IN THE COURT OF APPEALS OF IOWA

No. 1999-440 (9-697) / 98-1336
Filed January 26, 2000

STATE OF IOWA,

Plaintiff-Appellee,

vs.

STEVEN ANTONIO JOHNSON,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers, Judge.

Steven Johnson appeals from his convictions, following guilty pleas, for terrorism without intent in violation of Iowa Code section 708.6 (1997). **AFFIRMED.**

Derek G. Jones of Wells & Wells, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, **William** E. Davis, County Attorney, Michael J. Walton, Robert E. Weinberg and **Realff Ottesen**, Assistant County Attorneys, for appellee.

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

MAHAN, P.J.

Steven Johnson appeals from his convictions, following guilty pleas, for terrorism without intent in violation of Iowa Code section 708.6 (1997). Johnson contends his trial counsel was ineffective for not filing a motion in arrest of judgment when the district court (1) accepted his pleas of guilty without sufficient factual basis, and (2) accepted his pleas of guilty when they were not voluntarily made. We affirm.

Johnson was charged with two counts of terrorism without intent stemming from an incident in which he walked out of a friend's home and discharged a nine-millimeter handgun. Johnson entered guilty pleas on both counts in exchange for the State recommending against incarceration. The district court accepted the guilty pleas and sentenced Johnson to two indeterminate five-year terms to be served concurrently. The sentences were suspended, and Johnson was placed on probation.

Johnson appeals.

I. **Standard of Review.** We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *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). 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).

II. Factual Basis. Direct review of Johnson's claim there is no factual basis for his guilty plea to the charges of terrorism without intent is barred by his failure to timely move in arrest of judgment. Iowa R. Crim. P. 23(3)(a). However, this failure will not bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from the ineffective assistance of counsel. *See State v. Carter*, 582 N.W.2d 164, 165 (Iowa 1998); *Brooks*, 555 N.W.2d at 448.

> 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. 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.

Brooks, 555 N.W.2d at 448 (citations omitted).

In determining whether a factual basis for a guilty plea exists, we consider the entire record before the district court including the minutes of testimony and the plea colloquy. *Brooks*, 555 N.W.2d at 448-49 (citing *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996), and *State v. Millsap*, 403 N.W.2d 56, 58 (Iowa App.1987)).

In order to obtain convictions on both counts of terrorism without intent, the State needed to prove beyond a reasonable doubt that Johnson discharged his gun at or into two occupied buildings and thereby placed the occupants in reasonable apprehension of serious injury. *See* Iowa Code 708.6. The minutes of testimony and Johnson's statements during the plea colloquy show Johnson discharged his nine-millimeter handgun and the bullets struck at least two occupied buildings; at

the time of the shootings the Howerton residence was occupied by Mark Howerton and the Preacher residence was occupied by day care provider Margaret Eilers.

Johnson claims the record is silent concerning the key element about firing his weapon at an occupied residence. He argues that we are left to presume he simply shot the gun into the air. We disagree.

The minutes of testimony list several witnesses that make it clear Johnson fired his weapon into at least two residences. In addition, the district court painstakingly and thoroughly discussed the definition and elements of the two counts with Johnson. The district court read the provisions of Iowa Code section 708.6 to Johnson and asked him if he understood the definition of the charge. Johnson responded that he did. The district court then went through the actual elements as to each charge and asked Johnson if he understood the elements. Johnson responded that he did. Johnson gave details concerning the elements. The district court then asked separately for his plea to each count, and he responded "guilty." The State and defense counsel both indicated on the record their satisfaction with the factual basis. Finally, the district court then asked Johnson a second time for his plea to each separate count, and he once again responded "guilty."

We have carefully reviewed the entire record before the district court and conclude that a factual basis was established for the pleas.

III. Voluntariness. "Fundamental due process requires a guilty plea be voluntary and intelligent." *State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997). To "ensure that a plea is knowingly and voluntarily made," trial courts must follow the colloquy set forth in Iowa Rule of Criminal Procedure 8(2)(b). *Id.*

During the plea colloquy, Johnson stated he was satisfied with his attorney's representation and, other than the written plea agreement, there were no threats or promises made to obtain guilty pleas from him. Johnson now claims his attorney's statements on the record regarding their "up-and-down relationship" show he was coerced into pleading guilty. However, following these statements the district court asked him, "[Y]ou're satisfied then that you and your lawyer have been able to discuss this matter and resolve your differences so that you can come in here today and feel okay about pleading guilty?" Johnson answered, "Yes." The fact Johnson would have preferred to be charged with reckless use of a firearm resulting in damage to property instead of terrorism without intent or he reluctantly accepted his attorney's advice does not render his pleas involuntary. *See State v. Speed*, 573 N.W.2d 594, 597 (Iowa 1998).

IV. Summary. We have concluded that the district court did not err in accepting Johnson's pleas to the two counts. Therefore, Johnson's claim of ineffective assistance of counsel has not been established.

AFFIRMED.