

**IN THE COURT OF APPEALS OF IOWA**

No. 0-118 / 09-0754  
Filed March 10, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KRISTY LYNN BENDER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland (plea) and Charles L. Smith (sentencing), Judges.

Kristy Bender appeals from her conviction and sentence for the offense of possession of methamphetamine precursors. **SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor and Cristen Douglas, Assistant Attorneys General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**DOYLE, J.**

Kristy Bender appeals from her conviction and sentence for the offense of possession of a precursor substance in violation of Iowa Code section 124.401(4) (2007). She contends her trial counsel was ineffective in handling her guilty plea. Upon our review, we vacate the sentence and remand for further proceedings.

***I. Background Facts and Proceedings.***

According to the minutes of testimony, on July 30, 2008, a Pottawattamie County Deputy Sheriff stopped a car because the driver was not wearing a seatbelt. Bender was a front-seat passenger in the car. After learning the driver had no valid driver's license, the driver was arrested for driving while barred and placed in the deputy's patrol car. When the deputy learned Bender did not have a driver's license, he called for a tow truck because the owner of the car was unable to come and retrieve the car. The deputy inventoried the car and found items commonly associated with manufacturing methamphetamine. The deputy then also charged the driver with "precursors of drug manufacturing." The driver was transported to jail. The car was towed from the scene, and a Council Bluffs police officer gave Bender a ride to a local shopping mall. After reading the deputy's report, the deputy's supervisor advised him to arrest Bender for "precursors of drug manufacturing." An arrest warrant was prepared and served on Bender on September 16, 2008.

A trial information charged Bender with possession of a precursor substance in violation of Iowa Code section 124.401(4).<sup>1</sup> On January 12, 2009, Bender appeared before the district court and entered a plea of guilty to the charge. She was later sentenced to serve a term of incarceration not to exceed five years. The sentence was suspended and Bender was placed on supervised probation for a period of two years. As a condition of probation, Bender was ordered to reside at the Residential Correctional Facility until maximum benefits had been received.

Bender appeals. She contends her counsel was ineffective in failing to challenge the adequacy of the guilty plea on the ground that the record failed to establish a factual basis for the plea.

## ***II. Scope and Standards of Review.***

Failure to file a motion in arrest of judgment generally precludes challenges to a guilty plea on appeal. Iowa Rs. Crim. P. 2.24(3)(a), 2.8(2)(d); *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001). However, the failure to file a motion in arrest of judgment will not preclude the claim if the failure was the result of ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008); *Kress*, 636 N.W.2d at 19.

Our review of ineffective assistance of counsel claims is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We typically preserve these claims for

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<sup>1</sup> Iowa Code section 124.401(4) states in relevant part:

A person who possesses any product containing any of the following commits a class “D” felony, if the person possesses with the intent that the product be used to manufacture any controlled substance:

    . . . .  
 (b) Pseudoephedrine . . . .

    . . . .  
 (f) Lithium.

postconviction relief although we will resolve them on direct appeal if the record is adequate. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). We conclude the record in this case is adequate to decide this issue.

### ***III. Discussion.***

Bender claims her trial counsel was ineffective for failing to challenge the validity of her plea of guilty on the ground that the record failed to establish the requisite factual basis for the plea. To establish her claim of ineffective assistance of counsel, Bender “must prove by a preponderance of the evidence that (1) h[er] counsel failed to perform an essential duty, and (2) prejudice resulted.” *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (quoting *State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004)). If she fails to prove either prong of the claim, it must fail. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). Under the first prong of this test, counsel’s performance is measured “against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner.” *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004).

The district court may not accept a guilty plea without first determining that the plea has a factual basis. . . . 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. Prejudice in such a case is inherent.

*State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (internal citations omitted). Therefore, our first and only inquiry is whether the record shows a factual basis for Bender’s plea. *Id.* “[W]e 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, [and] the minutes of testimony. . . .”

*Id.*

Relevant portions of the plea record follow:

THE COURT: I need to ask you a few questions to make sure you understand what’s going on here today.

Have you received a copy of the county attorney’s trial information?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: Attached to that county attorney’s trial information were minutes of evidence, which was a list of the witnesses and the evidence the State intended to present against you at trial. Did you review that?

THE DEFENDANT: Yes sir.

THE COURT: Is that information true and accurate?

THE DEFENDANT: Yes, sir.

The minutes of testimony state that the deputy found ten blister packs of various brands of pseudoephedrine wrapped in a plastic bag. A pack of eight AA lithium batteries was found in the glove box. A one-gallon can of Coleman camping fuel and a package of coffee filters were found in the rear seat. Under Bender’s passenger seat, the deputy found four empty pseudoephedrine boxes, three shopping receipts, and three empty Wal-Mart pharmacy bags wrapped up in a plastic bag. The deputy found a black “CO2” gun and a large silver pocket knife under the driver’s seat.

Unlawful possession of a controlled substance requires proof that the defendant: (1) exercised dominion and control over the contraband; (2) had knowledge of its presence; and (3) had knowledge that the material was a controlled substance. *State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973). “In the realm of controlled substance prosecutions, possession can be either actual or constructive.” *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Actual

possession occurs when the controlled substance is found on the defendant's person. *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000). The State concedes, and we agree, Bender did not have actual possession of the precursor methamphetamine ingredients as they were not found on her person. Therefore, we must consider whether the evidence supports a finding of constructive possession. See *id.*; see also *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002).

Possession is constructive where the defendant has knowledge of the presence of the drugs and has the authority or right to maintain control of them. *Cashen*, 666 N.W.2d at 569. Proof of opportunity of access to a place where narcotics are found will not, without more, support a finding of unlawful possession. *Webb*, 648 N.W.2d at 77. In determining whether a defendant had constructive possession, we consider a number of factors, including incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing drugs, and any other circumstances linking the defendant to the drugs. *Id.* at 79. When drugs are found in a motor vehicle, additional factors include whether the contraband was in plain view, whether it was with the defendant's personal effects, whether it was found on the same side of the car seat as the defendant or immediately next to the defendant, whether the defendant was the owner of the vehicle, and whether there was suspicious activity by the defendant. *Cashen*, 666 N.W.2d at 572. Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances, including those not listed above, allow a reasonable inference that the defendant knew of the

drugs' presence and had control and dominion over the contraband. *Id.* at 569. "The existence of constructive possession turns on the peculiar facts of each case." *Webb*, 648 N.W.2d at 79.

The minutes of testimony do not reflect that Bender made any incriminating statements or that she made any incriminating actions upon the deputy's discovery of the contraband. There is no evidence that Bender's fingerprints were on any of the materials found in the car. It is not clear from the record which, if any, items were in plain view, although the State asserts the Coleman camping fuel and coffee filters, found in the rear seat were in plain view. The deputy's statement does not indicate those items were "in plain view." None of the items found were found with Bender's personal effects. Four empty pseudoephedrine boxes, three shopping receipts, and three empty Wal-Mart pharmacy bags wrapped in plastic were found under Bender's passenger seat. Other items were found under the driver's seat. Bender was not the owner of the car. There is no suggestion of suspicious activity by Bender.

The items relevant to the possession precursor charge are the ten blister packs of various brands of pseudoephedrine and the eight-pack of lithium batteries.<sup>2</sup> The batteries were found in the glove box, an area not under Bender's control and dominion. The State makes no suggestion to the contrary. The State argues the pseudoephedrine was under Bender's seat. Not so. Only empty boxes were found under her seat. The record is silent as to where in the car the pseudoephedrine was found, so we cannot conclude it was under

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<sup>2</sup> The other items found, not statutorily enumerated as precursors, would be relevant to establish the intent to manufacture any controlled substance prong of the charge.

Bender's control and dominion. Bender did not admit possession of the precursor items. Based on the minutes of testimony and the in-court colloquy, we do not believe a sufficient factual basis for the plea was established.

Where it is possible that a factual basis could be shown, it is appropriate to merely vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis. *Schminkey*, 597 N.W.2d at 792. There may be additional facts and circumstances that do not appear in the minutes of testimony that would support an inference that Bender constructively possessed the relevant precursor items. Therefore, we vacate the sentence and remand for further proceedings at which time the State may supplement the record to establish a factual basis for the crime charged. If a factual basis is not shown, the defendant's plea must be set aside.

**SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**