IN THE COURT OF APPEALS OF IOWA

No. 0-475 / 99-1300
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOLLIE LEE CALHOUN,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Tollie Calhoun appeals his conviction and sentence following a guilty plea to domestic abuse assault. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Myers, Assistant County Attorney, for appellee.

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

ZIMMER, J.

Tollie Lee Calhoun appeals from his conviction following a written guilty plea to domestic abuse assault, an aggravated misdemeanor, in violation of Iowa Code sections 708.2A and 708.2(2) (1997). Calhoun contends the trial court erred in failing to establish a factual basis for his plea, trial counsel was ineffective for allowing him to plead guilty when no factual basis existed for his plea, and the trial court erred in failing to include an accounting of credit for time served in its sentencing order.

I. Background Facts and Proceedings. Calhoun assaulted his live-in girlfriend on March 28, 1999. On June 1, 1999, the State filed a trial information charging Calhoun with enhanced domestic abuse assault, a class D felony, in violation of Iowa Code section 708.2A(4) (count 1); and criminal mischief in the fourth degree, a serious misdemeanor, in violation of Iowa Code sections 716.1 and 716.6 (count 2).

Pursuant to a plea agreement, Calhoun entered a written plea of guilty to domestic abuse assault, an aggravated misdemeanor, on July 30, 1999. The district court followed the negotiated plea agreement and sentenced Calhoun to an indeterminate two-year sentence which was suspended. The court also ordered two years of probation and required the defendant to reside in a residential facility as the condition of probation. In his written guilty plea, Calhoun waived his right to personally appear for sentencing and requested that judgment and sentence be pronounced upon receipt of the plea. He also waived his right to file a motion in arrest of judgment before being sentenced.

Calhoun filed his notice of appeal on August 22, 1999. He cont

trial court erred by failing to establish a factual basis for his plea and his trial counsel provided ineffective assistance by allowing him to plead guilty to an offense for which no factual basis existed. Calhoun also contends the court erred in failing to include an accounting of his credit for time served in its sentencing order.

II. Error Preservation. Iowa Rule of Criminal Procedure 8(2)(d) requires the district court to:

> . . . inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

Iowa Rule of Criminal Procedure 23(3)(a) provides that a defendant's failure to file a motion in arrest of judgment bars the defendant from challenging the inadequacy of guilty plea proceedings on appeal. The purpose of these two rules is to allow the district court to correct defects in guilty plea proceedings before an appeal and, therefore, eliminate the necessity for the appeal. *State v. Gant,* 597 N.W.2d 501, 503, (Iowa 1999). Calhoun did not file a motion in arrest of judgment before being sentenced and affirmatively waived his right to do so in his written guilty plea. Calhoun's failure to file a motion in arrest of judgment precludes him from attacking his guilty plea directly. *State v. Miller,* 590 N.W.2d 724, 725 (Iowa 1999). However, Calhoun may still challenge the guilty plea through an ineffective assistance of counsel claim. *See id.*

III. Ineffective Assistance of Counsel. Calhoun claims he received ineffective assistance because counsel permitted him to plead guilty to domestic abuse assault when no factual basis for the plea existed. Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for

postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Query*, 594 N.W.2d 438, 444 (Iowa App.1999). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). Here, we conclude the record is sufficient for us to consider Calhoun's ineffective assistance of counsel claim.

To succeed with this claim of ineffective assistance of counsel, Calhoun must prove: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 667, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Counsel fails to perform an essential duty if he or she 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. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). When a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty. *Id.*

Calhoun contends there was no factual basis for his plea of guilty to the crime of domestic abuse assault. We disagree. His written guilty plea expressly states that "the court may rely on the minutes of testimony attached to the trial information for a factual basis." The minutes of testimony in this case clearly form such a basis. The minutes reveal that on March 28, 1999, Calhoun became upset with his girlfriend, Kristin K. Smith, after she left their home to go to the grocery store. When she returned from the store, she discovered Calhoun had left. Smith then went to look for him. After she found Calhoun, he threw her to the ground and struck her several times. He also broke the driver's side of the

windshield of Smith's car. The minutes confirm Calhoun and his girlfriend were living together at the time of the assault. The minutes also confirm Calhoun has at least three prior convictions of domestic abuse assault. Because a factual basis exists for Calhoun's plea of guilty to domestic abuse assault, he is unable to establish counsel breached a duty in allowing him to plead guilty to that offense. *See Brooks*, 555 N.W.2d at 448.

IV. Credit for Time Served. Calhoun cites Iowa Code sections 901.6 and 903A.5 and Iowa Rule of Criminal Procedure 23(5)(b) for the proposition that the district court is required to include an accounting of a defendant's credit for time served in the sentencing order. The Iowa Supreme Court recently rejected the same argument in *State v. Hawk*, ___ N.W.2d ___, ___ (Iowa 2000) (holding Iowa Code sections 901.6 and 903A.5 do not require a judicial accounting of credit for time served). We affirm the district court.

AFFIRMED.