

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 19-0925
)
 AJAMU MANU EL-AMIN,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE WILLIAM P. KELLY, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED APRIL 29, 2020

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CERTIFICATE OF SERVICE

On the 13th day of May, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ajamu Manu El-Amin, No. 0035821, Iowa Medical and Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241.

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE IOWA CONSTITUTION WHEN PLEA COUNSEL ALLOWED DEFENDANT TO ENTER A GUILTY PLEA DESPITE THE LACK OF A FACTUAL BASIS?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW the Defendant-Appellant, Ajamu El- Amin, and pursuant to Iowa R. App. P 6.1103 hereby makes Application for Further Review of the April 29, 2020, decision of the Iowa Court of Appeals in the case of State of Iowa v. Ajamu El-Amin, Supreme Court No. 19-0925.

1. The Court of Appeals erred in holding that the defendant was not denied effective assistance of counsel when there was a lack of factual basis for defendant's guilty plea.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Ajamu Manu El-Amin, from his convictions, sentence and judgment for two counts of sexual abuse in the third degree in violation of Iowa Code sections 709.1(1) and 709.4(1)(a) (2017). Judgment was entered following defendant's guilty plea in Polk County District Court with the Honorable William P. Kelly, presiding.

Course of Proceedings: On May 3, 2018, the State filed a trial information charging defendant with sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3(c) (2017). (Trial Information) (App. pp. 4-5).

On May 6, 2019, defendant entered a guilty plea pursuant to an agreement with the State. Under the terms of the agreement, defendant would enter pleas of guilty to two counts of sexual abuse in the third degree. (Plea Tr. p. 80 Line 12 – p. 81 Line 6). The defendant would be sentenced to ten years on each count to be served consecutively. (Plea Tr.

p. 80 Line 12 – p. 81 Line 6). The District Court accepted the pleas as knowing and voluntary. (Plea Tr. p. 120 Line 17 – p. 121 Line 13).

Defendant requested immediate sentencing and waived his right to a delay before sentencing, his right to file a motion in arrest of judgment, and his right to use of a presentence investigation report. (Plea Tr. p. 122 Line 21 – p. 125 Line 17). The Court adopted the plea agreement and sentenced defendant to consecutive sentences of imprisonment.

(Sentencing Order) (App. pp. 6-11). The sentences were also ordered to be served consecutively to a sentence previously imposed. (Sentencing Order) (App. pp. 6-11). The court imposed the minimum fines on both counts. (Sentencing Order) (App. pp. 6-11).

Defendant filed notice of appeal on June 4, 2018. (Notice) (App. p. 12).

Facts: Defendant entered guilty pleas to two counts of sexual abuse. (Sentencing Order) (App. pp. 6-11). During

the plea taking hearing, when asked to provide a factual basis for the charges, defendant stated that he, “[f]orced Gina to have sex and then intimidated that other guy and made sure that he had sex with her too.” (Plea Tr. p. 116 Lines 7-9).

ARGUMENT

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE IOWA CONSTITUTION WHEN PLEA COUNSEL ALLOWED DEFENDANT TO ENTER A GUILTY PLEA DESPITE THE LACK OF A FACTUAL BASIS.

A. Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983); *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013), *State v. Ortiz*, 789 N.W.2d 761 (Iowa 2010). Defendant’s failure to file a motion in arrest of judgment does not preclude him from challenging the defects in the plea proceeding if that failure resulted from ineffective assistance of counsel. *See State v. Straw*, 709 N.W. 128, 133 (Iowa 2006).

We have recognized an exception to the rule when a defendant alleges trial counsel was ineffective for permitting him to plead guilty to a charge for which there is no factual basis and for failing to thereafter file a motion in arrest of judgment. *See, e.g., State v. Allen*, 708 N.W.2d 361, 368 (Iowa 2006); *State v. Royer*, 632 N.W.2d 905, 909 (Iowa 2001); *State v. Schoelerman*, 315 N.W.2d 67, 72–73 (Iowa 1982); *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013).

B. Standard of Review: When a defendant asserts a constitutional violation, the reviewing court makes an independent evaluation of the totality of the circumstances, which is the equivalent of a de novo review. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

C. Argument: A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the

defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984). See also *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant has the burden to prove both of these elements by a preponderance of the evidence. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2065, 80 L.Ed.2d at 693. A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. *Henderson v. Scurr*, 313 N.W.2d 522, 524 (Iowa 1981). The defendant must show "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 446 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. In the context of a guilty plea, a defendant must show there was a reasonable probability that "but for counsel's errors, he or she would have pleaded not guilty and would have insisted on going to trial." *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006).

Defendant contends plea counsel provided ineffective assistance by allowing him to enter a guilty plea and not filing a motion in arrest of judgment despite the lack of a factual basis for the charge on sexual abuse in the second degree. "Defense counsel violates an essential duty when counsel permits defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support the defendant's guilty plea." *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). "Prejudice is presumed under these circumstances." *Id.* at 764–65.

A district court must ensure that a plea is supported by a factual basis before accepting a guilty plea. Iowa R. Crim. P. 2.8(2)(b) (2017); *Finney*, 834 N.W.2d at 61.

This requirement exists even where the plea is an *Alford* plea. Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty. *Id.* Prejudice in such a case is inherent. Therefore, our first and only inquiry is whether the record shows a factual basis for [defendant's] guilty plea to the charge of theft of a motor vehicle. In deciding 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.

State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999). See also *Farley v. Glanton*, 280 N.W.2d 411, 416 (Iowa 1979) (factual basis for *Alford* plea substitutes for admission of guilt). “[U]nder no circumstances may a conviction upon [a] plea of guilty stand if it appears that the facts of the charge do not state a violation of the statute under which the charge is made.” *State v. Mitchell*, 650 N.W.2d 619, 620 (Iowa 2002); see also *Schminkey*, 597 N.W.2d at 788.

Defendant was originally charged with one count of

sexual abuse in the second degree. (Information) (App. pp. 4-5). Pursuant to a plea agreement the State orally amended the trial information to charge defendant with two counts of sexual abuse in the third degree in violation of Iowa Code sections 709.1(1) and 709.4(1)(a). (Plea Tr. p. 80 Line 12 – p. 81 Line 6, Sentencing Order p. 1) (App. p. 6). The victim in count I was identified as Gina Simmons and the victim in count II was identified as Jonathan Campbell. (Plea Tr. p. 80 Line 12 – p. 81 Line 6, Sentencing Order p. 1) (App. p. 6).

Iowa Code section 709.1(1) (2017) states as follows:

Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:

1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

Iowa Code section 709.4(1)(a) states as follows:

1. A person commits sexual abuse in the third

degree when the person performs a sex act under any of the following circumstances:

a. The act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person.

The following exchange occurred when the district court asked the defendant to provide a factual basis for the charges:

THE COURT: Okay. Now, we're talking about third-degree sexual abuse under Iowa Code section 709.4, so I want to just go over those elements with you.

So the State would have to prove that in Polk County, Iowa, on or about April 4th of 2017, either individually or by joint criminal conduct, or by aiding and abetting another, you committed sexual abuse in the third degree by performing a sex act by force or against the will of another person and you weren't cohabiting as husband and wife.

Mr. Salvner, what am I leaving out here?

MR. SALVNER: I don't think you are leaving anything out. It's essentially -- and, Your Honor, I submitted one order and then I submitted another one that's marked, "Use this one," because I think it's really important with my Amended Trial Information to include -- I missed a really important subsection. So sex abuse in the third degree has many ways that it can occur. 709.4(1)(a) is the one that Mr. El-Amin is pleading guilty to, which is a crime against an adult, by force or against the will of that

individual. So those are the elements.

THE COURT: So, Mr. El-Amin, you understand they would have to prove that you were in Polk County, Iowa, on that date and time and committed that crime. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Do you understand each and every element of the crime charged?

THE DEFENDANT: Yes.

THE COURT: Have you and Mr. Bailey discussed the charges and the elements of those crimes?

THE DEFENDANT: Yes.

THE COURT: Mr. El-Amin, did you, in Polk County, Iowa, on April 4th of 2017, commit the crimes of sexual abuse in the third degree?

THE DEFENDANT: Yes.

THE COURT: Can you tell me in your own words exactly what you did to commit those two charges.

THE DEFENDANT: Forced Gina to have sex and then intimidated that other guy and made sure he had sex with her too.

THE COURT: All right. I'm going to break it down a little bit more. So can you tell me where

you were at when you were engaging in a sex act, by force, with Gina.

THE DEFENDANT: In the alley behind South -- in the alley behind St. Vincent de Paul.

THE COURT: Okay. What town were you in?

THE DEFENDANT: Des Moines, Iowa.

THE COURT: That's in Polk County, Iowa?

THE DEFENDANT: It's right there off Sixth Street.

THE COURT: All right. And would you agree you did engage in a sex act against the will of Gina?

THE DEFENDANT: Yes.

THE COURT: And you had another gentleman that was there with you?

THE DEFENDANT: Yes.

THE COURT: Do you remember his name?

THE DEFENDANT: Jonathan Campbell.

THE COURT: All right. What did you do to Mr. Campbell?

THE DEFENDANT: Intimidated him to have sex, too.

THE COURT: And who did he have sex with?

THE DEFENDANT: Gina Simmons.

THE COURT: It was in the same alley, in Des Moines, Iowa?

THE DEFENDANT: Yeah.

THE COURT: In Polk County, Iowa?

THE DEFENDANT: Yep, right by Sixth Avenue.

THE COURT: And can you tell me how you used intimidation to get him to do that.

THE DEFENDANT: He says it was a knife, but it wasn't a knife. It was a stick. A stick -- a thick one, like Gina said it was. He said a knife. Gina said a stick. It was a stick.

THE COURT: All right. So you have a big stick. And what was -- what were you doing with the big stick?

THE DEFENDANT: Threatening him with it, to have sex with her. Like, I was going to poke him with it.

THE COURT: And did he in fact have sex?

THE DEFENDANT: Yes.

THE COURT: And did you in fact have sex with Gina?

THE DEFENDANT: Yes.

THE COURT: Mr. Bailey, do you have any

further questions for Mr. El-Amin?

MR. BAILEY: No, Your Honor.

THE COURT: Mr. Salvner?

MR. SALVNER: No, Your Honor.

(Plea Tr. p. 114 Line 15 – p. 118 Line 11).

The district court relied on the defendant's statements, the prosecutor's statements and the minutes of evidence in finding that a factual basis exists. (Sentencing Order p. 1) (App. p. 6). The factual basis, however, is lacking in regards to the second count. (Plea Tr. p. 114 line 15 – p. 118 Lines 11, Minutes) (Conf. App. pp. 4-30). There is no indication that defendant performed a sex act upon Jonathan Campbell. Defendant's trial counsel should not have allowed defendant to plead guilty to a crime which defendant did not commit.

In order to be guilty of sexual abuse in the third degree under code sections 709.1(1) and 709.4(1)(a), the defendant must have committed a sex act under certain circumstances upon the victim. We look "first and foremost to the language

it chose in creating the act.” *In re Det. Of Swanson*, 668 N.W.2d 570, 574 (Iowa 2003). “We read the statute as a whole and give it its plain and obvious meaning, a sensible and logical construction, which does not create an impractical or absurd result.” *Id.* (citation and internal quotation marks omitted). “Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it.” *Anderson v. State*, 801 N.W.2d 1, 1 (Iowa 2011) (quoting *Holland v. State*, 253 Iowa 1006, 1011, 115 N.W.2d 161, 164 (1962)).

We conclude that a factual basis to support a guilty plea is so fundamental that it cannot be waived. *State v. Elphic*, No. 14–0600, 2015 WL 408092, at *4 (Iowa Ct.App. Jan. 28, 2015) (quoting *United States v. Culbertson*, 670 F.3d 183, 190–91 (2d Cir.2012)); see also *United States v. Adams*, 448 F.3d 492, 502 (2d Cir.2006) (“A lack of a factual basis for a plea is a substantial defect calling into question the validity of the plea. ‘Such defects are not technical, but are so fundamental as to

cast serious doubt on the voluntariness of the plea,' and require reversal and remand so that the defendant may plead anew or stand trial.” (quoting *Godwin v. United States*, 687 F.2d 585, 591 (2d Cir.1982) (citations omitted))).

Two possible remedies exist in this circumstance. *Royer*, 632 N.W.2d at 909. If a defendant is charged with the wrong crime, dismissal of the charge is appropriate. *Id.* at 910. If it is possible a factual basis can be shown, it is more appropriate to vacate the sentence and remand the case to allow the State to provide a factual basis. *Id.* Since the plea agreement in the instant case encompassed both counts, the judgment and sentence for both counts should be vacated.

CONCLUSION

For all of the reasons stated above, Defendant-Appellant, Ajamu Manu El-Amin, respectfully requests this Court to vacate his conviction, sentence and judgment for remand to the District Court for further proceedings.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$2.15, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 2,841 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Robert P. Ranschau

Dated: 5/19/2020

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