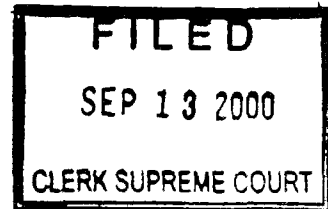


IN THE COURT OF APPEALS OF IOWA

No. 0-494 / 99-1633
Filed September 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK EUGENE FUEHRER,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Mark Fuehrer appeals from his conviction following a guilty plea to child
endangerment, an aggravated misdemeanor, in violation of Iowa Code section
726.6 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden,
Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Mark Fuehrer appeals from his conviction following a guilty plea to child endangerment, an aggravated misdemeanor, in violation of Iowa Code section 726.6 (1997). Fuehrer contends an insufficient factual basis existed to support his plea and his trial counsel was ineffective for failing to raise the issue. We affirm.

On January 19, 1999, the Linn County Attorney filed a trial information charging Fuehrer with child endangerment, an aggravated misdemeanor in violation of Iowa Code section 726.6 (1997) (Count I); and possession of a controlled substance, a serious misdemeanor in violation of Iowa Code section 124.401(5)(1997) (Count II). Fuehrer waived his right to speedy trial.

Fuehrer entered a plea agreement with the State, by which the State agreed to dismiss the possession of a controlled substance charge (Count II) in exchange for a plea of guilty to child endangerment (Count I). In addition, Fuehrer agreed to plead guilty to a separate pending charge of possession with intent to deliver a controlled substance, crack cocaine. The State would not make a sentencing recommendation on the possession with intent to deliver charge, but agreed the sentence imposed for child endangerment would run concurrently with the sentence imposed for the possession with intent to deliver charge.

On June 23, 1999, Fuehrer filed a written guilty plea to Count I. At a hearing that same day, the district court accepted Fuehrer's plea to the possession with intent to deliver charge and his written plea to the child

endangerment charge. The district court fully explained Fuehrer's right to file a motion in **arrest** of judgment pursuant to Iowa Rule of Criminal Procedure 23(3). Fuehrer did **not** file a motion in arrest of judgment within the time prescribed by rule 23(3).

On September 10, 1999, the district court imposed an indeterminate ten-year sentence for the possession with intent to deliver charge and a concurrent indeterminate two-year sentence for the child endangerment charge. Fuehrer filed his notice of appeal on October 7, 1999.

Waiver. We review Fuehrer's constitutional claim of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). We make an independent evaluation of the circumstances as shown by the entire record. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999).

As a preliminary matter, however, we must address the State's argument Fuehrer has waived his ineffective assistance of counsel claim by failing to adequately discuss the issue in his brief. Iowa Rule of Appellate Procedure 14(a)(3) provides: "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." The "Argument" heading in Fuehrer's brief reads as follows: "Insufficient Factual Basis Existed to Support a Guilty Plea to Child Endangerment and Trial Counsel was Ineffective for Failing to Raise the Issue." In the discussion that follows, Fuehrer argues the minutes of testimony, the transcript of the guilty plea, and the written plea fail to present an adequate factual basis to support Fuehrer's plea. Fuehrer asks this court to set aside the judgment and remand his case to the district court for a

factual determination. Fuehrer does not cite authority to support his ineffective assistance of counsel claim. He does not discuss the law as it relates to ineffective assistance of counsel. Fuehrer articulates neither the duties his counsel failed to perform, nor how the failure of his counsel to perform these duties prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Because Fuehrer fails to articulate any arguments to that end, the point is moot. See *State v. Cooley*, 608 N.W.2d 9, 13 (Iowa 2000). Therefore, this court need not consider Fuehrer's ineffective assistance of counsel claim. However, because we find no merit in that claim, we will address it here.

Ineffective Assistance of Counsel. Fuehrer's failure to file a motion in arrest of judgment precludes him from attacking the guilty plea directly. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). He may, however, challenge the guilty plea through an ineffective assistance of counsel claim. *Id.*

To succeed with his claim of ineffective assistance of counsel, Fuehrer must prove (1) his counsel failed to perform an essential duty; and (2) prejudice resulted. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *Bugely*, 562 N.W.2d at 178. An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts

surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find the record in this case adequate to resolve Fuehrer's ineffective assistance of counsel claim.

We will find counsel failed to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea. *Brooks*, 555 N.W.2d at 448. On the other hand, where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty. *Id.* Thus, the pivotal issue in this case is whether a factual basis existed for Fuehrer's guilty plea to the crime of child endangerment. If a factual basis existed, counsel was not ineffective for failing to file a motion in arrest of judgment; if a factual basis does not exist, then counsel was ineffective. *See id.*

In order to prove a defendant guilty of child endangerment, the State must show:

A person who is the parent, guardian, or person having custody or control over a child or minor under the age of eighteen with a mental or physical disability, commits child endangerment when the person does any of the following:

(a) knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental, or emotional health or safety.

Iowa Code § 726.6(1)(a) (1997).

The minutes of testimony describe the scene officers found when they arrived at Fuehrer's home at approximately 10:55 p.m. on December 18, 1998, in response to a disturbance. Fuehrer was not home at the time. Officers found his

five-year-old son in the house with three other men, one of which officers knew to be heavily involved with narcotic use. The officers observed drug paraphernalia, including hypodermic needles, spoons, screening materials, a cocaine crusher, a crack pipe, rolling papers, and a mirror with cocaine on it. They found two baggies containing a white powdery substance they believed to be cocaine in a first aid kit. The child told officers he knew knives and needles were in the house, and he would play with knives that belonged to him. He showed officers where his father kept knives, needles, and drugs. He told officers he found three needles on the kitchen table one time when he was living there. The only food officers found in the house was half a bag of cereal.

From the evidence in the record before us, we conclude a sufficient factual basis for the offense of child endangerment has been established. Fuehrer left his son in his house late at night with three other men, one of whom was known to be a heavy drug user. Officers found drugs and drug paraphernalia throughout the house. Fuehrer left knives and needles where his son could easily access and play with them. Because a factual basis exists for the plea, Fuehrer is unable to establish counsel breached a duty in allowing him to plead guilty to child endangerment.

AFFIRMED.