

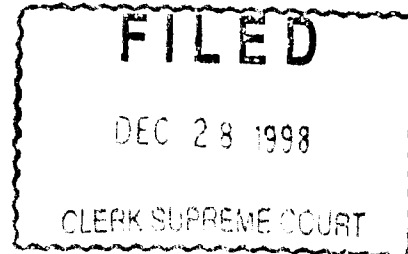
IN THE COURT OF APPEALS OF IOWA

No. 8-577 / 97-2333
Filed December 28, 1998

STATE OF IOWA,
Appellee,

vs.

WILLIAM JOSEPH SCHMINKEY,
Appellant.



Appeal from the Iowa District Court for Benton County, Van D. Zimmer
(guilty plea) and Larry J. Conmey (sentencing), Judges.

William Schminkey appeals his convictions for homicide by vehicle and theft
of a motor vehicle. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Ray Lough, County Attorney, and Karen Duncan, Assistant County
Attorney, for appellee.

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

VOGEL, J.

William Schminkey appeals his convictions for homicide by vehicle and theft of a motor vehicle based on two claims of ineffective assistance of counsel. We find Schminkey suffered no prejudice by counsel's failure to object to the State's alleged breach of the plea agreement and further find that a factual basis was established for the theft charge. We conclude that Schminkey was not denied effective assistance of counsel and therefore affirm.

Background facts. On May 17, 1997, Schminkey attended a party and later a bar, consuming a considerable amount of alcohol at both places. Schminkey left the bar, drove off in someone else's car, and subsequently caused an accident which resulted in the death of another driver. A toxicology report of Schminkey's urine indicated an alcohol content of .189.

Schminkey was charged with homicide by vehicle in violation of Iowa Code section 707.6A(1), involuntary manslaughter in violation of Iowa Code section 707.5(1), and theft of a motor vehicle in violation of Iowa Code sections 714.1 and 714.2(2). Schminkey claimed he was unable to recall the events of that night due to his intoxication, and subsequently entered an *Alford* plea¹ to the homicide and theft charges in exchange for the State's dismissal of the involuntary manslaughter charge and recommendation that his sentences run concurrently. Schminkey was ultimately

¹See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

sentenced to consecutive five and ten year terms. He raises two claims of ineffective assistance of counsel on appeal.

Ineffective assistance. To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). It is not necessary for us to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Our standard of review is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997); *State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* We find the record in this case sufficient to address both of Schminkey's claims on direct appeal.

I. Breach of plea agreement. Schminkey first asserts his counsel was ineffective for failing to object to the State's alleged breach of its plea agreement.

Specifically, Schminkey complains that the State did not recommend to the sentencing court that Schminkey's sentences run concurrently.

Different judges presided over Schminkey's plea and sentencing hearings. The plea agreement, as recited by the prosecutor at the plea hearing, was as follows:

The Defendant will be pleading guilty to Counts 1 and Count 3 pursuant to a decision of North Carolina versus Alford. This is based on an apparent inability to recall all of the events that evening, May 17th. The State's agreement is to dismiss Count 2 at the time of sentencing; *recommend to the court, with the understanding the court doesn't have to follow, that Counts 1 and 3 be concurrent*; and it is our intention to ask that Mr. Schminkey be sent to the penitentiary.

(Emphasis added)

At the sentencing hearing, the prosecutor did not make any express recommendations regarding Schminkey's sentences, but called the victim's father, who made a statement requesting that Schminkey receive the maximum penalty available for the offenses. Defense counsel called Schminkey's stepmother, made an argument for leniency and later made this request of the court: "we're just asking that whatever sentencing it is, that it is concurrent, under the agreement with the County Attorney and the presentence recommendation" The court did not ask the State for a sentencing recommendation on the record.²

² At sentencing, the Court stated:

The reasons for this sentence are as follows: The sentence imposed will hold the Defendant hopefully accountable for his actions on the evening that Jason Kray died. This Court cannot imagine -- The Court is satisfied that incarceration is necessary to protect the community from any further offenses by this Defendant. The Court has reviewed the presentence investigation report in its entirety and is satisfied that incarceration is absolutely necessary in this case for reasons that are set out in the presentence report, which I'm not going to enumerate on the record at this time.

We agree that, pursuant to the plea agreement, the prosecutor should have recommended concurrent sentences in open court at sentencing. However, the court was informed of the agreement by defense counsel and through the presentence investigation report. Furthermore, even if the prosecutor had made an express recommendation at the sentencing proceedings, the court was not bound by the agreement. Schminkey argues that without concurrent sentencing, he gained nothing by entering his plea. However, as long as the plea was voluntary and intelligent his argument must fail. There was strong support in the presentence investigation report for the court's imposition of consecutive sentences. We therefore find Schminkey suffered no prejudice from counsel's failure to object.

II. Factual basis. Schminkey next asserts that his trial counsel allowed him to plead guilty to a charge for which no factual basis could be established. We address the factual basis issue to determine whether Rogers' counsel was ineffective for failing to file a motion in arrest of judgment.

The court may determine a factual basis for a guilty plea by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony. *See State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975); *State v. Hansen*, 344 N.W.2d 725, 728 (Iowa App. 1983). Whatever the source, the record must disclose the factual basis relied on. *Johnson*, 234 N.W.2d at 879. 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. *See State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). However, where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty. *See Id.*

At the plea hearing, the district court found that the minutes of testimony provided “overwhelming evidence” of a factual basis for the pleas to both charges. Schminkey, however, asserts that the minutes of testimony do not provide a factual basis for the intent element of theft.

A person commits theft when the person takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof. *See Iowa Code* § 714.1 (1997). We have adopted the following definition for “deprive the other”:

Intent to "deprive the other" of the property means to permanently withhold, or cause it to be so withheld for an extended period of time, or under such circumstances, that its benefit or value is lost; or, the property is disposed of in such a manner or under such circumstances, as to render it unlikely that the owner will recover the property.

See State v. Berger, 438 N.W.2d 29, 31 (Iowa App. 1989) (adopting definition within Iowa Crim. Jury Instruction 1403 (1982), now contained within Iowa Crim. Jury Instruction 1400.2 (1988)).

The minutes of testimony establish that Schminkey took a pickup truck without the owner’s permission, collided with two vehicles at a high speed, then smashed the truck into a chain-link fence. Clearly, Schminkey caused the truck to be withheld

under such circumstances that its value was lost. Therefore, Schminkey's counsel was not ineffective in failing to file a motion in arrest of judgment as a factual basis was established before the plea entered.

Having considered all issues properly before us on appeal, we hereby affirm the convictions and sentence of William Schminkey.

AFFIRMED.