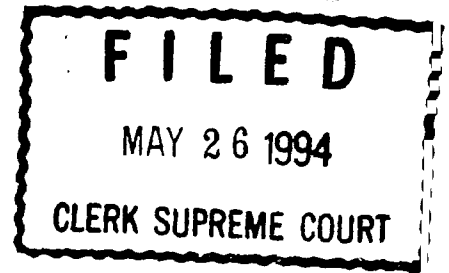


IN THE COURT OF APPEALS OF IOWA

No. 3-569 / 92-1881



STATE OF IOWA,

Appellee,

vs.

WALLACE GALBREATH,

Appellant.

Appeal from the Iowa District Court for Linn County,
Lynne E. Brady, Judge.

Defendant appeals an order denying his motion in arrest
of judgment on his plea of guilty to the crime of theft in
the second degree. **REVERSED, JUDGMENT VACATED, AND CHARGE
DISMISSED.**

Linda Hansen Robbins of Irvine & Robbins, Cedar Rapids,
for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Assistant Attorney General, Denver D. Dillard, County
Attorney, and Harold Denton, Assistant County Attorney, for
appellee.

Heard by Hayden, P.J., and Sackett, J., and Peterson, S.J.*, but decided by Donielson, C.J., and Hayden, Sackett, Habhab, Cady, and Huitink.

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Defendant Wallace Galbreath was charged with the crime of second-degree theft by misappropriation, as an habitual offender, in violation of Iowa Code sections 714.1(2) and 902.8 (1991). In exchange for the dismissal of the habitual offender charge, Galbreath entered a plea of guilty to second-degree theft by misappropriation. Prior to sentencing, the trial court denied Galbreath's motion in arrest of judgment and request to withdraw the guilty plea. Sentence was subsequently imposed, and Galbreath appealed. He claims the trial court failed to fully inform him of the nature of the charge. He also argues the facts presented did not support a guilty plea to theft by misappropriation.

The trial court personally addressed Galbreath prior to accepting his plea of guilty. After questioning Galbreath's understanding of his rights and the consequences of his decision to plead guilty, the trial court explained the nature of the charge and gathered the supporting facts through the following exchange:

Q. In order to prove you guilty, the State would have to prove on July 26, 1991, you misappropriated money entrusted to you by the Xayasouks. In July of 1991, on or around the 26th, were you in Linn County? A. Yes.

Q. Did you contact the Xayasouks or be in touch with them and give them a bid to repair their roof? A. Yes, I did.

Q. Did they make a down payment to you for materials? A. Yes.

Q. Was that by way of a check for \$1435? A. Yes, it was.

Q. Did you ever buy the materials or repair their roof? A. Yes, I did buy the materials but I did not repair the roof.

Q. Do you think you're guilty of this charge? A. Yes, I am.

Q. Any question about that? A. No.

The trial court gathered no additional facts and accepted the guilty plea after asking defense counsel if he knew of any reason why the plea should not be accepted. Defense counsel responded that he did not know any such reason. The trial court made no specific findings in accepting the plea.

At the hearing on the motion in arrest of judgment, it was developed that the charge originated from a written contract entered into between Galbreath and Deng Xayasouk on July 26, 1991. Galbreath was in the roofing business, and Xayasouk contacted him to request a bid for a new roof on his house. Galbreath inspected the house and submitted a written proposal. Under the proposal, Galbreath promised to install a new roof and perform other related work pursuant to certain specifications. In return, Xayasouk was required to pay Galbreath for the material and labor, including a down payment representing one-half of the full amount promised under the contract. The down payment was required to be made by Xayasouk at the time the proposal was accepted.

Xayasouk accepted the offer by signing the written acceptance form. He also gave Galbreath a check for \$1,435, representing the down payment. A few days later, however, Xayasouk developed second thoughts about the

contract. He demanded that Galbreath return the down payment. Xayasouk believed he had been the victim of a scam.

The minutes of testimony, as well as the State's evidence at the motion in arrest of judgment hearing, suggest Galbreath went out of business prior to entering into the contract with Xayasouk.¹ Galbreath was experiencing financial problems. He had terminated some employees and issued a check to one employee with insufficient funds in his bank account.

Galbreath claims judgment should have been arrested because the trial court failed to adequately inform him of the nature of the charge and failed to determine the existence of an adequate factual basis for the plea. He also asserts the charge does not apply to the facts of the case.

I.

A defendant has no right to withdraw a plea of guilty. State v. Tillman, 228 N.W.2d 38, 39 (Iowa 1975). It is within the discretion of the trial court. Id. Our standard of review is an abuse of discretion. Id. An abuse of discretion is found only when the defendant shows the trial court exercised its authority "on grounds or for

1. Xayasouk acknowledged in his testimony, however, that a dump truck containing tools and roofing materials was parked in front of his house on July 29, 1991. He had talked to Galbreath and was told the work would be done. Galbreath claims he did not begin the roofing project on July 29 because of foreboding weather conditions.

reasons clearly untenable or to an extent clearly unreasonable". State v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987) (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)).

Before accepting a plea of guilty, the trial court must make a determination that the defendant understands the nature of charge and the consequences of the plea, the plea is voluntary, and a factual basis exists for the plea. State v. Findley, 239 N.W.2d 852, 853 (1976). These four protections are required because a plea of guilty is not only a confession, it is itself a conviction. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711-12, 23 L. Ed. 2d 274, 279 (1969). It is a "grave and solemn act to be accepted only with care and discernment." Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747, 756 (1970). The trial court's refusal to permit the withdrawal of a plea will be upheld where the record supports that the four essential protections have been satisfied. See Ramirez, 400 N.W.2d at 588.

A guilty plea cannot be considered voluntary "unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418, 425 (1969). The defendant must not only understand the nature of the charge, but must further discern that his or her conduct actually falls within the charges. Id. at 467, 89 S. Ct. at 1171, 22 L. Ed. 2d at 426; see State v. Thornton,

533 A.2d 951, 954-55 (Md. App. 1987). The record must affirmatively show that the conduct which is admitted by the defendant constitutes the offense to which he or she has pleaded guilty. Id.; see Farley v. Glanton, 280 N.W.2d 411, 416 (Iowa 1979) (factual basis must be specific enough to show accused conduct was within ambit of that defined under statute).

In addressing the challenges to the plea proceeding in this case it is unnecessary for us to consider each claim raised by Galbreath. We find the evidence cannot support a conviction for the charge brought against Galbreath.

Theft by misappropriation under our Iowa statute has two elements. It is committed when a person holds property "in trust", or otherwise has "possession or control" of "property of another," and intentionally misappropriates the property by using it or disposing of it in a manner inconsistent with the trust or the owners rights. Iowa Code § 714.1(2) (1991); Eggman v. Scurr, 311 N.W.2d 77, 78 (Iowa 1981); Uniform Jury Instruction 1400.4. It is the statutory companion to the venerable concept of larceny by embezzlement. See United States v. Bailey, 734 F.2d 296, 303 (7th Cir. 1984); United States v. Frederick, 551 F. Supp. 1035, 1043 (D. Kan. 1982); see also Moore v. United States, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L. Ed. 422, 423 (1895) ("[e]mbezzlement is the fraudulent appropriation of property by a person to whom such property

has been entrusted, or into whose hands it has lawfully come.")

As with common-law larceny, theft by misappropriation is a crime against possession and not against title. See People v. Christenson, 312 N.W.2d 618, 620 (Mich. 1981). If the property owner intends to pass title as well as possession, there can be no crime of larceny. Id.

In this case, the facts presented during the plea colloquy and the hearing on the motion in arrest of judgment reveal Galbreath gained possession of Xayasouk's money pursuant to the terms of a contract. The contract required Galbreath to supply materials and labor and, in return, required Xayasouk to pay an agreed amount for the materials and labor. This requirement included the delivery of the down payment representing one-half of the full amount promised under the contract. The down payment was required to be made by Xayasouk before Galbreath was obligated to begin his promised performance under the contract. The rights of Galbreath and Xayasouk were defined by their contract.

After Xayasouk tendered the down payment, and before Galbreath began to perform his obligations under the contract, Xayasouk unilaterally repudiated the agreement. This repudiation, however, did not transform Galbreath's receipt of the down payment into a criminal act. See State v. Potter, 195 Iowa 163, 166, 191 N.W. 855, 858 (1923)

(there can be no larceny without a trespass upon the property rights of another).

Xayasouk had no contractual right to cancel the agreement, and the contract did not require Galbreath to return the down payment in the event Xayasouk decided to repudiate.² Moreover, the contract did not prohibit Galbreath from using the down payment for his own benefit prior to completion of his required performance.

When an advance payment is made under the terms of a construction contract, the payment becomes the property of the contractor and is not held by the contractor as "property of another" or property "in trust." The contract governs the rights and obligations of the parties, and the transaction cannot support a charge of embezzlement or misappropriation. Reed v. State, 523 So. 2d 62, 65 (Miss. 1988); Shelley v. State, 447 So. 2d 124, 126 (Miss. 1984); Crawford v. State, 453 So. 2d 1139, 1142 (Fla. Dist. App. 1984); People v. Christenson, 312 N.W.2d 618, 620-22 (Mich. 1981); Commonwealth v. Austin, 393 A.2d 36, 38-39 (Pa. 1978). Both title and possession passed to Galbreath in this case, and the first element of the crime of theft by misappropriation could not be met.

We recognize the evidence from the hearing on the motion in arrest of judgment, as well as the minutes of

2. There was no claim by the state that Xayasouk had a right of rescission. We find no evidence in the record to support any statutory right of cancellation. See e.g. Iowa Code § 82.3-82.4 (1991), now Iowa Code § 555A.2 (1993).

testimony, implies Galbreath never intended to perform his obligation under the contract. This suggestion may help support criminal liability. Yet, it is still insufficient to support a conviction for theft by misappropriation.

Under our theft by misappropriation statute, the nature or character of the delivery of the property, whether induced by legal or illegal means, is not an element. Iowa Code § 714.1(2) (1991) (crime is committed "whether such possession or control is lawful or unlawful"); Christenson, 312 N.W.2d at 620. Theft by misappropriation is confined to situations involving the possession of another's property. When both possession and title are received, there can be no misappropriation. Id. If fraudulent representations are used to induce the owner of property to pass both possession and ownership, the proper charge is theft by false pretenses or deception. Id. at 620; see Eggman, 311 N.W.2d at 81 (intent to defraud is not an element of theft by misappropriation); Iowa Code § 702.9(5) (1991); 50 Am. Jur. 2d Larceny § 7 (1970).

There was no evidence in this case that Xayasouk maintained any right to retain title to the down payment. Accordingly, there can be no misappropriation. It was an abuse of discretion to deny the motion in arrest of judgment.

We reverse the conviction and vacate the judgment. We would ordinarily remand for further proceedings to give the State an opportunity to establish an adequate factual basis. See Iowa R. Crim. P. 23(3)(d). In this case, however, remand would serve no useful purpose. It would also be fruitless to remand to allow the State to furnish another bill of particulars. See Iowa R. Crim. P. 10(6)(a). Galbreath raised the inapplicability of the statute in his motion in arrest of judgment, and the State was given a full opportunity to present supporting evidence. The alleged victim, his wife, and Galbreath testified at the hearing, and the roofing contract was introduced. See State v. Birch, 306 N.W.2d 781, 783 (Iowa 1981) (one purpose of motion in arrest of judgment is to allow record to be fully developed to determine whether plea is valid). The only real dispute involves Galbreath's motives. Accepting all the State's evidence as true, there is no support for the charge of theft by misappropriation. Therefore, we dismiss the charge. See State v. Schoelerman, 315 N.W.2d 67, 75 (Iowa 1982). The dismissal is without prejudice to another prosecution under a new indictment or information.

REVERSED, JUDGMENT VACATED, AND CHARGE DISMISSED.