

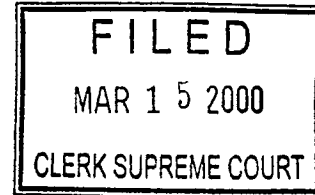
IN THE COURT OF APPEALS OF IOWA

No. 1999-569 (9-830) / 99-0250
Filed March 15, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD LEROY WUBBEN,
Defendant-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey (plea hearing), Jon Stuart Scoles (sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his guilty plea to third-degree burglary in violation of Iowa Code sections 713.1, 713.6A (1997). He contends his trial counsel was ineffective by allowing him to plead guilty without establishing a proper factual basis of his guilt. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, J.J.

MILLER, J.

Defendant Chad Wubben appeals from his conviction, after guilty plea, of burglary in the third degree. He claims counsel was ineffective in allowing him to plead guilty without establishing a proper factual basis and for not filing a motion in arrest of judgment. We affirm.

The minutes of testimony state witnesses would testify that shortly after midnight on May 4, 1998, Bert Roberts, Jr., was awakened by his son who advised him someone was in the garage taking their bicycles. Roberts went to the garage and observed his neighbor, Chad Wubben, run out of the garage. Roberts noticed his son's bicycle, which had been put in the garage earlier, was sitting alongside the door outside the garage, and that the front tire was sitting along the side of his neighbor's garage next door. Upon Wubben's arrest, Roberts identified Wubben as the person who ran out of his garage and further stated that Wubben had no right, license, or authority to be in the garage or remove any property from the garage.

Wubben was subsequently charged with burglary in the third degree, in violation of the Code of Iowa, Sections 713.1 and 713.6A (1997). On January 4, 1999, Wubben signed and entered a written plea of guilty. In it, he specifically acknowledged that "having the intent to commit a felony, assault or theft and having no right license or privilege to do so, [I] entered an occupied structure . . ." and further that "[t]he Court may rely on the Minutes of Testimony as a further factual basis." It appears this was part of a plea bargain reached with consideration to other charges and probation violations filed against Wubben.

On the same date, Wubben appeared in open court to enter his plea of guilty. The following exchange occurred between the Court and Wubben:

The Court: Mr. Wubben, is that correct you wish to plead guilty to the charge of burglary in the third degree? Wubben: Yes. The Court: Have you read through and understood each of the separately initialed paragraphs of your written plea of guilty? Wubben: Yes. The Court: Has Ms. Evans [trial counsel] adequately explained to you each of those paragraphs? Wubben: Yes, she has.

* * *

The Court: Under paragraph 8 it states that you understand the elements of the charge. You understand that those are the elements that the State would have to prove beyond a reasonable doubt in order to obtain a conviction of the charge against you? Wubben: Yes. The Court: And under paragraph 9 it states that you admit on or about May 4, 1998, . . . , that having the intent to commit a felony, assault or theft and having no right, license or privilege to do so entered an occupied structure Is all of that true and correct? Wubben: Yes. The Court: Specifically what did you do? Wubben: What did I do? The Court: Yeah. Wubben: Went in the garage. That was it. The Court: You went into a garage? Wubben: Yeah. The Court: And what was your intent upon going into the garage? Wubben: I guess I didn't really have any intent.

* * *

The Court: Did you have the intent to commit a felony, assault or theft upon entering the garage? Wubben: More than likely a theft. The Court: A theft? Wubben: Yeah. The Court: To take something inside? Wubben: Yep. The Court: All right. Did you review the minutes of testimony attached to the trial information with Ms. Evans? Wubben: Yes, I did. The Court: And do you have any dispute with any of the statements of the witnesses . . .? Wubben: There's couple of them I didn't feel were, you know, 100 percent true but can't do nothing about it now so-- The Court: So you're basically in agreement-- Wubben: Yeah. I'm in agreement with it.

* * *

The Court: And, Mr. Wubben, after having reviewed with you your written plea of guilty to the charge, do you still wish to plead guilty? Wubben: Yes, I do.

Wubben now challenges his counsel's performance, claiming that there was no factual basis established to enter a plea of guilty. Specifically, Wubben claims the record does not establish that at the time he entered the garage he intended to commit a theft. He further claims that trial counsel was ineffective for not filing a motion in arrest of judgment.

Iowa Rule of Criminal Procedure 8(2)(d) requires the district court to inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

Iowa Rule of Criminal Procedure 23(3)(a) provides that a defendant's failure to file a motion in arrest of judgment bars a defendant from challenging the adequacy of guilty plea proceedings on appeal. The purpose of these two rules is to allow the district court to correct defects in guilty plea proceedings before an appeal and therefore eliminate the necessity for the appeal. *State v. Gant*, 597 N.W.2d 501, 503-04 (Iowa 1999). It is undisputed that the district court advised Wubben of the requirement to file a motion in arrest of judgment and that Wubben failed to file the motion. Therefore, Wubben's failure to file a motion in arrest of judgment precludes him from attacking the guilty plea directly. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). Wubben, however, may challenge the guilty plea through an ineffective-assistance-of-counsel claim. *Id.*

Our supreme court has previously set forth the proper analysis for reviewing ineffective-assistance-of-counsel claims resulting from counsel allowing a defendant to plead guilty to a charge for which a factual basis does not exist and then failing to file a motion in arrest of judgment:

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. On the other hand, where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty.

Id.

We review a Sixth Amendment claim of ineffective assistance of counsel de novo. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998).

To establish an ineffective assistance of counsel claim, the applicant must show that “(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom.” *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel’s conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding

of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

We may dispose of an ineffective assistance of counsel claim if the applicant fails to prove either the breach of duty or the prejudice prong of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Although we ordinarily do not address ineffective-assistance-of-counsel claims on direct appeal, we have the obligation to determine whether such claims should be disposed of on direct appeal or should be reserved for postconviction relief proceedings. *Gant*, 597 N.W.2d at 504. Here, neither party requests we preserve the alleged constitutional violation for postconviction relief, and we are convinced the record is sufficient for us to consider Wubben's ineffective-assistance-of-counsel claim on direct appeal.

Wubben claims there was no factual basis to support the required element of intent to commit a theft at the time he entered Roberts' garage to support his guilty plea. See *State v. King*, 344 N.W.2d 562, 563 (Iowa App. 1983) (holding when the charge is burglary by entry the felonious intent must exist at the time of entry in order to support a conviction). The trial court shall not accept a plea of guilty without first determining the plea has a factual basis. See Iowa R. Crim. P. 8(2)(b).

The record does not support Wubben's claim. Wubben signed a written plea of guilty in which he acknowledged he had the intent to commit a felony, assault or theft when he entered the garage. In his written plea of guilty he also consented to the court relying on the minutes of testimony as a further factual

basis for his plea of guilty. In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including the minutes of testimony. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). The minutes stated that when Roberts went outside he noticed a bicycle which had been put in the garage earlier was now outside, and he recognized Wubben as the person who ran out of the garage. The minutes may thus be seen as circumstantially establishing Wubben had the intent to commit a theft when he entered the Roberts' garage. They thus support Wubben's acknowledgment of intent which was earlier set forth in his written plea of guilty.

Wubben contends the minutes of testimony do not support a factual basis for his plea of guilty because he stated during the guilty plea proceeding that he did not feel that they were "100 percent true." However, during the guilty plea hearing he ultimately agreed with the information in them which circumstantially established the requisite intent. He did so by directly acknowledging the requisite intent as set forth immediately hereafter.

When questioned by the court about his intent when entering the garage, Wubben answered his intent was "more than likely a theft." The court then pressed for a more definite answer by asking, "[t]o take something inside?" Wubben answered, "Yep." While Wubben would have us believe that this is insufficient to establish a factual basis for the guilty plea, it is not necessary for the trial court to wring from a defendant a detailed confession satisfying each element of the offense charged to establish a factual basis. *State v. Hansen*, 221 N.W.2d 274, 276 (Iowa 1974); *see also State v. Smith*, 300 N.W.2d 90, 92 (Iowa

1981). Wubben's responses to the court's questions are adequate to establish the requisite intent to commit a theft at the time of entry.

In summary, Wubben acknowledged in a written guilty plea that he had an intent to commit a felony, assault or theft when he entered the garage; the minutes of testimony may properly be considered, and circumstantially establish an intent to commit a theft at the time of entry; and Wubben directly acknowledged the requisite intent in the guilty plea hearing. The record before the trial court establishes a factual basis for the requisite intent to commit a theft at the time of entry. Therefore, trial counsel breached no duty by allowing Wubben to plead guilty and not filing a motion in arrest of judgment.

AFFIRMED.

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