IN THE COURT OF APPEALS OF IOWA

No. 8-460 / 97-1127

STATE OF IOWA,

Appellee,

vs.

RODNEY DEAN SCHULT,

Appellant.

SEP 30 1998

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler and Todd A. Geer, Judges.

Rodney Schult appeals from his convictions, following guilty pleas, for possession of a controlled substance with intent to deliver and possession of a controlled substance. **AFFIRMED.**

James H. Pickner, Hawarden, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Cady, C.J. and Streit, and Vogel, JJ.

CADY, C.J.

Rodney Dean Schult appeals his convictions for possession of methamphetamine with intent to deliver and possession of marijuana. He claims his trial counsel was ineffective for allowing him to plead guilty to the charges when insufficient factual bases for the charges existed in the record. We affirm the district court.

The facts giving rise to this case developed after police officers began surveillance of Schult's home. The officers approached three individuals returning from a drug buy as they drove into Schult's driveway. Schult, Michael Fisher, and Brenda Reichert exited the vehicle. While speaking with the officers, Fisher dropped a bag containing methamphetamine. An officer also noticed the odor of marijuana coming from inside the residence. A search of the home revealed marijuana residue, drug paraphernalia, and bags containing methamphetamine.

Schult pled guilty to possession of methamphetamine with intent to deliver and possession of marijuana. During the plea colloquy, Schult stated the methamphetamine belonged to another person in the vehicle. While he acknowledged he used some of the drug, he indicated he had returned it to its owner. When the court inquired about the possession of marijuana charge, Schult stated his girlfriend had already pled guilty to this charge. He indicated the marijuana belonged to her. After Schult made these statements, the county attorney pointed out the State had

knowledge of the events leading to the purchase of the methamphetamine because a wired informant allowed officers to hear the conversation. At this point the trial court determined the parties should proceed with a jury trial. The parties, however, reached a new plea agreement. The district court then proceeded with the guilty plea, stating a factual basis was established by "statements earlier made and the minutes of evidence in this matter."

Schult did not file a motion in arrest of judgment. The district court sentenced him to a term of up to ten years on the possession with intent to deliver charge and 180 days on the possession of marijuana charge. The two sentences were ordered to be served consecutively. Pursuant to the plea agreement, the sentencing court suspended the sentences and placed Schult on probation for a period of three to five years.

On appeal Schult claims he received ineffective assistance of counsel due to his trial counsel's failure to challenge the factual basis for his pleas. He maintains his statements regarding the methamphetamine charge did not support a factual basis for delivery. On the marijuana charge, he claims the facts did not distinguish between actual and constructive possession.

Schult's claim of ineffective assistance of counsel involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Schult must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Schult must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

We will find counsel failed to perform an essential duty if defense counsel 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). Conversely, where a factual basis exists

for the plea, counsel will not usually be found ineffective for allowing the defendant to plead guilty. *Id.* In determining whether a factual basis for Schult's plea exists, we consider the entire record, including the minutes of testimony and the plea colloquy. *See id.* at 448-49; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996).

Schult first asserts his counsel was ineffective by allowing him to plead guilty to possession of methamphetamine with intent to deliver when Schult denied an intent to deliver drugs. He contends his statements supported no more than a plea to possession of methamphetamine.

Because we consider Schult's claim within the context of ineffective assistance of counsel, we conduct a de novo review of the record, and, therefore, consider the entire record in determining whether a factual basis exists. Schult cannot claim he received ineffective assistance of counsel for pleading guilty when a factual basis did in fact exist in the record. *See Brooks,* 508 N.W.2d at 632.

In this case, the minutes of testimony support a conviction of possession with intent to deliver methamphetamine. In the minutes, Schult made a statement to a police officer admitting he purchased methamphetamine in order to give it to Fisher. Fisher stated Schult purchased the methamphetamine after an individual came to his home with twenty dollars and asked "if there was any [methamphetamine] around for the weekend."[1] Fisher explained Schult made a phone call before he drove Schult and

[1] The individual wanting to purchase the methamphetamine was an informant.

Reichert to obtain the methamphetamine. Further, Schult admitted in the plea colloquy to possessing and using the methamphetamine on the return trip to his home. Based on the information contained in the minutes of testimony and the statements made during the plea colloquy, we conclude the record provides a factual basis for possession with intent to deliver methamphetamine.

Schult next contends his plea to possession of marijuana was defective. Specifically, he asserts no attempt was made to determine whether the facts would support a finding of actual or constructive possession. He further maintains the district court's inquiry did not sufficiently demonstrate his understanding of the law in relation to the facts.

On our de novo review of the record, we find the minutes of testimony provide a factual basis for the charge of possession of marijuana. Reichert and Schult lived together at the residence the police searched. The search revealed marijuana and drug paraphernalia in the home. Further, Schult admitted to an officer there was marijuana in the home. Although Reichert claimed she owned the marijuana, possession may be actual or constructive. *See State v. Padavich,* 536 N.W.2d 743, 751(Iowa 1995). In this case, the record supports a finding that Schult at least constructively possessed marijuana. Schult therefore did not receive ineffective assistance of counsel by counsel's allowing him to plead guilty to this charge.

We have considered all of Schult's claims and affirm the district court.

AFFIRMED.