IN THE COURT OF APPEALS OF IOWA

No. 6-004 / 94-1956

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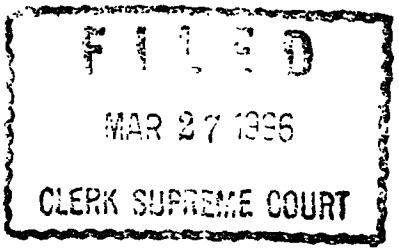
JERALD R. GREGG,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Lee County, Phillip Collett, Judge.

Jerald Gregg appeals from the district court's order denying his application for postconviction relief. **AFFIRMED.**

Matthew Boles of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen and Thomas H. Miller, Assistant Attorneys General, Michael Short, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

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

SACKETT, P.J.

Jerald Gregg appeals the district court's denial of his application for postconviction relief. He claims he should not have been subjected to criminal prosecution for conduct done under a reasonable interpretation of probate court orders. He also claims he received ineffective assistance of trial counsel due to his counsel's failure to: (1) object to the guilty plea proceedings on the ground there was no factual basis for his plea; (2) raise all available defenses; (3) conduct an adequate investigation; and (4) pursue an evaluation of his mental state. We affirm.

In 1989, Jerald Gregg, an attorney, was appointed as conservator for William Mason, who was a disabled Vietnam veteran. In January 1990, the district court entered an order allowing Gregg to pay Mason up to $1500 per month to be used for Mason's personal needs. By October 1990, Mason had managed to save more than $7000 and this money was held in a conservatorship account.

Gregg started a flying club called the Bluebird Flying Club and opened a bank account for the club. Gregg was the sole signatory on this account. He placed Mason's $7000 in the Bluebird account. After this transaction, in November 1990, the district court entered an order which recognized Mason was interested in regaining his pilot's license and which permitted Mason to join a flying club if Gregg felt it would minimize the cost for Mason to become recertified as a pilot. Gregg did not inform the court he had already transferred Mason's funds to the Bluebird account.

Also, for a four-month period, Gregg transferred $650 per month from the conservatorship account to the Bluebird account. Gregg purchased an airplane on behalf of Bluebird. The money in the Bluebird account was used to make payments on the airplane and to pay for Gregg's flying lessons and other expenses of flying the airplane.

Gregg was charged with theft in the first degree, under a theory of theft by misappropriation, and two counts of perjury. While the case was pending, he filed an application for a mental health evaluation for the purpose of determining whether he suffered from a disorder which would serve as a diminished responsibility defense. The district court granted the application. Before the evaluation was completed, Gregg filed an application to be released from the evaluation. In the application he asserted he was not interested in raising any mental health defenses.

In January 1992, Gregg pled guilty to the crime of theft in the first degree. In exchange, the State dismissed the two charges of perjury. Gregg was sentenced to a term of imprisonment not to exceed ten years. His conviction was affirmed on appeal. *State v. Gregg*, 513 N.W.2d 421 (Iowa App. 1993) (Unpublished).

On October 25, 1993, Gregg filed an application for postconviction relief. In his application, as amended, he claimed he received ineffective assistance of trial counsel at the guilty plea proceedings. The district court denied Gregg's application for postconviction relief. The court found all of the issues raised by Gregg had been decided on direct appeal. The court concluded he was barred from relitigating the

issues in a postconviction proceeding. The court further held, if some of the issues had not been decided in the direct appeal, Gregg had not shown sufficient reason for failing to raise them on appeal and he had failed to show actual prejudice resulting from his claimed errors. Gregg now appeals.

I. Postconviction relief proceedings stand as an action at law, triable to the court only on error. *Blum v. State*, 510 N.W.2d 175, 177 (Iowa App. 1993). When the applicant alleges a constitutional violation, however, this court will make its own evaluation of the totality of the circumstances under which the postconviction ruling was made. *Id.*

II. Gregg claims the district court erred in accepting his guilty plea because an insufficient factual basis for the plea was presented at the plea proceeding. He admits he did not file a motion in arrest of judgment. He asserts this failure was due to ineffective assistance of counsel. Gregg believes the crime of theft by misappropriation is a specific intent crime. He states he never admitted he had an intent to defraud Mason and claims no factual basis was presented to show he had such an intent.

Where a criminal defendant is informed by the trial court as to the necessity of filing a motion in arrest of judgment in order to challenge a guilty plea, he is then precluded from raising a claim there was no factual basis for his plea unless his failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982).

To establish a claim of ineffective assistance of counsel, a postconviction applicant 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 an applicant 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 guilty plea has a factual basis. *See 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).

The State asserts this issue was decided adversely to Gregg in our previous decision. We held there was a factual basis for the plea. However, Gregg raised for the first time in postconviction proceedings his claim there was no factual basis to show a specific intent to defraud the ward, which he believes is an element of theft by misappropriation.

The Iowa Supreme Court has clearly stated a general criminal intent, but not a specific intent to defraud, is an element of the crime of theft by misappropriation. *Eggman v. Scurr*, 311 N.W.2d 77, 81 (Iowa 1981); *see also State v. Ludvigson*, 482

N.W.2d 419, 423 (Iowa 1992) (theft by misappropriation is not a specific intent crime); *State v. Bugely*, 408 N.W.2d 394, 396 (Iowa App. 1987) (theft by misappropriation is a general intent crime); *State v. Nicholson*, 402 N.W.2d 463, 465 (Iowa App. 1987) (theft by misappropriation is not a specific intent crime).

Because a specific intent to defraud is not an element of theft by misappropriation, Gregg's guilty plea could not be invalid due to a lack of factual basis showing this specific intent. There need be only a factual basis to show a general criminal intent. *Ludvigson*, 482 N.W.2d at 422-23. Our previous decision addressed the issue of general criminal intent and found Gregg had admitted he was conservator of the ward's account, he transferred money from the ward's account to the Bluebird account, and he was the only person who had access to the Bluebird account.

We determine there was a sufficient factual basis for Gregg's guilty plea. We conclude a challenge to the plea proceeding would not have been successful. Gregg has failed to show he received ineffective assistance of counsel due to his counsel's failure to file a motion in arrest of judgment.

III. Gregg contends he received ineffective assistance because his counsel did not raise all available defenses. He believes he should not be subject to criminal prosecution for conduct done under a reasonable interpretation of probate court orders. He states he relied on the November 1990 order which gave him permission

to enroll Mason in a flying club. He stated he reasonably believed this order gave him the right to start his own flying club with Mason as a member.

This issue again goes to Gregg's intent. Gregg is actually claiming he did not have a criminal intent because he thought his actions were authorized by the probate court. We have already concluded the issue of general criminal intent was decided adversely to Gregg on direct appeal. We therefore need not address this issue further.

IV. Gregg claims he received ineffective assistance of counsel due to his counsel's failure to conduct an adequate investigation of exculpatory documents and evidence, which he claimed prejudiced him. This issue was also decided adversely to Gregg on direct appeal of his conviction.

V. Gregg asserts he received ineffective assistance of counsel due to his counsel's failure to pursue an evaluation of his mental state. He states at the time he entered his plea he was suffering from amnesia which prevented him from recalling any events from December 1990 to June 30, 1991. He states he was unable to fully assist in his defense.

The record shows the district court did order a mental health evaluation of Gregg on July 11, 1991. However, it was Gregg who requested he be released from the Mental Health Institute before the evaluation was completed. In his application to be released, dated July 22, 1991, Gregg stated he was not interested in raising any mental health defenses. Because Gregg asked to be released before the evaluation

was completed, we find he is unable to now claim ineffective assistance of counsel due to the fact the evaluation was not completed.

After reviewing all arguments raised by Gregg in this appeal, we affirm the decision of the district court denying his request for postconviction relief. Costs of this appeal are assessed to Gregg.

AFFIRMED.