IN THE COURT OF APPEALS OF IOWA

No. 0-088 / 99-0260
Filed March 29, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE BORDELON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant-appellant Dale Bordelon was convicted following a guilty plea of burglary in the third degree in violation of Iowa Code section 713.6A (1997), and criminal mischief in the fourth degree in violation of Iowa Code section 716.6 (1997). He appeals contending his trial counsel was ineffective in (1) failing to move to dismiss the charge of burglary in the first degree on the grounds the State violated his speedy indictment rights; (2) failing to obtain a ruling on his claim of a speedy indictment violation; (3) failing to obtain a ruling on his claim of a due process violation; and (4) allowing him to plead guilty where there was no factual basis for the charge. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General; John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Defendant-appellant Dale Bordelon was convicted following a guilty plea of burglary in the third degree in violation of Iowa Code section 713.6A (1997), and criminal mischief in the fourth degree in violation of Iowa Code section 716.6 (1997). He appeals contending his trial counsel was ineffective in (1) failing to move to dismiss the charge of burglary in the first degree on the grounds the State violated his speedy indictment rights; (2) failing to obtain a ruling on his claim of a speedy indictment violation in his motion to dismiss; (3) failing to obtain a ruling on his claim of a due process violation; and (4) allowing him to plead guilty where there was no factual basis for the charge. We affirm.

Defendant was charged following a confrontation with Steve Yates on September 7, 1998, when he hit and shattered Yates's windshield leaving Yates covered with glass.

Defendant was charged on September 15, 1998, by trial information with assault with a weapon in violation of Iowa Code section 708.2(3), an aggravated misdemeanor; criminal mischief in the fourth degree in violation of Iowa Code sections 716.1 and 716.6, a serious misdemeanor; and assault without intent to inflict bodily injury but causing bodily injury in violation of Iowa Code sections 708.1(1) and 708.2(2), a serious misdemeanor.

Defendant was arraigned on September 17, 1998, and made a plea offer the same day. Trial was set for November 16, 1998. Plea negotiations followed. On October 23, 1998, defendant filed a motion to dismiss. A hearing on defendant's motion to dismiss was held on November 10, 1998. The motion was

denied on December 7, 1998. The parties agreed to continue the trial date and defendant waived in writing his right to speedy trial. On November 16, 1998, a single document containing defendant's waiver and the district court's order continuing the trial to January 13, 1999, was filed.

On December 10, 1998, the county attorney filed a preliminary complaint, charging defendant with burglary in the first degree, based on the September 7 incident. On December 11, 1998, defendant was arrested on the felony charge. On December 16, 1998, the assault with a weapon and criminal mischief charges were dismissed. On December 21, 1998, the county attorney filed a trial information, charging defendant with burglary in the first degree, a class B felony, in violation of Iowa Code sections 713.1 and 713.3. On January 13, 1999, the charge of assault causing injury was dismissed.

On February 5, 1999, defendant filed a motion to dismiss the trial information on the grounds (1) the State failed to file the charge of burglary in the first degree within forty-five days; (2) the charge of assault is a lesser-included offense of burglary in the first degree; (3) there was prosecutorial misconduct; and (4) defendant's Fourteenth Amendment rights to due process were violated when the State filed the burglary in the first degree charge because defendant was not told during plea negotiations if he did not accept the State's plea offer on the misdemeanors, a more serious felony charge would be filed. Defendant contends as a consequence he was not informed of the true terms of the offer when he made his decision to plead not guilty to the misdemeanor charges.

On February 11, 1999, the county attorney amended the trial information to burglary in the third degree in violation of Iowa Code section 713.6A and criminal mischief in the fourth degree in violation of Iowa Code section 716.6. On the same day, defendant pled guilty to these charges. He was sentenced to an indeterminate term of five years for the burglary charge and an indeterminate term of one year for the criminal mischief charge.

We first address defendant's contention his trial counsel was ineffective in failing to move to dismiss the charge of burglary in the first degree on grounds the State violated his speedy indictment rights. In the February 5, 1999 motion, counsel moved for dismissal of the trial information on the grounds the State did not file the burglary trial information within forty-five days of the September 7, 1998 arrest. Counsel did not obtain a ruling on this motion.

We agree with the State the record is not sufficient to address defendant's claim his right to speedy indictment was violated and his counsel should have sought a ruling on this claim and his claim of due process violations made in the February 5, 1999 motion. We preserve these claims for postconviction proceedings.

We next address defendant's claim counsel was ineffective for allowing him to plead guilty without a factual basis for the plea.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). To prevail on a claim of ineffective assistance of counsel, a defendant must prove his or her counsel failed in an essential duty and prejudice resulted. *State v. Phillips*, 580 N.W.2d 748, 754

sought a ruling on this claim and his claim of due process violations made in the February 5, 1999 motion. We preserve these claims for postconviction proceedings.

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We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). To prevail on a claim of ineffective assistance of counsel, a defendant must prove his or her counsel failed in an essential duty and prejudice resulted. *State v. Phillips*, 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). In doing so, defendant must overcome the strong presumption his attorney's actions were reasonable under the circumstances. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). Miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the normal range of competency. *Meier v. State*, 377 N.W.2d 204, 206 (Iowa 1983).

To establish prejudice defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial. *Gering v. State*, 382 N.W.2d

151, 152 (Iowa 1986). The ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998).

The district court may not accept a guilty plea without first determining the plea has a factual basis. *See* Iowa R. Crim. P. 8(2)(b); *Schminkey*, 597 N.W.2d at 788. Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty. *Id.*; see *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Prejudice in such a case is inherent. *Schminkey*, 597 N.W.2d at 788; *see State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (holding that where there is no factual basis for a guilty plea, ineffective assistance of counsel is established). In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report. *Schminkey*, 597 N.W.2d at 788; *see Brooks*, 555 N.W.2d at 448-49.

Burglary is defined in Iowa Code section 713.1 as follows:

> Any person, having the intent to commit a felony, assault, or theft therein, who, having no right, license or privilege to do so, enters an occupied structure not being open to the public . . . or any person having such intent breaks an occupied structure, commits burglary.

Iowa Code § 713.1.

An "occupied structure" is defined in Iowa Code section 702.12 as "any . . . land, water or air vehicle . . . occupied by persons for the purpose of carrying on business or other activity therein . . . "

Defendant admitted on September 7, 1998, at the guilty plea hearing, he broke or entered into an automobile occupied by Steve Yates. Defendant first indicated he did it in self-defense, and the court said it could not accept the plea because self-defense was a legal defense to burglary in the third degree.

At that point, defense counsel requested a recess in order to talk with his client. After the court reconvened, the prosecutor stated she wished to correct the amended trial information on the burglary charge so that in lieu of the words "entering and enter" it would read "breaking and break." In addition, she requested the court's permission to add the word "window" after the phrase "motor vehicle." With these changes and additions, the charge of burglary in the third degree read as follows:

> Defendant, on or about September 7, 1998, in the county of Polk and State of Iowa, committed or aided and abetted in the commission of Burglary in the Third Degree by breaking an occupied structure when he had no right to do so, with the intent to commit an assault, to wit: did break a motor vehicle window when he had no right to do so, with the intent to assault Steve Yates.

The court informed defendant the State was changing the charge again, having originally charged him with entering a motor vehicle. Defendant admitted to having committed the crime in the revised version. The following colloquy then took place:

Q: Tell me what you did?
A: I broke the window of Mr. Steve Yates to assault Mr. Yates.

Q: Tell me why you did that?
A: Because I was angry, you Honor.

Q: You lost your cool, right?
A: Yes, your Honor.

Q: Well, how did you break the window?
A: I struck it, your Honor.

Q: What did you strike it with?
A: A weapon, your Honor.

Q: Well, what was it?
A: It was a flashlight, your Honor.

Q: Where'd that come from?
A: Out of my car, your Honor.

Q: How many times did you hit that car window?
A: I don't recall, sir, exactly.

Q: More than once?
A: Once or twice, sir.

Q: Is there any excuse for your doing that?
A: Not other than losing my temper, your Honor.

Defendant pled guilty to the third-degree burglary and criminal mischief charges.

Defendant argues a factual basis was lacking due to the existence of the affirmative defense of self-defense. We do not find support for defendant's contention in the record. We affirm the district court's decision in this regard.

AFFIRMED.