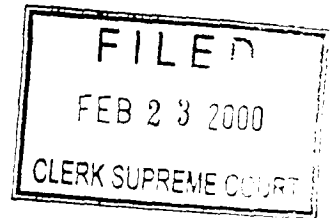


IN THE COURT OF APPEALS OF IOWA

No. 1999-384 (9-637) / 98-2134
Filed February 23, 2000



STATE OF IOWA,
Appellee,

vs.

SUZANNE M. HAYDEN,
Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, District Associate Judge.

Suzanne Hayden appeals the sentence entered upon her guilty plea to third-degree theft in violation of Iowa Code sections 714.1 and 714.2(3) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Richard R. Phillips, County Attorney, and Kerrie Snyder, Assistant County Attorney, for appellee.

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

VOGEL, J.

Hayden appeals the judgment and sentence following her guilty plea to third degree theft in violation of Iowa Code sections 714.1 and 714.2(3) (1997). She claims she received ineffective assistance of counsel because her attorney failed to file a motion in arrest of judgment. Because we conclude her plea was voluntary and a factual basis was established, we find no breach of duty by her trial attorney and affirm.

Background facts. Hayden pled guilty to a third degree theft charge on November 4, 1998. She waived time before sentencing and received a one year term of incarceration with all but sixty days suspended and a \$500 fine. On appeal, Hayden claims she received ineffective assistance of trial counsel when her attorney failed to file a motion in arrest of judgment because her guilty plea was not voluntary and there was an insufficient factual basis for the plea.

Scope of review. Generally, review of criminal proceedings is for errors. See *State v. Cullison*, 227 N.W.2d 121, 126-27 (Iowa 1975). A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure

~~worked to the~~ defendant's actual and substantial disadvantage so that, but for ~~counsel's error~~, the result of the proceeding would have been different. *Id.*

Voluntary nature of guilty plea. Hayden claims her guilty plea was not voluntary because the court failed to comply with Iowa Rules of Criminal Procedure section 8(2)(b). This rule requires the court to make sure the defendant understands four main factors before a plea can be accepted. *Id.* These factors include the nature of the crime, the mandatory minimum and possible maximum penalty involved, the rights given up when tendering a guilty plea, and the fact that a guilty plea will waive the right to a trial. *Id.*

1. Nature of the crime. Hayden asserts that the court did not establish the elements of the crime during the plea proceedings. We agree the court did not discuss each element of third degree theft. However, this requirement is not so rigid.

We have consistently held we will not reverse a judgment based on a guilty plea where trial court did not specifically explain each element of the crime, if under all the circumstances it is apparent the accused party understood the nature of the charge.

State v. Hansen, 221 N.W.2d 274, 276 (Iowa 1974) (citations omitted).

Here, the trial information clearly set forth the elements of the charge. Hayden's knowledge of the nature of the offense was further evidenced by her response to the court's inquiry regarding her actions. She stated she had taken possession of a satellite dish and had moved out of state with it. She also stated in a form captioned "acknowledgement of rights" that she had "taken possession of the property of another". These statements show that she understood the nature of the crime.

2. Penalty. Hayden next alleges her plea could not be voluntary because she ~~was not~~ aware of the correct penalties for third degree theft, an aggravated misdemeanor. The penalties contained in her "acknowledgement of rights" were incorrectly stated as the minimum and maximum penalties for a serious misdemeanor rather than an aggravated misdemeanor, which carries harsher sentencing provisions. We agree Hayden's attorney should have pointed out this error but find it did not work to Hayden's prejudice. Had the minimum sentence been listed as *greater* than the actual minimum, Hayden could claim she was prejudiced by the error. However, she actually received a sentence within the range for the lesser offense of a serious misdemeanor.

3. Waiving rights. The rights Hayden waived were clearly stated on the "acknowledgement of rights" form that she and her attorney reviewed, completed and signed. The trial court questioned her about the written acknowledgement during the proceeding, verifying his review of the form. The trial court also inquired whether Hayden understood the waiver of her right to a trial and she responded affirmatively.

Even so, Hayden claims she was not instructed on each right waived during the plea proceedings as the rule requires. However, there is no litany that the courts must adhere to in every case, as she suggests. Substantial compliance with the rule is sufficient to make a determination that the plea has been entered voluntarily and intelligently. See *State v. Hightower*, 587 N.W.2d 611, 613 (Iowa App. 1998); see also *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). The use of a signed form to explain the individual rights that are being waived in conjunction with the consultation of an attorney and review by

the court rises to the level of substantial compliance with the rule. *Kirchoff*, 452 N.W.2d at 805.

Therefore, because we find there was substantial compliance with the Rule 8 requirements, the trial counsel had no duty to attack the plea proceeding with a motion in arrest of judgment.

Factual basis of guilty plea. Hayden also claims her attorney should have filed a motion in arrest of judgment as she claims there was an insufficient factual basis to prove third degree theft. More specifically, she contends there was no showing of her intent to permanently deprive another of their property or of the statutory \$500 property value.

The factual basis for a guilty plea may be established using the entire file including any inquiry of the defendant or prosecutor, the presentence investigation report, and the minutes of testimony. *Hightower*, 587 N.W.2d at 614 (citing *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975); *State v. Hansen*, 344 N.W.2d 725, 728 (Iowa App. 1983)). Hayden contends there was no factual basis showing the intent element.

Because proof that the defendant acted with the specific purpose of depriving the owner of his property requires a determination of what the defendant was thinking when an act was done, it is seldom capable of being established with direct evidence. Therefore, the facts and circumstances surrounding the act, as well as any reasonable inferences to be drawn from those facts and circumstances, may be relied upon to ascertain the defendant's intent.

State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999) (citations omitted).

Hayden made two separate statements in the record admitting that she took possession of the satellite dish. However, we look beyond Hayden's possession

of the satellite dish to see if the record supports the intent element. The minutes of testimony disclose that she made a payment for the satellite dish from a closed bank account, took the dish with her when she moved out of state, and failed to leave any forwarding address. We conclude these facts form an adequate basis to show Hayden's intent to deprive the owner of the property.

Hayden next contends there was an insufficient factual basis to meet the \$500 value element for third degree theft. During the plea proceeding, she stated that the balance owed on the dish was \$450. The state contends that the actual value of the property, rather than the outstanding balance, exceeds the \$500 minimum. Iowa Code section 714.2(3) (1997) defines third degree theft as follows:

The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

The minutes of testimony clearly state the value of the property exceeded \$500. We find the record contains evidence to form a factual basis of third degree theft.

Ineffective assistance of counsel. Because Hayden's plea was voluntary and there was a factual basis to support the charge, her trial counsel's decision not to file a motion in arrest of judgment is clearly not a breach of an essential duty. Therefore, Hayden's claim of ineffective assistance of counsel must fail.

AFFIRMED.