

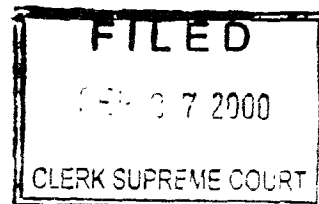
IN THE COURT OF APPEALS OF IOWA

No. 0-406 / 99-1287
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NANNETTE HORTON,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart and James D. Coil, District Associate Judges.

Defendant appeals from the judgment and sentence entered following her guilty plea to possession of a controlled substance (cocaine). See Iowa Code § 124.401(5) (1997). Defendant contends the district court erred by failing to establish a factual basis for her guilty plea, and by failing to include in its sentencing order an accounting of her credit for time served. She also contends her trial counsel was ineffective in allowing her to plead guilty to an offense which had no factual basis and not filing a motion in arrest of judgment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Defendant appeals from the judgment and sentence entered following her guilty plea to possession of a controlled substance (cocaine). See Iowa Code § 124.401(5) (1997). Defendant contends the district court erred by failing to establish a factual basis for her guilty plea, and by failing to include in its sentencing order an accounting of her credit for time served. She also contends her trial counsel was ineffective in allowing her to plead guilty to an offense which had no factual basis and not filing a motion in arrest of judgment. We affirm.

On December 4, 1998, Horton was charged with possession of cocaine as a result of a law enforcement officer observing a crack cocaine pipe in plain view within her vehicle on a routine traffic stop. On February 25, 1999, Horton entered a written plea of guilty, where she states she is "pleading guilty to the charge of Possession of Cocaine," and admitted that "on October 25, 1998, I knowingly possessed a crack pot pipe." There was no plea colloquy. On July 20, Horton was sentenced to one year in county jail and a \$250 fine. Horton appeals.

Horton challenges her conviction, contending the record does not disclose the trial court relied on an adequate factual basis. However, because Horton did not file a motion in arrest of judgment, she may not directly challenge her guilty plea. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). She may, and does on this appeal, challenge the guilty plea through an ineffective-assistance-of-counsel claim. *Id.*

To establish an ineffective assistance of counsel claim, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). T

test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 688, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The defendant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience does not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

While we often preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). The record is sufficient in this case. Our review is de novo. *Id.*

When reviewing ineffective-assistance-of-counsel claims resulting from counsel allowing a defendant to plead guilty to a charge for which a factual basis

does not exist and then failing to file a motion in arrest of judgment, 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. *Miller*, 590 N.W.2d at 725.

The trial court may ascertain a factual basis for a guilty plea exists by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony. *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975); *State v. Hightower*, 587 N.W.2d 611, 614 (Iowa App. 1998). Whatever the source, the record must disclose the factual basis relied on. *Johnson*, 234 N.W.2d at 879; *Hightower*, 587 N.W.2d at 614. When, as in this case, the defendant has entered a written plea of guilty, the court does not need to address the defendant in open court to determine the voluntariness of the plea. *Patten v. State*, 553 N.W.2d 336, 337 (Iowa App. 1996).

In this case, there was no plea colloquy. At sentencing, the trial court stated on the record "based upon . . . your written plea of guilty [in this case], I will be entering orders and adjudging you guilty" The written guilty plea also stated the "Court may rely on the Minutes of Testimony attached to the Trial Information for a factual basis for this plea of guilty." The minutes of testimony in turn incorporated an attached arresting officer's report. Therefore, we may refer to the written guilty plea, the minutes of testimony, and the police report to

determine whether there was a factual basis for Horton's plea of possession of cocaine.

Iowa R. Crim. P. 8(2)(b) imposes upon trial judges the duty to determine that all pleas of guilty have a factual basis. Our supreme court has stated

[w]e see no logic in a rule which would compel a court to reject a guilty plea intelligently and voluntarily offered by a defendant when the latter's statements, coupled with the balance of the record before the court, persuasively point to the commission of a crime and the guilt of the accused. Under such circumstances, neither the United States nor Iowa Constitutions, in our view, require that defendant be subjected to the trauma of trial or the State subjected to the expense of litigating a dead issue.

State v. Marsan, 221 N.W.2d 278, 280 (Iowa 1974). Five years later, our supreme court stated the "factual basis must be 'precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal.'" *Farley v. Glanton*, 280 N.W.2d 411, 416 (Iowa 1979) (quoting *United States v. Johnson*, 546 F.2d 1225, 1226 (5th Cir. 1977)).

To be found guilty of Possession of Cocaine, the State must prove beyond a reasonable doubt 1) Horton knowingly or intentionally possessed cocaine; and 2) Horton knew the substance she possessed was cocaine. See II Iowa Criminal Jury Instructions 2300.3 (1994); Iowa Code § 124.401(5) (1997); see also *State v. Reeves*, 209 N.W.2d 18, 21-22 (Iowa 1973).

In her written plea of guilty Horton stated she "knowingly possessed a crack pot pipe." This alone is insufficient to show she possessed cocaine, as there is no indication in the written guilty plea there was any cocaine in the crack pipe. However, the minutes of testimony state, "These witnesses will testify in accordance with the police report which is attached . . . ," the police report states

one of the officers "saw a glass tube, with black burn marks on the inside of it, which is suspected to be a crack pipe," and the minutes of testimony further indicate the arresting officers would testify they "found the Defendant in the possession of cocaine."

Horton does not contend she did not understand the nature of the charge, and in fact stated in her written guilty plea she did understand the nature of the charge. On the day she was sentenced for this crime, she was also sentenced on two other separate possession of a controlled substance charges, both of which had gone to jury trial, one just two weeks before her plea of guilty in this case. Horton undoubtedly understood the charge, its elements, and what she was pleading guilty to. Horton's written plea of guilty, the minutes of testimony, and the police report that was made a part of the minutes of testimony together provide a factual basis for her plea of guilty. Counsel was therefore not ineffective for allowing her to plead guilty and not filing a motion in arrest of judgment.

Horton's final contention is the district court erred by failing to include "an accounting of defendant's credit for time served in the sentencing order." Our review is for correction of errors at law. Iowa R. App. 4. The State contends in this appeal Iowa Code sections 901.6 and 903A.5 do not require a trial court to include a statement of the days credited for time served in the judgment entry. In *State v. Bean*, 474 N.W.2d 116 (Iowa App. 1991), the State agreed Iowa Code sections 901.6 and 903A.5 did require such a statement. *Bean*, 474 N.W.2d at 122. We adopted the State's concession and remanded the case to the district court to modify its judgment entry by including therein a statement of days

credited to the defendant. *Id.* The State has now changed its position, and in a very recent case our supreme court has rejected the contention that the trial court must, at sentencing or as part of a written judgment entry, announce the credit to which the defendant is entitled for time served. See *State v. Hawk*, ____ N.W.2d ____, ____ (Iowa 2000). Our decision on this issue is controlled by the decision in *Hawk*, and we therefore reject the defendant's contention in this case.

AFFIRMED.