FILED
JUN 24 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 24, 1987
vs.	)	208
GARY CLASEN GILMOUR,	)	7-160
Defendant-Appellant.	)	86-996

Appeal from the Iowa District Court for Scott County (123844-01), Edward B. DeSilva, Judge.

Defendant appeals the judgment and sentence entered upon his plea of guilty to theft in the second degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Pamela Greenman Dahl, Assistant Attorney General; and James Hoffman, Assistant Scott County Attorney; for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

PER CURIAM

The defendant appeals the judgment and sentence entered upon his plea of guilty to theft in the second degree. We affirm.

On March 24, 1986, defendant was charged by trial information with theft in the second degree, in violation of Iowa Code sections 714.1(3) and 714.2(2) (1985). On April 23, 1986, defendant entered a plea of guilty to the charge of theft in the second degree. The only concession made by the state for this plea was an agreement by the prosecutor not to make a recommendation as to sentencing. On May 21, 1986, defendant moved in arrest of judgment, asserting that his plea of guilty lacked a factual basis. On June 13, 1986, a hearing was held on this motion. The motion was overruled. On July 3, 1986, the defendant was sentenced to a term of imprisonment not to exceed five years.

On appeal, the sole issue argued by defendant is that the record fails to show a factual basis for his guilty plea. Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

Iowa Rule of Criminal Procedure 8(2)(b) provides in relevant part that a court shall not accept a guilty plea without first determining that the plea is made voluntarily and intelligently and has a factual basis. In State v. Sisco, 169 N.W.2d 542, 549 (Iowa), the supreme court said that notwithstanding a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as may satisfy it that there is a factual basis for the plea. Our courts have held that the establishment of a factual basis may effectively be accomplished by asking the defendant to expressly state what was done. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 618 (Iowa 1974). The trial court may also ascertain that a factual basis for a guilty plea exists by inquiry of the prosecutor, examination of the presentence report, or reference to

the minutes of testimony. State v. Johnson, 234 N.W.2d 878, 879 (Iowa 1975). Minutes of testimony can be sufficient to establish a factual basis. State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). Whatever the source, the record must reveal the factual basis relied on. Johnson, 234 N.W.2d at 879.

In this case, defendant was asked to explain what happened in his own words and Gilmour said he was in the photography business, he invited women to model, he indicated to the women they would be paid, and, in fact, they were not paid.

The minutes of testimony further substantiate that the guilty plea had a factual basis. The minutes showed that several women were prepared to testify that the defendant had promised to pay them and, in fact, did not pay them. For example, one witness was prepared to testify as follows:

> I answered the ad in the Quad City Times and met Gary Gilmour at the Chef's Hat, where he advised me that he was looking for models to shoot shots for a magazine that he showed to me with no cover, and he furthermore stated he was working for the Brown & Williamson Agency out of Florida. He promised me $50.00 to $60.00 an hour and that I could make up to $3,000.00 to $5,000.00 per week when I got into the program a little further. When I went to his apartment to pose he asked me to do nude modeling because the agency needed nude photos to see the size of my figure and wanted the size for clothes and also to be able to identify what clothing would look the best on my nude figure. He also said I would have a better chance of getting into the magazine by posing nude and would have a better chance of making the big time. On my third modeling session with Gilmour he handed to me a dildo and told me to use it because the company would know what size I was and that it created a "puffyness" [sic] for the swim suit shots. I refused to do this. The second time I met with him I asked him about the promised money and he told that I would be getting $50.00 an hour. Again at the third session I inquired as to where my money was from the two previous sessions and he indicated that I was to be paid but that he had not received the money yet.

Defendant argues that even if he promised to pay the women and did not pay them, the record does not show deception. Iowa Code section 714.1(3) (1985) requires that the defendant be shown to have obtained by deception,

labor or services from another. Iowa Code section 702.9 (1985) sets out definitions of deception, including the following:

> 1. Creating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true.
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> 2. Failing to correct a false belief or impression as to the existence or nonexistence of a fact or condition which the actor previously has created or confirmed.
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> * * *
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> 5. Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to perform.

The record shows an adequate factual basis for the existence of the element of deception. Again, the minutes of testimony provide an indication of the nature of this deception.

> I answered the Gilmour ad in the Quad City Times. He told me that he had contacts with Playboy, Penthouse, Farm & Fleet and so on, he told me of the big money that I would make. He promised that he would pay me money for photos he took, but I never received any money. The first time I posed for him was at West Lake Park in undergarments along with three other girls and in the presence of my mother.
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> I stopped posing for him for quite awhile, but he kept calling me all the time bothering me and attempting to have me come back to pose, he promised me some real big money if I would just pose in the nude. He told me again about all the contracts he had with different magazines. In the later part of January, I was posing for him in the nude and he began taking off his clothes telling me that it would make me feel more comfortable. He also gave me a dildo that was vibrating and asked me to put it in my mouth which I refused, but then he told me to put it in my vagina and I did, telling me that if I did just what he told me I would really get some place in the modeling field. I had heard that most modeling agencies and the people who run them are somewhat strange and felt that perhaps I should go along with this for my career. He told me he was going to send the photos to Playboy to see what they thought and that I would probably be receiving a contract. There were numerous nude photo sessions wherein he took many photos of me and I never received any money for any of them.
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> * * *

> I also answered the ad in the newspaper and went to Gilmour's apartment and he wanted me to do nude sessions. He also told me he was working with a Brown & Williamson Agency out of Florida and recently gotten the Farm & Fleet account out of Wisconsin and he needed quite a few models to do the work. Once we went to a local bar and wherein he came on to me very strong, trying to take my shirt off and fondle me sexually, trying to convince me to have sex with him. He would call me and make very sexual suggestions to me on the phone, telling me that he had a contract for me. I kept on asking where the money was, since he had promised that I would be making a $150.00 to $300.00 a fitting and that the money was being sent to me. I modeled for him about four times. At one point he stated that I might have to start providing some funds to him until he got another expense check. He also told me that I would get more money for posing nude.

This proposed testimony does not reveal a mere breach of contract, a failure to pay, as defendant asserts. Rather, it provides a factual basis for finding that Gilmour was guilty of knowing deception of the women involved; that he did not intend nor was he able to pay them for their modeling; and, that he created a belief as to the existence of facts which were false and that he knew to be false.

We find there was a factual basis in the record for the defendant's plea of guilty to theft in the second degree.

AFFIRMED.