know of the roommate's drug sales. Police obtain and execute an arrest and search warrant for the apartment based upon the first roommate's suspected drug sales. In executing the warrant, the police locate user-level quantities of drugs and paraphernalia in common areas. The lion's share of the drugs, along with purported indicia of possession with intent like pay/owe sheets, scales, baggies and the like, however, are found hidden in the seller's bedroom. In this example, both roommates are in constructive, simple possession of the contraband, but only one can be fairly said to have possessed the items with the intention of distributing them.

[¶ 26] In possession with intent cases, something more than mere constructive possession is required. The possession must be with the intent to distribute, manufacture, or deliver them. That is exactly the problem LaFave has warned of—defendants might be pleading to offenses for which their conduct does not support. Section 19-03.1-23(1)(a) requires the State to assert that Eaton had the intention to deliver drugs; not that he merely acquiesced in the presence of controlled substances in his home. Furthermore, in light of Eaton's attorney's argument concerning constructive possession, the district court should have asked Eaton whether he had any intention of providing those drugs to another person to satisfy factual basis requirement. The district court could have protected its record by merely asking one question of Eaton: whether he agreed he possessed those drugs with the intent to distribute them.

[¶ 27] At the summary disposition hearing, the State argued the intent to deliver can be inferred from the circumstances and the district court agreed. The State argued that possession with intent can be inferred from the possession of large quantities of narcotics. The State also argued the existence of pay/owe sheets and evidence of Eaton going to Arizona and shipping drugs back to his home was adequate. The most significant problem with the State's position is that it is attempting to infer not one element of the crime, but two. That is, the State is seeking to infer both "willful" possession and that Eaton had the "intent to distribute." If the State can infer two elements, why not three? Why not four? Why not just presume all criminal defendants must be guilty? Where does the State's argument stop? There was no indication that the quantities were more than user quantities. Regarding the pay/owe sheets, nothing in the factual basis given by either the State or defense counsel referenced whether the pay/owe sheets were Eaton's rather than Thomas's. In that respect, the factual basis here is woefully inadequate.

[¶ 28] This Court has not directly addressed the sufficiency of a factual basis involving the possession with intent element in a drug case. Federal courts, however, provide substantial guidance in that regard. In United States v. Mastrapa, 509 F.3d 652, 658 (4th Cir. 2007), the defendant was charged in a conspiracy to distribute more than 500 grams of methamphetamine. The defendant agreed with two other men to transport several bags of groceries to a hotel room in Virginia. Id. at 654. Undercover agents at the hotel found five

pounds of methamphetamine in the grocery bags. Id. Mastrapa claimed that he agreed to give the men a ride, but that he did not know what was in the bags or what the other men were doing. Id. Mastrapa pled guilty, however, to minimize his sentence. Id. At the plea hearing, "Mastrapa refused, despite questioning by the district court, to admit to the factual basis necessary to support the charges against him, and the record included no evidence of Mastrapa's mens rea." Id. at 654-55. In determining that a factual basis existed, the court considered an affidavit from a DEA agent, which generally described the conspiracy between the two other men. See id. at 658. The only facts in the affidavit concerning Mastrapa's role was that surveillance observed him drive one of the men to the hotel room and carry in the grocery bags. Id. "There was no other evidence given about whether Mastrapa was involved in planning the transaction, overheard its plans, or otherwise knowingly participated in a drug transaction." Id. The district court accepted the plea and sentenced Mastrapa. On appeal, Mastrapa argued there was an insufficient factual basis because there was no evidence of Mastrapa's mens rea; his intent to participate in the conspiracy. The Court of Appeals concluded that "the district court could not have found a factual basis in the record . . . in that the record failed to demonstrate that Mastrapa had knowledge of the conspiracy and that he knowingly and voluntarily participated in the conspiracy." Id. at 660. The Court of Appeals further noted that the magistrate was put on notice of the defective factual basis and should have inquired further. See id. Like in Mastrapa, Eaton alleges the factual basis is

insufficient to support the mens rea requirement. Just as Mastrapa was confused about what facts could constitute the elements of conspiracy to distribute drugs, Eaton was confused concerning whether constructive possession was sufficient to constitute possession with the intent. Further inquiry should have been required.

[¶ 29] In United States v. Tunning, 69 F.3d 107 (6th Cir. 1995), the defendant pled guilty to credit card fraud. Id. at 109. At the change of plea hearing, the prosecutor provided the following factual basis:

> Your Honor, the United States would prove that on or about September 15, 1984, Mr. Tunning obtained an American Express credit card in the name of Timothy Kennedy, and he obtained it using certain false information. He used his own Social Security number. He used-there is a real Tim Kennedy with whom Mr. Tunning has been associated before. He used Mr. Kennedy's actual date of birth on the application for that credit card.
>
> There was also some question in our mind, and the United States would have offered some proof as to whether or not the address he actually put on the application was in fact a real address for him and whether the income, the annual income that he reported on that application was in fact expected to be received by him. [Defense counsel] and I have discussed the proof the defendant would have put on in that-on those issues. However, that would have been part of the United States' argument, your Honor.
>
> Further the United States would have proven that there were a number of other cards, I believe twenty other cards that were obtained from this individual in the name of Tim Kennedy. So some of the others had also-those applications that we could find the false date of birth had been used on those as well. With respect to the American Express card, a total bill of somewhere between just short of [$]17,000 and just over $18,000 was run up on it. It was never paid.
>
> There was I suppose, depending on how one views the situation, some attempt to make some type of payment on the card. But from the stand-from the viewpoint of the United States, your Honor, the

> attempt was either a sham attempt or no real attempt was made on the card. The American Express finally wrote the account off. There were a variety of facts and circumstances surrounding the entire indictment that would have gone to the issue of intent.
>
> Mr. Tunning in one of the counts involved-and I'm sure the Court's aware of this though it would have been in two of the counts dismissed that he did use on a driver's license that he gave to Covington police when he was leaving Covington when he was arrested, a driver's license under the name of Tim Kennedy that was obtained from the state of Virginia using a real Tim Kennedy's date of birth, a real Tim Kennedy's Social Security number, representing himself to be Tim Kennedy and that to be true information.
>
> Your Honor, there were a variety of facts such as that. There was also some evidence the United States would have sought to introduce under [Fed.R.Evid.] 404(b) outside the indictment that we would have sought to introduce on the issue of the intent. But in short, Your Honor . . . that is the case.

Tunning, 69 F.3d at 112-13 (emphasis added). The Court of Appeals determined that this factual basis because it failed to establish the defendant, Tunning, knowingly obtained and used the credit card with "the intent to defraud." Id. at 113.

[¶ 30] Like in Eaton's case where the State has argued the court should infer the intent to distribute element, the government in Tunning argued that the "intent to defraud" element should be inferred from the circumstances. Id. The Court of Appeals, however, squarely rejected the government's argument because a "critical element" of the offense should not be inferred. Id. ("Although 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."). The Court of Appeals further held that "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. It is important to note that in Tunning, the prosecutor at least attempted to cover the intent element with a bare assertion of what he could have proved. In Eaton's case, however, no one covered either intent element during the entire plea colloquy. If even a bare assertion of the criminal intent was not enough in Tunning, clearly, no assertion should have been found insufficient in Eaton's case.

[¶ 31] In United States v. McCreary-Redd, 475 F.3d 718 (6th Cir. 2007), the defendant entered a formal plea agreement with the United States, where the factual basis was stipulated in the plea agreement. Id. at 720. The stipulated facts provided that "[i]ncident to the arrest, Officers recovered a vial attached to McCreary-Redd's ke y chain which contained a quantity of cocaine base, also known as 'crack,' approximately 3.0 grams that was individually wrapped and packaged for resale." Id. at 723 (emphasis in original). Among other charges, McCreary-Redd pled guilty to possession with the intent to distribute crack cocaine. When the district court was determining the factual basis, it asked the defendant whether he entered the stipulation. The defendant responded that he did. On appeal, McCreary-Redd challenged the intent to distribute element in the factual basis. The Court of Appeals held that the factual stipulation was ambiguous because, without more, the facts were consistent both with personal use and with distribution. See id. at 724.

[¶ 32] Based upon a review of these cases, it becomes readily apparent that the factual basis serves an important role and should not be given flippantly. These cases are very instructive in how the district court should have ruled in this case. Bare assertions concerning critical elements of the offense are insufficient. Objective facts without the inquiry into the subjective intent of the defendant can equally support several levels of drug crimes and should not be sufficient for a factual basis. When the court is put on notice that the defendant takes issue with the factual basis, it should inquire further or choose not to proceed. The district court must determine the elements of the offense, and then ensure the defendant admits conduct that actually constitutes the offense. Unfortunately, in this case, there seemed to be a preference of expediency and efficiency over the careful administration of justice.

[¶ 33] The State will likely argue that Eaton's case is similar to State v. Fickert, 2010 ND 61, 780 N.W.2d 670. In Fickert, the Court held that because the defendant failed to object to the factual basis, they would only review the issue for obvious error. See id. at ¶ 13. In Fickert, the defendant was charged with A felony gross sexual imposition for engaging in sexual conduct with a victim under the age of 15. Fickert admitted to conduct constituting the offense, but stated that he did not understand the factual basis because "it only happened one time." Id. at ¶ 12. Fickert argued on appeal 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.

[¶ 34] Fickert differs from Eaton's case in that Fickert admitted to law enforcement that he was guilty by stating that the victim was "not lying." Fickert also told the district court that it only happened "one time" as opposed to two separate occasions, as alleged in the factual basis. Based on that admission and Fickert's previous admissions, the district court did not commit obvious error by concluding there was a sufficient factual basis. Fickert admitted conduct constituting the offense but argued it was not as egregious as the State made it out to be in that it only happened one time, not more than once as alleged by the State.

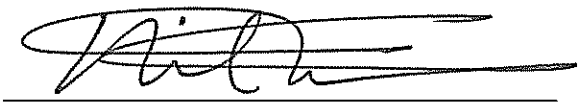
[¶ 35] Eaton's case is distinguishable from Fickert. First, Fickert openly admitted to all of the conduct required to constitute the offense. Eaton, however, did not. At no time did Eaton admit that the controlled substance was his other than "constructively possessing" the items, or that he intended to deliver the controlled substance. Those facts were not established by statements by the prosecutor, statements by defense counsel, or admissions by Eaton. Second, while Eaton's attorney did not say the words "I object," he did lodge a speaking objection in that he took immediate issue with the State's factual basis. He clarified that Eaton admitted to constructive possession of the drugs. No one ever asked whether Eaton intended to distribute drugs. Eaton's case should be viewed differently, as there is a huge difference between an insufficient factual basis and one where the defendant was merely confused about it. "The lack of a sufficient factual basis for a plea can never be harmless. . . ." See, e.g., United States v. Williams, 176 F.3d 301, 313 (6th Cir. 1999).

[¶ 36] Eaton's counsel made it clear that Eaton acknowledged the factual basis was sufficient for constructive possession of the drugs and the drug paraphernalia, but not possession with intent to distribute. Without more, the factual basis is insufficient and the judgment was improvidently entered. Further, as a result of a lack of a sufficient factual basis, the court committed substantial error affecting the voluntariness of Eaton's plea. See McCarthy v. United States, 394 U.S. 466, 467 (1969); see also Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that a guilty plea must be voluntary and intelligent to satisfy the constitutional requirements of due process).

[¶ 37] CONCLUSION

[¶ 38] 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.

[¶ 39] Respectfully submitted this 31st day of August, 2010.



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