

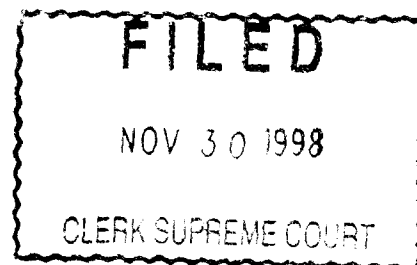
IN THE COURT OF APPEALS OF IOWA

No. 8-550 / 97-1918
Filed November 30, 1998

STATE OF IOWA,
Appellee,

vs.

SABRA ROGERS,
Appellant.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Sabra Rogers appeals the judgment and sentence entered upon her guilty plea for kidnapping in the second degree and robbery in the first degree. **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for appellee.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

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

VOGEL, J.

Sabra Rogers appeals the judgment and sentence entered upon her guilty plea for kidnapping in the second degree and robbery in the first degree. We find Rogers' trial counsel was not ineffective for failing to file a motion in arrest of judgment and motion for reverse waiver, and therefore affirm. However, we find the record inadequate to address another claim of ineffective assistance, and therefore preserve it for postconviction relief.

Background facts. On May 15, 1997, Rogers, then aged fifteen, and three friends, Laura Hochmuth, John August, and James Schultz were hitchhiking in the Quad City area when Scott York stopped to give them a ride. Rogers gave him directions to a relative's house, but when they arrived, the group overpowered York and forced him into the back seat. Hochmuth took York's wallet, emptied it of its cash, then Schultz drove to York's bank where Rogers and Hochmuth used York's ATM card.

The group drove to Omaha, then Kansas City, and eventually left York, who had been severely beaten, for dead in a field in Cherokee County, Kansas. Rogers and her friends then drove to Mexico where they stayed for several days before returning to United States and informing the police that they had been kidnapped.

Rogers was arrested and charged with first-degree kidnapping and two counts of first-degree robbery. The juvenile court waived its jurisdiction over Rogers so that she could be prosecuted as an adult. Rogers eventually pled guilty to second-degree

kidnapping and one count of first-degree robbery. The court sentenced her to two consecutive twenty-five year terms. Rogers now appeals.

I. Voluntary and intelligent plea. Rogers asserts that her plea was not entered into voluntarily and intelligently. However, error was not preserved on this issue because Rogers' counsel did not file a motion in arrest of judgment. *See* Iowa R. Cr. P. 23(3)(a). Furthermore, we cannot consider this claim in the context of ineffective assistance because Rogers does not raise such a claim with regard to counsel's failure to file a motion in arrest of judgment attacking the plea on these grounds. *See State v. Carter*, 582 N.W.2d 164, 165 (Iowa 1998).

II. Ineffective assistance. Rogers claims her trial counsel rendered ineffective assistance of counsel in failing to file a motion in arrest of judgment challenging the factual basis for her plea; failing to file a motion for "reverse waiver"; and advising her to plead prior to the court's ruling on her pretrial motions.

To prevail on a claim of ineffective assistance, the defendant must show (1) his counsel failed to perform an essential duty, and (2) prejudiced resulted. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). Our review of this constitutional issue is de novo. *See 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.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *Id.* This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *Id.*

Factual basis. Rogers asserts that the court failed to establish a factual basis for her second-degree kidnapping plea. We address the merits of this claim to determine whether Rogers' counsel was ineffective for failing to file a motion in arrest of judgment.

Generally, 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.*

A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:

1. The intent to hold such person for ransom.

...

Iowa Code § 710.1 (1997). Kidnapping in the second degree is defined as one in which the purpose is to hold the victim for ransom or where the kidnapper is armed with a dangerous weapon. *See Iowa Code § 710.3 (1997).*

Rogers asserts that the facts presented at the plea sentencing did not establish that Rogers held York for ransom. However, in response to the court's inquiry with regard to the kidnapping charge, Rogers stated:

On May 15th, I was with a codefendant, Laura Hochmuth, flagging down Scott York. When we flagged him down, we told him that if he gave us his car and his ATM card we would let him go. And at first he didn't give us the number to his ATM card, and we told him that if he just gave us the number we would let him go. When he gave us the number, we didn't let him go.

Rogers's statement establishes that she confined York for his car and ATM card; this is clearly sufficient to establish the element of ransom. *See State v. Hayes*, 532 N.W.2d 472, 475 (Iowa App. 1995) (ransom established where abductors demanded money from the victim and title to his car, even though they never received the demanded ransom).

As we find that a factual basis was established for the plea, we find Rogers' trial counsel did not render ineffective assistance in failing to file a motion in arrest of judgment.

Reverse waiver. Rogers next asserts that her trial counsel was ineffective in failing to file a motion for what is commonly referred to as a "reverse waiver" pursuant to Iowa Code section 232.8(c). That section provides that certain violations committed by a child age sixteen or older "are excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause." However, Rogers was fifteen years of age at the time she committed the offenses, therefore section 232.8(c) did not apply. Instead, the district court had jurisdiction over Rogers pursuant to section 232.45, following the juvenile court's waiver to adult court. A motion for reverse waiver under 232.8(c) would have been meaningless under these circumstances, therefore Rogers has not shown that her trial counsel failed an essential duty.

Premature pleading. Finally, Rogers asserts that her trial counsel rendered ineffective assistance in advising her to plead before the court ruled on her pretrial motions. We find the record on appeal is inadequate to properly address this claim and therefore preserve it for postconviction relief.

Having considered all issues properly before us on appeal, we hereby affirm Rogers' convictions and sentence.

AFFIRMED.