IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0807

REVETTE ANN SAUSER,
Applicant–Appellant,

vs.

STATE OF IOWA,
Respondent–Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
THE HONORABLE THOMAS A. BITTERS, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

In her brief, the defendant suggests this case involves a novel question concerning the appropriate remedy when a plea lacks a factual basis. Defendant's Proof Br. at 21. She is mistaken. At least three controlling Iowa Supreme Court cases address the question of remedy under these circumstances, including one from 2015. *See, e.g.*, *State v. Ceretti*, 871 N.W.2d 88, 97–98 (Iowa 2015) (vacating an entire plea bargain and permitting the State to proceed on remand as it saw fit, because the defendant's sentencing exposure was substantially reduced); *State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006) ("On remand, the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supportable by the available evidence."); *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (allowing the State to reinstate a charge dismissed as part of a plea bargain or re-charge the defendant under a Code section supported by the evidence, when the defendant pled to a crime for which there was no factual basis). This case can be decided based on existing legal principles and transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The applicant/defendant, Revette Ann Sauser, appeals the denial of postconviction relief. Her application was denied by the Delaware County District Court, the Hon. Thomas A. Bitter presiding.

Course of Proceedings

In 2012, with jurors waiting in a nearby room, the defendant pled guilty to second-degree kidnapping, voluntary manslaughter, and going armed with intent.[1] *See* PCR Ruling, pp. 1–2; App. 30–31. The defendant pled guilty following an on-the-record colloquy. PCR Ruling, p. 2; App. 32. The plea colloquy included the following exchange concerning the factual basis for the kidnapping plea:

> **THE COURT:** Okay. First of all, with regard to Kidnapping in the Second Degree, the elements of that offense would be as follows: That you confined without authority or consent an individual named Terry Sauser, with the intent to inflict serious injury upon him, while armed with a dangerous weapon, and that is contrary to Iowa Code Section 710.3.
>
> [...]

[1] Only the kidnapping conviction is at issue in this appeal from an application for postconviction relief.

[DEFENSE COUNSEL]: Your Honor, she had received all of the Minutes, she's received amended and substituted Trial Information, the supplemental Minutes. We didn't go through the deposition process largely because we didn't feel it was necessary, because the DCI had done such an extensive investigation in this matter, and we've been through pretty much what everybody is going to testify to. Is that correct, Revette?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: She -- and we went through the elements of these offenses, and we believe that there are sufficient Minutes, and she's prepared to stipulate that there's sufficient evidence to support these charges. Is that correct?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about that statement that he just made?

THE DEFENDANT: No.

THE COURT: Do you understand what he's telling me?

THE DEFENDANT: Yes.

THE COURT: Okay. All right. So, let's just do this in a briefer format, then, so that I understand that you know what it is we're speaking about today. Okay?

THE DEFENDANT: Okay.

THE COURT: This incident occurred on or about April 3rd, 2011. Is that correct?

THE COURT: It occurred at your home in Ryan, Iowa. Correct?

THE DEFENDANT: Correct.

THE COURT: Ryan is within the State of Iowa and in the County of Delaware, correct?

THE DEFENDANT: Correct.

THE COURT: On that date, did you bring a gun to your living room, knowing you were going to confine Terry Sauser?

THE DE FENDANT: Yes.

THE COURT: You knew you did not have the right to confine Terry Sauser during the argument that the two of you had. Correct?

THE DEFENDANT: Correct.

THE COURT: You also knew that you had the intent to inflict serious injury on Mr. Sauser, correct?

THE DEFENDANT: Correct.

THE COURT: You used the gun that you were carrying to keep Mr. Sauser confined in that space, 17 correct?

THE DEFENDANT: Correct.

THE COURT: During the argument the two of you had, you intentionally shot and killed Terry Sauser as a result of a sudden, irresistible passion which was a result of serious provocation. Is that correct?

THE DEFENDANT: Yes.

> **THE COURT:** And you understand all those words?
>
> **THE DEFENDANT:** Yes.
>
> **THE COURT:** And as a result of the shooting, Mr. Sauser died, correct?
>
> **THE DEFENDANT:** Correct.
>
> **THE COURT:** Does the State wish for any additional colloquy on the offenses?
>
> **[THE STATE]:** No, Your Honor.
>
> [...]

Plea hrg. tr. p. 18, line 17 — p. 22, line 12. The defendant did not file a motion in arrest of judgment following the plea nor did she appeal her convictions. PCR Ruling, p. 2; App. 31.

The defendant later filed an application for postconviction relief asserting various grounds challenging her plea. *See* PCR Application; App. 20–24. The district court denied the application and this appeal followed, wherein the defendant only challenges the factual basis for the kidnapping plea. *See* PCR Ruling; App. 30–37; Defendant's Proof Br.

Facts

The defendant and Terry Sauser were married for 12 years. PCR Ruling, p. 2; App. 31. On April 3, 2011, the defendant was

planning to leave Terry, but they ended up fighting. PCR Ruling, p. 2; App. 31. The defendant claimed Terry told her that, if he couldn't have her, no one could. PCR Ruling, p. 2; App. 31.

The defendant "grabbed a gun" and held it for "30–45 minutes" while she and Terry argued. PCR Ruling, p. 2; App. 31. During this time, she texted a friend: "I've got my gun. He better leave me alone. I'll shoot." PCR Ruling, p. 3; App. 32. According to the defendant, the argument escalated, she "displayed" the gun, and she shot and killed Terry. *See* PCR Ruling, pp. 1–3; App. 30–32; *see also* Autopsy Report (attached to minutes).

DCI agents interviewed the defendant and she gave a variety of different stories. *See* PCR Ruling, p. 3; App. 32; Defendant's Proof Br. at 15–17. She denied making some of the statements—which were recorded—at the PCR trial. *See* PCR Ruling, p. 3; App. 32.

Tom Goodman, the defendant's trial attorney, testified at the PCR trial. He believes there was a sufficient factual basis for the kidnapping charge because the defendant "did hold the gun and pointed it in [the victim's] direction, which I think would basically fit the definition of kidnapping." PCR trial tr. p. 95, line 24 — p. 96, line 6. As he recalled:

> When I -- when I discussed it with Revette in terms of -- in terms of what had occurred, I asked her, you know, Did you hold the gun on him for some time before you fired it? I believe her answer to that was yes. I don't specifically recall that because I -- I had some doubts at least initially as to whether we would have a complete factual basis for that particular charge, but she had indicated that, yes, she was pointing the gun at him, and I said, Well, would he have been free to get up and leave? And she said, Well, I was holding the gun on him.
>
> So I think given those circumstances, that -- like I said, it was a little more tenuous than maybe some other factual basis that you would have in most. … But I think it did meet the – the requirements.

PCR trial tr. p. 104, lines 1–21 (line break modified for clarity).

According to Goodman, the facts established the defendant "did threaten [the victim] with [the gun] that she was going to shoot him, so I think based on the threat, that that probably met the definition for the kidnapping." PCR trial tr. p. 104, line 22 — p. 105, line 16. In particular, Goodman recalled that the victim "sat back on the couch" after the defendant pointed the gun at him, rather than leaving or moving toward her. PCR trial tr. p. 105, lines 17–21. In Goodman's estimation, the facts established confinement: "Well, if she's holding a gun at him, I think that probably in most people's minds would be

confinement." PCR trial tr. p. 106, lines 2–6.

Finally, Goodman testified that he discussed the factual basis with the defendant and that, if she did not agree there were facts to support the charges, they would have gone to trial. PCR trial tr. p. 96, lines 7–15.

ARGUMENT

I. The Defendant Admitted All of the Elements on the Record and There Is a Factual Basis for Her Plea.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Constitutional claims, including allegations of ineffective assistance, are reviewed de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

Merits

The issue at the heart of this case is relatively straightforward: was there a factual basis for the defendant's 2012 plea to kidnapping in the second degree? Based on the defendant's explicit admission to the elements during the plea colloquy, bolstered by additional information in the minutes of testimony and from the testimony of her trial attorney, the answer is yes.

A guilty plea need not be supported by proof beyond a doubt, but there must be a "factual basis" for the charge. *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). Factual-basis review requires less than "the totality of evidence necessary to support a guilty conviction"—it requires "only" that the record "demonstrate facts that support the offense." *See State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). In other words, the record must contain some facts that support the material elements of the conviction, but there is no need for the kind of record required for a conviction. *See id.* As described more recently by the Supreme Court, the factual-basis test does "not require a detailed factual basis, [but does] require the defendant to acknowledge facts that are consistent with the elements of the crime." *Rhoades v. State*, 848 N.W.2d 22, 30 (Iowa 2014).

"[T]he entire record before the district court may be examined" to determine whether a plea contains a factual basis. *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). The factual basis is often found in "four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence.". *Ortiz*, 789 N.W.2d at 768. Here, the best evidence of the plea's factual basis comes from the plea-hearing

transcript, the minutes of testimony, and the statements the defendant made to Goodman (as relayed by Goodman during the PCR trial).

Because this claim is litigated in the context of a postconviction action, it must be evaluated through the rubric of an ineffective-assistance-of-counsel claim. *See generally* Iowa Code ch. 822. The Iowa Supreme Court has held that counsel is ineffective for permitting a guilty plea that lacks a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). On this record, however, counsel was not ineffective because there is an adequate factual basis.

"The defendant's admission on the record of the fact supporting an element of an offense is sufficient to provide a factual basis for that element." *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005). As relevant to this case, second-degree kidnapping has four elements:

1. The defendant confined the victim.
2. The defendant did so with intent to inflict serious injury upon the victim.
3. The defendant knew she did not have the consent of the victim to do so.
4. The defendant was armed with a dangerous weapon.

See Iowa Model Crim. Jury Instr. No. 1000.2 (June 2017 revision).

The defendant admitted to all four elements during her plea colloquy with the judge:

1. The defendant confined the victim:

   THE COURT: You used the gun that you were carrying to keep Mr. Sauser confined in that space, correct?

   THE DEFENDANT: Correct.

Plea hrg. tr. p. 21, lines 15–18.

2. The defendant did so with intent to inflict serious injury upon the victim:

   THE COURT: You also knew that you had the intent to inflict serious injury on Mr. Sauser, correct?

   THE DEFENDANT: Correct.

Plea hrg. tr. p. 21, lines 11–14.

3. The defendant knew she did not have the consent of the victim to do so:

   THE COURT: You knew you did not have the right to confine Terry Sauser during the argument that the two of you had. Correct?

   THE DEFENDANT: Correct.

Plea hrg. tr. p. 21, lines 7–10.

4. <u>The defendant was armed with a dangerous weapon:</u>

THE COURT: On that date, did you bring a gun to your living room, knowing you were going to confine Terry Sauser?

THE DEFENDANT: Correct.

Plea hrg. tr. p. 21, lines 2–5. Because the defendant admitted to all the material facts of the offense, this alone is enough to affirm the denial of postconviction relief, as the plea is supported by a factual basis established during the on-the-record plea colloquy. *Philo*, 697 N.W.2d at 486.

In her brief, the defendant complains that the plea colloquy was somehow flawed because the district court did not define the word "confine." Defendant's Proof Br. at 36.[2] She focuses her argument on a complaint grounded in the *Rich*[3]*–Robinson*[4] line of cases, which require proof that the defendant's confinement of the victim was more than merely incidental to commission of the underlying offense.

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[2] Although such a complaint could possibly be advanced on a voluntariness theory, the defendant explicitly writes in her brief that she is limiting her challenge to a "factual basis" theory. Defendant's Proof Br. at 4 & n.1. This Court should thus find any voluntariness claim waived.

[3] *State v. Rich*, 305 N.W.2d 739 (Iowa 1981).

[4] *State v. Robinson*, 859 N.W.2d 464 (Iowa 2015)

See Defendant's Proof Br. at 26–31. But the *Rich–Robinson* line of cases is only applicable when the purpose of the kidnapping is something *other than* confinement or ransom—like sex abuse. *See State v. Misner*, 410 N.W.2d 216, 222–24 (Iowa 1987).[5] One version of events given by the defendant was that "Terry didn't want her to leave," told her "that if he couldn't have her, no one could," and that she got the gun out so that he would "leave her alone." *See* PCR Ruling, p. 3; App. 32. Under this version of events, the confinement itself was the end goal: she confined the defendant for purpose of making him hold still, not to commit some other additional crime (particularly given her assertion that the murder was an accident). *See* PCR Ruling, p. 3; App. 32. Under *Misner*, the merely-incidental rule from *Rich* is not applicable, as the confinement was the goal of

[5] To the extent the defendant may argue *Misner* actually supports his position because it suggested juries on mixed facts ought to be instructed on all potential bases of a kidnapping (e.g. whether the kidnapping was merely incidental to the commission of other crimes or if the removal/confinement was the motivating purpose of the act), the procedural posture of this case is different. *Misner* was a direct appeal of a jury trial, requiring proper instructions and proof beyond a reasonable doubt. This case reviews whether a guilty plea was supported by a factual basis—whether there is some evidence consistent with the material elements. *Rhoades*, 848 N.W.2d at 30; *Ortiz*, 789 N.W.2d at 768.

the criminal enterprise, not merely to facilitate another crime (like sex abuse). *Misner*, 410 N.W.2d at 222–24.

But even if the defendant were right that the principles of the *Rich–Robinson* line of cases are in play, she is not entitled to relief. The defendant does not cite any case law mandating that a district court read case law aloud to give a lengthy legal definition of every word used in the plea colloquy, for there is no such legal authority. While she does not couch his argument in these terms, it is true that the Iowa Supreme Court has recognized that statutory terms that have a technical legal meaning that *differs* from the term's ordinary usage should be defined in a plea colloquy. *See Rhoades v. State*, 848 N.W.2d 22, 30 (Iowa 2014) (quoting a statute to establish the term "intimate contact" does not have its ordinary meaning of sexual intercourse, but rather "means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus"). However, "confinement" does not have a hypertechnical legal definition that materially differs from its ordinary usage.

According to a common dictionary, "confine" means:

1. to enclose within bounds; limit or restrict:

> *She confined her remarks to errors in the report. Confine your efforts to finishing the book.*
>
> 2. to shut or keep in; prevent from leaving a place because of imprisonment, illness, discipline, etc.:
>
> *For that offense he was confined to quarters for 30 days.*

See Confine, dictionary.com, http://www.dictionary.com/browse/confine (last accessed Dec. 20, 2017). Although the model jury instruction for confinement certainly includes more words, its core paragraph expresses substantially the same underlying concept: "… A person is 'confined' when his freedom to move about is substantially restricted by force, threat or deception. …" Iowa Model Crim. Jury Instr. No. 1000.5 (June 2017 revision).

But even if the defendant is correct that the factual basis was required to satisfy the more-than-merely-incidental *Rich–Robinson* rule, the record still supports the plea. As the PCR court found, based on a review of the minutes and other record evidence, the defendant did not have the gun for some fleeting moment: she had the gun for between 30 and 45 minutes while she argued with Terry and she "displayed" the gun for some portion of that time. *See* PCR Ruling, pp. 2–3; App. 31–32. As Goodman explained at the PCR trial, the

defendant held the gun and pointed it at the victim, causing him to sit back down, rather than move about. *See* PCR tr. p. 95, line 24 — p. 96, line 6; p. 105, lines 17–21. When he asked the defendant whether Terry was free to get up and leave, she responded, "Well, I was holding the gun on him," making clear that pointing the gun prevented Terry's movement, thus confining him. PCR trial tr. p. 104, lines 1–21. This argument, as Goodman recognized, is mostly about common sense: "Well, if she's holding a gun at him, I think that probably in most people's minds would be confinement." PCR trial tr. p. 106, lines 2–6.

The more-than-merely-incident rule is satisfied here because impairing someone's movement is not necessary to shooting them. (People, of course, can shoot at moving targets.) The *Rich–Robinson* factors also point toward adequate evidence of confinement:

- The risk of harm to Terry was substantially increased by impairing his movement because it is easier to shoot and kill a person sitting on a couch than it is to shoot and kill a person who is moving about;
- The risk of detection was significantly reduced because confining Terry allowed the defendant to control the crime scene and prevent him from fleeing before she had a chance to finish the job;

- And escape was made significantly easier because the defendant could not fight back if he was sitting on a couch and unable to reach the gun to defend himself.[6]

Also, while "no minimum period of confinement is required to convict a defendant of kidnapping," the time when the defendant possessed the gun was substantial: 30–45 minutes. *See* PCR Ruling, pp. 2–3; App. 31–32; *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994).

Finally, as to remedy, the case law expressly recognizes that, if counsel is found ineffective because there was no factual basis, the State must be afforded an opportunity to develop a factual basis in the criminal case. *See Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014). Although the defendant seems to suggest *Ceretti* is at odds with this conclusion, it is not. Defendant's Proof Br. at 42. If and only if this Court reverses the PCR court *and* the State is unable to establish a factual basis does it become necessary to apply *Ceretti* and permit the State to elect whether it wishes to pursue sentencing on the remaining counts or vacate and re-negotiate the entire plea deal (or alternatively seek trial on the original charge or charges, which here involve first-degree murder and potentially other counts supported by the

[6] Admittedly, this defendant chose not to flee the scene, but that does not change the fact that confinement eased her escape. Moreover, the factors are non-exclusive and jurors "may" but not are not required to consider the factors. *See* Iowa Model Crim. Jury Instr. No. 1000.5 (June 2017 revision).

evidence). *See State v. Ceretti*, 871 N.W.2d 88, 97–98 (Iowa 2015). While the defendant suggests the district court should get to determine the course of action under these circumstances, *Ceretti* and other cases clearly hold otherwise. *Id.* at 97–98; *State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006) ("On remand, the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supportable by the available evidence."); *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (allowing the State to reinstate a charge dismissed as part of a plea bargain or recharge the defendant under a Code section supported by the evidence, when the defendant pled to a crime for which there was no factual basis). To the extent the defendant suggests alternate remedies based on his misreading of Iowa case law, this Court should reject the invitation, for the defendant cites no legal authority supporting his position, and it is clearly foreclosed by controlling case law.

CONCLUSION

This Court should affirm the denial of postconviction relief.

REQUEST FOR NONORAL SUBMISSION

This routine case assesses whether there is a factual basis for a guilty plea. It should be placed on the nonoral calendar.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,701** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: February 13, 2018

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