IN THE COURT OF APPEALS OF IOWA

No. 8-394 / 97-433

STATE OF IOWA,

Appellee,

vs.

DEAN BARRETT MORGAN,

Appellant.

FILED
AUG 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton and Donna L. Paulsen, Judges.

Dean Morgan appeals his convictions for second-degree theft, domestic abuse assault, and carrying weapons, arguing his trial counsel was ineffective for allowing him to plead guilty to charges for which factual bases were not established. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Ann Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas and Jim Ward, Assistant County Attorneys, for appellee.

Considered by Cady, C.J., and Vogel, and Mahan, JJ.

CADY, C.J.

Dean Barrett Morgan appeals his convictions for second-degree theft, domestic abuse assault, and carrying weapons. He claims his trial counsel was ineffective for allowing him to plead guilty to the charges without establishing sufficient factual bases for the charges. We affirm the district court and preserve his carrying weapons claim for postconviction relief.

Morgan initially pled guilty to second-degree theft, domestic abuse assault, and operating while intoxicated (OWI), second offense. He later pled guilty to carrying weapons and interference with official acts. The district court subsequently sentenced him to an indeterminate term of five years on the theft-second charge, to be served concurrently with the sentences imposed in the other cases with the exception of a one-year term of incarceration for the interference charge. This sentence was to be served consecutively to the other sentences. Morgan did not file a motion in arrest of judgment.

On appeal Morgan claims his counsel was ineffective by allowing him to plead guilty to second-degree theft, domestic abuse assault, and carrying weapons when facts did not exist to support the guilty pleas.

I. Ineffective Assistance

Morgan's claim of ineffective assistance of counsel involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Morgan must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen,* 565 N.W.2d 333, 336 (Iowa 1997). Morgan must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

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. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Conversely, where a factual basis exists

for the plea, counsel will not usually be found ineffective for allowing the defendant to plead guilty. *Id.* In determining whether a factual basis for Morgan's plea exists, we consider the entire record, including the minutes of testimony and the plea colloquy. *See id.* at 448-49; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996).

Morgan maintains he received ineffective assistance of counsel because his trial attorney failed to ensure adequate factual bases existed for the charges of second-degree theft, domestic abuse assault, and carrying weapons.

A. Second-Degree Theft

Morgan asserts a factual basis was not established for theft because during the plea colloquy he referred to the stolen item as a "thing," thus rendering it impossible to identify the specific item or establish the value of the item. *See* Iowa Code § 714.2(2) (1997). During the district court's dialog with Morgan, however, the court expressly told him if he went to trial the State would have to prove he "exercised control over stolen property, a 1995 Honda motorcycle." While Morgan later referred to the motorcycle as a "thing," the previous dialog established the nature of the property stolen. Because a motorcycle is considered a "motor vehicle" for second-degree theft purposes, a factual basis for Morgan's guilty plea was established. *Id.*; *see also* § 321.1(42)(a),(d). Accordingly, Morgan did not receive ineffective assistance of counsel on this charge.

B. Domestic Abuse Assault

Morgan next asserts an inadequate dialog occurred to establish a factual basis for the type of injury necessary to support domestic abuse assault. The following dialog occurred between the district court and Morgan:

> COURT: Okay. Tell me what you did to get this domestic abuse assault filed against you.
> MORGAN: My ex-wife and I were--got in an argument. And she pushed me and I slapped her.
> COURT: As a result of the slap, did she receive a bodily injury?
> MORGAN: Yeah.

Morgan contends it is not possible to establish a bodily injury occurred in this case without evidence the victim suffered pain or illness from the blow. *See State v. Gordon*, 560 N.W.2d 4, 6 (Iowa 1997). He emphasizes that while it can be established he slapped his wife, it cannot necessarily be inferred a "bodily injury" occurred. Accordingly, he claims the facts reveal nothing more than simple misdemeanor domestic assault.

Because we consider Morgan's claim within the context of ineffective assistance of counsel, we conduct a de novo review of the record, and, therefore, consider the entire record in determining whether a factual basis exists. Morgan cannot claim he received ineffective assistance of counsel for pleading guilty when a factual basis did in fact exist in the record. *See Brooks*, 508 N.W.2d at 632.

In this instance, the minutes of testimony indicate Morgan's ex-wife had been to the doctor twice for injuries sustained during the assault and had a visible bruise under her right eye. She was diagnosed as having a "contused right ophthalmic margin and left temporal region." While a red mark or bruise does not per se constitute a bodily injury, it may be evidence of the existence of a such an injury. *Gordon*, 560 N.W.2d at 6. Based on the information contained in the minutes of testimony, we conclude the description of the injuries provides a factual basis for domestic abuse assault.

Morgan also maintains the court did not establish he had previously been found guilty on a domestic abuse charge. The State points out the trial information contained a list of prior domestic abuse charges. Because these charges establish Morgan's prior domestic abuse history, the trial information provides a factual basis for the enhanced domestic abuse charge.

C. Carrying Weapons

Finally, Morgan contends a factual basis does not exist for the charge of carrying weapons. Specifically, he asserts the record does not establish his knowledge of the gun's presence in his car.

During the plea colloquy, Morgan initially admitted to driving his car with a gun between the front seats. He stated, however, the gun did not belong to him. He indicated it was placed in the car by a friend, and he had no knowledge it was there. He did admit he was close enough to the weapon to exercise control over it.

Because knowledge of possession was part of the factual basis to be proven for the offense, the State and defense counsel asked the court to rule based upon the stipulated facts contained in the trial information and minutes of testimony. The district court then found the stipulated facts supported a finding of guilty to the charge of carrying weapons.

It is unclear from the record why Morgan's counsel permitted him to stipulate to the findings in the minutes of testimony and trial information when he admitted in the plea colloquy he lacked knowledge of the gun's presence in his car. Consequently, we preserve this claim for postconviction relief to enable counsel to explain the decisions. We have considered all of Morgan's arguments and otherwise affirm the district court.

AFFIRMED.