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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed
vs.)
REECE HENDERSON JONES, JR.,) 98 / 59711
Appellant.)

Appeal from Scott District Court - Nathan Grant, Judge.

Appeal from court's acceptance of guilty plea to charge of conspiracy to obtain money by false pretenses. Reversed in part and remanded.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General and Thomas G. Schebler, Assistant Scott County Attorney for Appellee.

James D. Hoffman, of Davenport, for Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

The defendant, Reece Henderson Jones, Jr., entered a guilty plea to the crime of conspiracy to commit the crime of false pretenses, in violation of § 719.1, The Code. He appeals claiming the trial court failed to find a factual basis for the plea of guilty. We reverse.

The trial court, through his questioning, established that the defendant had committed an overt criminal act. Further, he established that another person assisted the defendant in committing this crime of false pretenses. The defendant said that he (the defendant) "had a phone call made." However, his questioning did not establish that the other party was aware the defendant's request was made in furtherance of a crime and that the other party acted with such knowledge.

A § 719.1, The Code, violation arises when two or more persons " . . . conspire or confederate together with the fraudulent or malicious intent wrongfully to . . . to commit any felony . . . " In State v. Paden, 199 Iowa 383, 385, 202 N.W. 105 (1925) the court said:

> "A conspiracy involves concert of action, and the gist of the crime is the unlawful agreement with intent to do the thing charged in the indictment. Proof of the overt act charged is not sufficient *per se* to warrant a conviction."

Paden citing *State v. Madden,* 170 Iowa 230, 148 N.W. 995 (1915), recognized that the doing of an overt criminal act could not constitute a conspiracy charge unless there was an agreement and confederation between the defendants "to do such an act prior to the time such an act was done, if it was done." *Paden,* 199 Iowa at 385.

> "This was the law of the case. It is the law of the state. A conspiracy necessarily involves two persons; and neither the nature

> nor the essence of the crime (conspiracy) can be established by the acts or declarations of one conspirator in the absence and without the knowledge and concurrence of the other." *Paden*, 199 Iowa at 386.

The trial court did not establish whether the other party knowingly agreed to aid in the furtherance of a crime. If he knowingly aided, it would be some evidence that there was an agreement to commit the crime. "The gist of the crime of conspiracy is the unlawful agreement or combination . . . " State v. Thompson, 241 Iowa 16, 39 N.W.2d 637 (1949). There are in reality two crimes in a conspiracy; (1) agreement to commit a crime and (2) overt acts pointing to the commission of a specific crime, here the crime of false pretenses. The trial court established the overt criminal act of number (2) but failed to establish an agreement between the defendant and the other party as required in number (1).

The remedy for an inadequacy in the factual basis of a guilty plea is a setting aside of the judgment pronouncing sentence and a remand for the establishment of the required factual basis. If such a showing is not satisfactorily made, the plea is set aside. If the required showing is made, the court proceeds in accordance with chapter 789, The Code. Ryan v. Iowa State Penitentiary, Fort Madison, 218 N.W.2d 616, 620 (Iowa 1974).

Reversed in part and remanded for further proceedings.