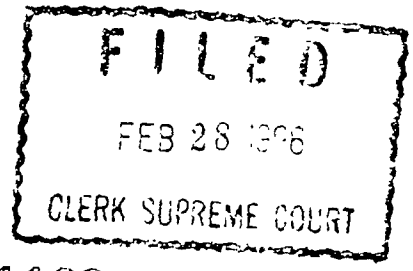
IN THE COURT OF APPEALS OF IOWA

No 5-636 / 95-0747



001169

STATE OF IOWA,

Appellee,

vs.

STEVEN WESLEY RASMUSON,

Appellant

Appeal from the Iowa District Court for Clay County, Tom Hamilton, Judge

Steven Rasmuson appeals the judgment and sentence entered upon his conviction, following a guilty plea, of failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Michael L. Zenor, County Attorney, and Michael Houchins, Assistant County Attorney, for appellee.

Considered by Hayden, P J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

On October 5, 1994, Officer Mark Toney of the Iowa State Patrol stopped a vehicle driven by Steven Rasmuson when he noticed the vehicle was being driven in an unusual manner Rasmuson's appearance and behavior caused Toney to believe he was intoxicated Toney administered an intoxilyzer test to Rasmuson, and the test indicated Rasmuson had a blood alcohol level of 146. Toney searched the car incident to his arrest of Rasmuson and found in the trunk a marijuana plant which was six feet tall

Rasmuson was charged with the crimes of operating while intoxicated, in violation of Iowa Code section 321J 2 (1993), possession of a controlled substance, in violation of section 124 401(3); and failure to affix a drug tax stamp, in violation of sections 453B 1(3)(b), 453B.3, and 453B 12

Rasmuson entered into a plea agreement with the State On March 6, 1995, he pled guilty to failure to affix a drug tax stamp. At the plea proceedings, he admitted the minutes of testimony contained accurate information regarding what took place in this offense. The State agreed to dismiss the other two charges and to recommend defendant receive a suspended sentence and probation.

At the sentencing hearing, the court asked Rasmuson if he had been drinking on the day of the offense, and Rasmuson replied he had only taken some NyQuil, a cold medicine, before he started driving. He also claimed he had no idea how the marijuana

plant got in his trunk The court found Rasmuson's statements lacked candor and honesty The court noted Rasmuson's past criminal history and his denial of an alcohol problem, although he had a record of several offenses involving alcohol Rasmuson was sentenced to a term of imprisonment not to exceed five years He now appeals

I. Rasmuson contends he received ineffective assistance of counsel due to his trial attorney's failure to file a motion in arrest of judgment. He believes such a motion would have been successful because there was no factual basis for his plea of guilty to the charge of failure to affix a drug tax stamp Under section 453B.3, a dealer may not possess a taxable substance unless it has a drug tax stamp permanently affixed Section 453B 1(3)(b) defines a "dealer" as a person who possesses forty-two and one-half grams of marijuana Rasmuson claims there is no factual basis in the record to show he had possession of forty-two and one-half grams of marijuana.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Caldwell v. State*, 494 N W 2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a defendant has the burden to prove by a preponderance of the evidence counsel was ineffective. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

We consider whether a challenge to the guilty plea proceeding would have been successful. Iowa Rule of Criminal Procedure 8(2)(b) requires a court to determine if

a defendant's guilty plea has a factual basis *State v Boone*, 298 N W 2d 335, 337 (Iowa 1980) This requirement is necessary to assure the accuracy of the plea, in order to preclude convictions for crimes of which the accused is not in fact guilty based on the evidence adduced at the plea proceeding *State v. Sanders*, 309 N W 2d 144,145 (Iowa App 1981)

We determine there was a factual basis for defendant's plea. The minutes of testimony stated Officer Toney would testify defendant had possession of a six-feet high marijuana plant which weighed more than forty-two and one-half grams At the plea proceedings, defendant admitted the minutes of testimony contained accurate information regarding what took place in this offense. Thus, defendant admitted the marijuana plant weighed more than forty-two and one-half grams.

Due to our finding there was a factual basis for defendant's plea, we conclude defendant has failed to show he received ineffective assistance of counsel based on counsel's failure to file a motion in arrest of judgment.

II. Rasmuson claims the district court abused its discretion by considering unproven and unprosecuted charges in sentencing him. He believes the court improperly considered the dismissed charge of operating while intoxicated, because the court questioned him about his blood alcohol level at the time he was stopped by officers

A sentence will be disturbed by a reviewing court only upon a showing the trial court abused its discretion *State v. Dicks*, 473 N W 2d 210, 215 (Iowa App 1991) No abuse of discretion will be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable *Id.* Defendant has the burden of showing an abuse of discretion *State v. LeGrand*, 501 N W 2d 59, 64 (Iowa App 1993)

A sentencing court may not consider those crimes for which the defendant has been charged but not convicted *State v. Barker*, 476 N W 2d 624, 627 (Iowa App 1991) The district court may not consider a dismissed charge nor the facts arising from it unless these are admitted to by the defendant or independently proved *State v. Black*, 324 N W 2d 313, 316 (Iowa 1982).

We do not find the district court improperly relied on the dismissed charge of operating while intoxicated when sentencing defendant. Rather, the court's concern was with defendant's candor and honesty The court stated:

> You know, Mr Rasmuson, one of the things that is of concern to Mr. Wagener, the Presentence Investigation Reporter, and to myself is, you know, is your candor and honesty, and if you look on page 9 under Defendant's needs, about the last sentence or so in that paragraph says here, further opinion of this officer that Rasmuson needs to have a change in his attitude by conducting himself in a law abiding manner in addition to being honest and truthful which he failed to do on numerous occasions during the presentence investigation interview.
>
> I see your statement, your version of the offense here. You say you consumed some Nyquil the day you were picked up but you tested .146. You think you get that drinking Nyquil?

Thus, the court's focus was not on whether defendant had been operating a motor vehicle while intoxicated, but on whether he was truthful in his denial he had been drinking alcohol on the day he was picked up The court also questioned defendant's statement he had no idea how the marijuana plant got in his trunk

Based on defendant's past criminal history and lack of candor, the court determined he was not a good candidate for probation We determine there was no abuse of discretion in the court's sentencing of defendant

We affirm defendant's conviction and sentence for failure to affix a drug tax stamp Costs of this appeal are assessed to defendant.

AFFIRMED.