IN THE COURT OF APPEALS OF IOWA

No. 1999-192 (9-416) / 98-1642
Filed August 27, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM RUMLEY,
Defendant-Appellant.

FILED
AUG 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Douglas McDonald, District Associate Judge.

On appeal from her conviction for fourth-degree theft, the defendant alleges her trial counsel was ineffective in allowing her to plead guilty when the record failed to establish a factual basis for the offense. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Mark Havercamp, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Defendant-appellant William Rumley appeals following his conviction of fourth-degree theft. Defendant contends his trial counsel was not effective in allowing him to plead guilty to the charge as the record did not establish a factual basis for the plea. We agree and reverse and remand.

Our concern when a claim is made that counsel, in a criminal case, is not effective is with the fundamental fairness of the proceeding whose result is being challenged. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on his claim of ineffective assistance of counsel, defendant must prove both the following conditions: (1) counsel failed in an essential duty; and (2) prejudice resulted from counsel's error. *See State v. Arne*, 579 N.W.2d 326, 328-29 (Iowa 1998). To show his counsel failed in an essential duty, defendant must show his attorney's performance fell outside the normal range of competency. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998); *see also State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995). Trial counsel is not incompetent in failing to pursue an issue that has no merit. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Although claims of ineffective assistance of counsel are normally preserved for

postconviction relief proceedings, we will consider them on direct appeal if the record is adequate. *Id.* With these principles in mind, we address defendant's claim.

Defendant was a passenger in a car stopped by police officers. The driver gave the officer permission to search the car. The search resulted in the officers finding three shirts allegedly from J.C. Penney's that still had anti-theft devices attached.

Defendant was initially charged with fourth-degree theft in violation of Iowa Code section 714.1(1) (1997) (taking possession or control over the property of another). Defendant filed a written guilty plea admitting (1) there was a factual basis for the offense and (2) he did the acts described in the minutes of testimony. At the hearing on his guilty plea, defendant's attorney said defendant was admitting he possessed stolen property, but did not actually steal it.

Defendant's plea was accepted, and he received a suspended sentence and was ordered to pay a fine.

Defendant contends counsel should not have allowed him to plead guilty to an offense where no factual basis for it had been established. He advances the minutes of testimony did not (1) identify the owner of the shirts, (2) state their value, or (3) give an indication defendant had possession or control of them.

The State concedes the offense to which defendant pled guilty (possession of stolen property) was not the offense charged in the trial information (taking possession or control). The State argues defendant waived any challenge when he entered a valid guilty plea to the uncharged offense.

With reference to the charge, the incident report shows the car was stopped and, on searching the car, the officer found "three jerseys which still had price tags on them and the ink tag anti-theft devices still affixed to two of them."

It further indicated defendant was charged with possession of a controlled substance, theft in the fourth degree, possession of drug paraphernalia, and having an open container.

By trial information, defendant was charged with violation of Iowa Code section 714.2(4)[1] as defined in Iowa Code section 714.1(1) [2]. Defendant also was charged in a second count with possession of a controlled substance in violation of Iowa Code section 124.401(5).

There was a plea agreement. After defendant pled to the charge from which appeal is taken, the possession of controlled substance count was dismissed.

The evidence does not support the charge. There is no evidence as to the ownership of the shirts or their value and no fact to support a finding defendant took possession or control of them from another. The only evidence is the shirts were in a car in which defendant was riding. Even though this is raised as an ineffective

---

[1] The theft of property exceeding one hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.

Iowa Code § 714.2(4).

[2] A person commits theft when the person does any of the following:
1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

Iowa Code § 714.1(1).

assistance of counsel claim and the plea resulted in the dismissal of a second charge, we cannot allow a plea to stand that has no factual basis. This court was vacated in *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) for affirming a conviction in a similar situation and preserving the allegation of ineffective assistance of counsel for postconviction review reasoning counsel may have had strategic reasons for permitting his client to plead guilty notwithstanding the lack of a factual basis. In vacating us, the supreme court said, "Endorsing such strategies (as this court employs), however, would erode the integrity of all pleas and the public's confidence in our criminal justice system." *Hack*, 545 N.W.2d at 263 (citing *State v. Sanders*, 309 N.W.2d 144, 145 (Iowa App. 1981)). This plea was not supported by the record made and, accordingly, violates the letter and spirit of Iowa Rule of Criminal Procedure 8(2)(b). *Hack*, 545 N.W.2d at 263.

We reverse defendant's conviction and remand for further proceedings consistent with this opinion. On remand, the State may reinstate the charge dismissed in contemplation of a valid plea, *see id.; Sanders*, 309 N.W.2d at 147, or re-indict defendant under a Code section supportable by the available evidence. *See State v. Galbreath*, 525 N.W.2d 424, 427 (Iowa 1994).

REVERSED AND REMANDED.