

IN THE COURT OF APPEALS OF IOWA

No. 5-407 / 94-2077

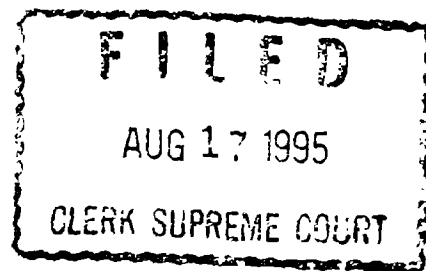
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MARY KATHLYN BURGESS,

Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Thomas M. Horan,
Judge.

Mary Burgess appeals from her conviction, following a guilty plea, for second-degree theft in violation of Iowa Code sections 714.1(2) and 714.2(2) (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, 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 Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Mary Kathlyn Burgess appeals from a judgment and sentence entered following her plea of guilty to theft in the second degree in violation of Iowa Code sections 714.1(2) and 714.2(2) (1993). She contends her attorney was ineffective in failing to challenge the trial court's finding of a factual basis to support her plea of guilty under an Alford plea. We affirm.

At the time the plea was offered, defendant acknowledged the persons named in the trial information would testify as outlined in their minutes of testimony. The trial court, based on those minutes, found defendant guilty and advised her of her right to file a motion in arrest of judgment. No motion was filed.

Defendant contends there was no factual basis for her plea. She cites *State v. Galbreath*, 525 N.W.2d 424 (Iowa 1994), in support of her position. She contends in *Galbreath*, 525 N.W.2d at 427, the court found similar circumstances did not support the same charge.

The State advances *Galbreath*, decided on December 21, 1994, was not the law when defendant entered her plea on August 3, 1994, and cannot be relied on. The State further contends defendant's reliance on *Galbreath* is misplaced and defendant has failed to show the required prejudice.

Defendant worked as an interior designer. The minutes of testimony recited four people would testify defendant had taken deposits from them on furniture or draperies and defendant had not delivered the merchandise. A fifth person would

testify she had given defendant money to pay a third party to refinish furniture and the refinisher was not paid and the money was not refunded. The sixth person, a police officer, testified he had been assigned to investigate complaints against defendant and interviewed her and she had taken the money but had excuses for not delivering the merchandise. We agree with defendant that, as in *Galbreath*, 525 N.W.2d at 426, the alleged victims made a down payment on a contract. There is, as was the case in *Galbreath*, no showing the down payment was to be held in trust. *Id.*

While addressing the issue as one of first impression in Iowa, the court said:

Most courts that have confronted the issue have held that a down payment made pursuant to the terms of a construction contract is not held by the contractor as "property of another". . . . and we hold that the term "property of another" as it is used in Iowa Code section 714.1(2) means property in which the owner retains an interest, whether by trust or some other legal relationship. Thus, in the context of an ordinary construction contract, cash advanced as a down payment will not qualify as "property of another" because title and possession are transferred from the owner to the contractor -- not in trust -- but outright.

Id. at 426-27.

Defendant pled guilty to a charge for which no factual basis existed.

The State urges defendant's attorney could not be charged with the holding in *Galbreath* as it had not yet been decided and this was a plea bargain and there may be other facts supporting the charge that may present a valid reason for the plea.

We recognize *Galbreath* had not yet been decided by the Iowa court when defendant's plea was entered. The Iowa court in *Galbreath* followed the majority of

courts on the issue. *Id.* There was a basis for making the motion in arrest of judgment.

The record is insufficient for us to address the State's claim this was a plea bargain and there may have been other reasons the motion in arrest of judgment was not filed.

We believe defendant's attorney should have the opportunity to explain the reasons why the motion in arrest of judgment was not made. We affirm the conviction reserving defendant's claim for postconviction proceedings.

AFFIRMED.