IN THE COURT OF APPEALS OF IOWA

No. 0-623 / 99-1955
Filed December 13, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANNY HAROLD WALKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Judge.

Danny Walker appeals from the judgment and sentence entered upon his guilty plea to theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) (1999). He contends his trial counsel was ineffective in allowing him to plead in the absence of a factual basis and in failing to file a motion in arrest of judgment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Richard Crowl, County Attorney, and Daniel McGinn, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

MILLER, J.

The defendant Danny Harold Walker appeals from the judgment and sentence entered upon his guilty plea to theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) (1999). He contends his trial counsel was ineffective in allowing him to plead guilty to a charge for which no factual basis was established and then failing to file a motion in arrest of judgment. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

On the evening of August 9, 1999 officers from the Council Bluffs Police Department stopped Walker after they were informed by dispatch that the "County" was pursuing a stolen vehicle. After Walker was stopped he refused to unlock the doors and get out of the vehicle. One of the officers then broke the driver side window and removed Walker from the car. The officers stated Walker appeared very intoxicated.

Walker was subsequently charged with operating a motor vehicle while intoxicated and first-degree theft. He pled guilty to the OWI charge and later, based on a plea agreement, pled guilty to theft in the second degree (exercising control over stolen property) in violation of Iowa Code sections 714.1(4) and 714.2(2). He was sentenced to fifty-eight days in jail on the OWI charge with credit for time served, and to an indeterminate five-year prison term on the theft charge.

The vehicle Walker was driving had been reported stolen by his cousin, Larry Anderson, who was from Idaho and had leased it from a Ford dealership in Omaha, Nebraska, while his vehicle was being worked on. The "Minutes of

Testimony" show that Mr. Anderson would testify that he had not given Walker permission to use the vehicle. Walker admitted he did not have permission to keep the vehicle but claims he did not have the intent to permanently deprive the owner of it.

Walker appeals only the theft conviction and sentence. He contends there was no factual basis for his plea and his trial counsel was ineffective for allowing him to plead guilty. He asserts there was no evidence in the record to establish he knew the vehicle was stolen and there was no evidence to establish he intended to permanently deprive the owner of the vehicle. In the alternative, Walker submits that if error was waived by his counsel's failure to file a motion in arrest of judgment it was ineffective assistance of counsel to fail to file such a motion.

II. STANDARD OF REVIEW AND PRESERVATION OF ERROR

Walker's claim that his constitutional right to effective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, has been violated is reviewed de novo. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Walker's failure to seek arrest of judgment bars a direct appeal of his conviction. *Brooks*, 555 N.W.2d at 448. However, this failure does not bar a challenge to the guilty plea if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *Id.*

III. MERITS

To establish an ineffective assistance of counsel claim, the defendant 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 defendant 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 defendant 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 does 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.*

While we often preserve ineffective assistance of counsel claims for a postconviction proceeding, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). However, this preference for preserving ineffective of assistance claims does not relieve Walker of his duty on direct appeal to state the specific ways in which counsel's

performance was inadequate and identify how competent representation probably would have changed the outcome. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999); see *also Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We find the record here adequate to address Walker's ineffective assistance claim.

Pursuant to a plea agreement, Walker pled guilty to an amended charge of second degree theft by exercising control over stolen property in violation of Code section 714.1(4). It provides, in relevant part, that a person commits theft when the person, "Exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen . . . ."

As stated above, Walker alleges there was no factual basis for the charge and thus his counsel was ineffective for allowing him to plead guilty to the charge and thereafter failing to file a motion in arrest of judgment. "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty." *Brooks*, 555 N.W.2d at 448. Prejudice in such a case is inherent. *See State v. Hack* 545 N.W.2d 262, 263 (Iowa 1996). Therefore, our first and only inquiry is whether the record shows a factual basis for Walker's guilty plea to the charge of theft by exercising control over stolen property.

> In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report.

Schminkey, 597 N.W.2d at 788; *see also Brooks*, 555 N.W.2d at 448-49.

Walker argues that nothing in the record supports the inference, beyond a reasonable doubt, that he believed he was driving a stolen vehicle, or that he intended to permanently deprive the owner of the vehicle, both of which he claims are required for a conviction under section 714.1(4). We conclude this incorrectly characterizes certain requirements under section 714.1(4), and conclude there is a factual basis in the record to support Walker's guilty plea.

Under section 714.1(4) there must be evidence that the defendant knew or actually believed that the property was stolen. Iowa Code § 714.1(4) (1999); *State v. Hensley,* 534 N.W.2d 379, 383-84 (Iowa 1995); *State v. Hutt*, 330 N.W.2d 788, 790 (Iowa 1983). However, this section does not require evidence of an intent to permanently deprive the owner of the property.[1] *State v. McVey*, 376 N.W.2d 585, 586 (Iowa 1985) ("Thus the crime of theft based on exercising control over stolen property does not require proof of any intent beyond the voluntary act of exercising the prohibited control over property the accused knows is stolen").

Therefore, we conclude that the fact there may be no evidence in the record showing Walker intended to deprive the owner of the vehicle is irrelevant for purposes of section 714.1(4), because such intent is not required. However, because section 714.1(4) requires evidence that Walker knew or actually believed the vehicle was stolen, we must determine whether the record contains evidence which would support a finding that he knew or actually believed the vehicle had been stolen.

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[1] Section 714.1(1), by way of contrast does require an intent to permanently deprive the owner of his or her property. *See Schminkey*, 597 N.W.2d at 789; *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981).

To show that property has been "stolen" there must be evidence of legal ownership and subsequent unauthorized deprivation. *See State v. Schmitz*, 610 N.W.2d 514, 518 (Iowa 2000). The "Minutes of Testimony" state that the vehicle in question was owned by "H P Smith Ford in Omaha" and was being leased by Anderson while his vehicle was being worked on, that the vehicle had been reported stolen, that the defendant was found driving the vehicle, and that Anderson had not given the defendant permission to use the vehicle. These allegations provide a factual basis which would support a finding the vehicle had been stolen. The question that remains is whether the record provides evidence from which it can be inferred that Walker knew or actually believed the vehicle had been stolen.

Knowledge that property has been stolen can be inferred from possession of recently stolen property. *See State v. Browning*, 269 N.W.2d 450, 453-54 (Iowa 1978); *State v. Knapp*, 426 N.W.2d 169, 174-75 (Iowa App. 1988). From the fact that Anderson was leasing the vehicle only as a substitute while his own was being worked on it can reasonably be inferred that he had recently leased it, and therefore that any theft of the vehicle had occurred recently. The minutes clearly state that Walker was driving the vehicle. He was in possession of it. It can be inferred from Walker's possession of the vehicle, together with evidence that it had been recently stolen, that Walker knew or actually believed it had been stolen.

The inference of Walker's knowledge is further supported by evidence of other facts and circumstances, specifically his own acts. "It is today universally conceded that the fact of an accused's flight, . . . , resistance to arrest, . . . , and

related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *State v. Wimbush*, 260 Iowa 1262, 150 N.W.2d 653, 654 (quoting Wigmore on Evidence, Third Ed., section 276, Volume II, page 111). Walker's flight from county officers, and his resistance to arrest by refusing to unlock the doors and get out of the vehicle once stopped, are evidence of consciousness of guilt, thus of guilt itself, and are thus further evidence that Walker knew or actually believed the vehicle had been stolen.

In summary, the facts alleged in the minutes of testimony, together with reasonable inferences that can be drawn from those facts, provide a factual basis for a finding that Walker knew or actually believed he was driving a stolen vehicle. Therefore, Walker has failed to demonstrate that trial counsel was ineffective in allowing him to plead guilty and not filing a motion in arrest of judgment.

AFFIRMED.