

IN THE COURT OF APPEALS OF IOWA

No. 9-245 / 98-0433

Filed May 26, 1999

STATE OF IOWA,
Appellee,

vs.

MARK LAWRENCE FRENCH,
Appellant.



Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge.

On appeal from his conviction for absence from custody, Mark French argues his trial counsel was ineffective for failing to challenge the factual basis for his guilty plea or file a motion in arrest of judgment. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Victoria Siegel, County Attorney, and Rose Anne Mefford, Assistant County Attorney, for appellee.

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

STREIT, J.

Mark French was charged with absence from custody, in violation of Iowa Code section 719.4(3). Pursuant to a plea agreement, French pled guilty to the charge. He contends his trial counsel was ineffective for failing to file a motion in arrest of judgment to challenge the factual basis for his plea. We affirm.

In November 1993, French was placed at the Ottumwa Residential Corrections Facility by the Iowa Department of Corrections to participate in the work-release program. French signed out of the facility to work on December 21, 1997, and did not return when he was required. The court accepted French's guilty plea to absence from custody and sentenced him to a one-year prison term to run concurrently with the sentence he was currently serving for third-degree burglary.

We review allegations of ineffective assistance of counsel *de novo*. *State v. Gregg*, 464 N.W.2d 431, 432 (Iowa 1990). To prevail in such a claim, defendant must prove counsel failed to perform an essential duty and prejudice resulted. *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). The test for the first element is whether the lawyer's performance was outside the range of normal competency. *Pettes v. State*, 418 N.W.2d 53, 56 (1988). The test for the second element is whether counsel's error affected the outcome of the case. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

French contends a factual basis did not exist to establish the charge of absence from custody because neither the minutes of testimony nor his colloquy establish the

institution was under the control of the Department of Corrections. French argues even if the minutes of testimony establish this fact, the minutes cannot be relied upon because the court did not indicate it was relying on the minutes of testimony to establish the factual basis.

The trial court may ascertain that 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); *Brainard v. State*, 333 N.W.2d 711, 722 (Iowa 1974); The trial court may rely upon a trial information's recitation of facts to form a factual basis. Whatever the source, the record must disclose the factual basis relied on. *State v. Hightower*, 587 N.W.2d 611 (Iowa App. 1998).

To prove French was guilty of voluntary absence from custody, the State had the burden to establish the following: (1) French had been committed to an institution under the control of the Iowa Department of Corrections, a community-based correctional facility, jail, or correctional institution; and (2) French was knowingly and voluntarily absent from a place he was required to be. Iowa Code § 719.4(3) (1997).

In conducting a plea proceeding, a trial court must substantially comply with Rule 8; strict compliance is not required. *State v. Ludemann*, 484 N.W.2d 611, 613 (Iowa App. 1992). Substantial compliance is met unless the court's disregard for the requirements of rule 8(2)(b) raises doubt as to the voluntariness of the plea. *State v.*

Fluhr, 287 N.W.2d 857, 864 (Iowa 1980). Ordinarily, and preferably, the factual basis should be developed through defendant's interrogation by the court. This jurisdiction has no requirement that trial court must in all cases wring from defendant a detailed confession satisfying each element of the offense charged. *State v. Watson*, 284 N.W.2d 204, 206 (Iowa 1979). This does not negate the requirement that a factual basis for the guilty plea must have been shown.

The court did not make specific reference to the minutes of testimony to establish the factual basis in this case. We find a factual basis established by other sources disclosed on the record. The trial court substantially complied with rule 8 by referring to French's written plea petition in which French pled guilty to the charge and by conducting an in-court colloquy with French to satisfy itself of the voluntariness of French's plea. The charge in the trial information described the events to include the fact defendant was "committed to an institution under the control of the Iowa Department of Corrections. . . ." French admitted this was true when he said he understood the charge and was guilty of it. It is clear the trial judge was relying on these facts contained in the trial information to find a factual basis for defendant's guilty plea.

Even if the record does not reveal the defendant was in an institution under the control of the Iowa Department of Corrections, defendant's contentions fail. In this case the trial court did not ask French if the "residential facility" he failed to report to was under the control of the Iowa Department of Corrections. If we determine this

requires remand for the court's determination of the factual basis for the guilty plea, the minutes of testimony would provide this necessary fact. *Id.* This court need not engage in such senseless gestures of form over substance. French requests only a remand for a factual basis inquiry. Let us save the litigants the trip. The minutes of testimony state French was placed in the "Ottumwa Residential Corrections Facility by the Iowa Department of Corrections." This is sufficient to establish the factual basis that the facility was under the control of the Department of Corrections. There is not a question as to the voluntariness of French's plea.

Consequently, French has not demonstrated prejudice under these circumstances. We affirm the judgment and sentence of the district court.

AFFIRMED.

No. 98-0433. [9-245] STATE v. FRENCH

Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. (5 pages \$2.00)

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