IN THE COURT OF APPEALS OF IOWA

No. 0-319 / 99-916
Filed June 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS VIRGIL NULL,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Curtis Null appeals his judgment and sentence following a guilty plea to eluding in violation of Iowa section 321.279 (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

The State charged Curtis Null with: (1) assault on a police officer with intent to inflict serious injury, in violation of Iowa Code section 708.3A(1) (1997); (2) interference with official acts with intent to cause serious injury, in violation of Iowa Code section 719.1; (3) driving while barred, in violation of Iowa Code sections 321.555(1) and 321.561; and (4) eluding, in violation of Iowa Code section 321.279. Null pled guilty to the driving while barred and eluding charges. Following trial on the remaining charges, a jury convicted Null of the lesser-included offenses of assault on a police officer and interference with official acts. The district court entered judgment and sentenced Null to a total prison term not exceeding three years on the four counts. On appeal, Null contends his trial attorney was ineffective in allowing him to plead guilty to eluding because, in his view, the record did not contain a factual basis to support his plea. We affirm.

Iowa Rule of Criminal Procedure 8(2)(b) requires a court to ensure that a plea has a factual basis. A defendant who wishes to challenge a plea must file a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a); *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). Failure to file the motion will preclude a defendant from challenging the plea's factual basis on appeal, unless the failure is due to ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

An ineffective assistance of counsel claim implicates constitutional rights. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Therefore, our review is de novo. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). While we generally preserve such claims for postconviction relief proceedings, we will consider them

on direct appeal where the record is adequate to address the issue. *Schminkey*, 597 N.W.2d at 788. To succeed on his claim, Null must prove by a preponderance of the evidence that (1) his counsel breached an essential duty, and (2) he was prejudiced by the error. *Gant*, 597 N.W.2d at 504. We may affirm if Null fails to prove either element. *Id.*

The first element requires Null to prove his counsel's performance fell outside the normal range of competence. *Id.* If trial counsel permits a defendant to plead guilty to a charge that lacks a factual basis and then fails to challenge the plea by filing a motion in arrest of judgment, we will find counsel breached an essential duty. *Brooks*, 555 N.W.2d at 448.

In the guilty plea context, the prejudice element generally requires an applicant to show there is a reasonable probability that, but for counsel's errors, the applicant would have insisted on going to trial rather than choosing to plead guilty. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). However, where trial counsel permits a defendant to plead guilty to a charge that lacks a factual basis, prejudice is inherent. *Schminkey*, 597 N.W.2d at 788. We conclude the record is adequate to resolve the issue of whether trial counsel breached an essential duty in failing to challenge the factual basis for Null's eluding plea.

A person is guilty of the aggravated misdemeanor of eluding if:

> . . . while participating in a public offense, as defined in section 702.13, that is a felony, the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual or audible signal as provided in this section.

Iowa Code § 321.279. Null contends the record lacked a factual basis for the "participation in a felony" element of the eluding crime. In determining 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.

Iowa Code section 702.13 states a person is "participating in a public offense:"

> . . .during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be.

This section further states a person may participate in the offense whether the person is successful or unsuccessful in committing the offense. *Id.*; *see also State v. Ceasar*, 585 N.W.2d 192, 198 (Iowa 1998).

The predicate felony charged here was assault on a police officer with intent to inflict serious injury. According to the minutes of testimony, Davenport Police Officer Warren Welke would testify he saw a young woman standing on the shoulder of a road in the early morning hours of January 31, 1999. She was crying and appeared visibly shaken. Welke asked her to sit in the squad car. She told him a man tried to pick her up. At that moment, the man, later identified as Null, drove by the squad car. Welke stopped Null's car and checked the vehicle's registration and the license of the registered owner. He determined the date of birth of the owner was not close to that of Null's and asked Null to get out

of the car. Null did not, and instead began to drive away. The minutes of testimony further stated:

> This witness reached into the vehicle with his left hand behind the steering wheel and grabbed the driver's right hand, as it was on the ignition, attempting to keep him from restarting the vehicle. The driver got the car started and grabbed this witness's left arm tightly with his left hand, pulling it against the steering wheel and got the car in gear again. Sgt. Welke yelled at him to let go, drew his service weapon at the same time. The driver refused to let this witness go, the car began to move and Sgt. Welke knew he had to get loose or he would be injured. He fired 2 bullets into the drivers door. He was then able to pull free just as the car accelerated rapidly. He took one more shot at the left front tire but the tire did not deflate. He will testify regarding the pursuit that ensued and that he gave permission to Sgt. Sievert to ram the vehicle.

These portions of the minutes support the State's charge that Null willfully eluded a marked vehicle while participating in the crime of assaulting a police officer with intent to inflict serious injury. We conclude the record before the plea taking court contained a factual basis for Null's guilty plea to eluding. Therefore, trial counsel did not breach an essential duty in failing to file a motion in arrest of judgment to challenge the factual basis for his plea. Accordingly, we reject Null's ineffective assistance of counsel claim and affirm his judgment and sentence.

AFFIRMED.