

IN THE COURT OF APPEALS OF IOWA

No. 0-278 / 09-0994
Filed June 16, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

COLBY ALAN PALMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Defendant appeals from his conviction and sentence entered on a plea of
guilty to possession of contraband, a class D felony, in violation of Iowa Code
section 719.7 (2009). **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, John P. Sarcone, County Attorney, and Susan Cox and Jim Ward,
Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J.
takes no part.

VOGEL, P.J.

Colby Palmer appeals from the judgment and sentence entered upon his plea of guilty to possession of contraband, a class D felony, in violation of Iowa Code section 719.7 (2009). He raises an ineffective-assistance-of-counsel claim. Because we find his guilty plea was not supported by a factual basis and therefore, his counsel did breach an essential duty, we vacate the sentence and remand.

I. Background Facts and Proceedings.

Palmer was an inmate at Polk County Jail on February 19, 2009, when he was transported to the county courthouse. While at the courthouse, he took an ink pen from his attorney, hid it in his sock, repeatedly denied taking it, and then smuggled it into the jail. Upon return to the jail, deputies discovered the hidden ink pen. On March 18, 2009, Palmer was charged with possession of contraband, a class D felony, in violation of Iowa Code section 719.7(3)(c) and (4)(b).

Subsequently, the State and Palmer reached an agreement regarding three pending charges, whereby the State would reduce a willful injury (a felony) charge to assault with intent to inflict serious injury (an aggravated misdemeanor) and recommend concurrent sentences for all three charges, in exchange for Palmer's guilty pleas. On May 18, 2009, Palmer pled guilty to assault with intent to inflict serious injury, assault on a peace officer, and possession of contraband. During the plea colloquy regarding the possession of contraband charge, the district court read Palmer the items that are statutorily defined as contraband

under section 719.7(1)(b),¹ but then explained that, “The statute actually says that those items that I read are contraband, but the definition is not limited to [] those items.” Palmer indicated his understanding. Palmer then stated that he “took an ink pen from my prior attorney back to the jail,” hid the pen in his sock, and at the time knew the pen was contraband. The district court found that a factual basis for the possession of contraband charge existed. Judgment was then entered and concurrent sentences were imposed. Palmer appeals only his conviction and sentence for possession of contraband, claiming his counsel was ineffective because he allowed him to plead guilty where a factual basis for this charge did not exist.

II. Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v. Martin*, 778 N.W.2d 201, 202 (Iowa Ct. App. 2009). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We normally do not decide such claims on direct appeal, but will where the record is adequate to do so. *Id.* We find the record is adequate in the present case.

III. Analysis.

Prior to accepting a guilty plea, the district court must determine there is a factual basis for the plea. Iowa R. Crim. P. 2.8(2)(b). In determining whether Palmer’s counsel was ineffective, our first and only inquiry is whether the record

¹ Palmer was not charged with possessing the contraband items listed in Iowa Code section 797.1(b), which would have been a C felony under section 719.7(4).

shows a factual basis for Palmer's plea. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *Martin*, 778 N.W.2d at 202. We look to the entire record before the district court at the guilty plea hearing to determine whether a factual basis exists. *Schminkey*, 597 N.W.2d at 788.

Palmer does not challenge the fact that he possessed the ink pen, but rather asserts that an ink pen is not contraband under section 719.7. This section provides,

1. "Contraband" includes but is not limited to any of the following:

a. A controlled substance or a simulated or counterfeit controlled substance, hypodermic syringe, or intoxicating beverage.

b. A dangerous weapon, offensive weapon, pneumatic gun, stun gun, firearm ammunition, knife of any length or any other cutting device, explosive or incendiary material, instrument, device, or other material fashioned in such a manner as to be capable of inflicting death or injury.

c. Rope, ladder components, key or key pattern, metal file, instrument, device, or other material designed or intended to facilitate escape of an inmate.

...

3. A person commits the offense of possessing contraband if the person, not authorized by law, does any of the following:

a. Knowingly introduces contraband into, or onto, the grounds of a secure facility for the detention or custody of juveniles, detention facility, jail, correctional institution, or institution under the management of the department of corrections.

b. Knowingly conveys contraband to any person confined in a secure facility for the detention or custody of juveniles, detention facility, jail, correctional institution, or institution under the management of the department of corrections.

c. Knowingly makes, obtains, or possesses contraband while confined in a secure facility for the detention or custody of juveniles, detention facility, jail, correctional institution, or institution under the management of the department of corrections, or while being transported or moved incidental to confinement.

4. A person who possesses contraband or fails to report an offense of possessing contraband commits the following:

a. A class "C" felony for the possession of contraband if the contraband is of the type described in subsection 1, paragraph "b".

b. A class “D” felony for the possession of contraband if the contraband is any other type of contraband.

5. Nothing in this section is intended to limit the authority of the administrator of any secure facility for the detention or custody of juveniles, detention facility, jail, correctional institution, or institution under the management of the department of corrections to prescribe or enforce rules concerning the definition of contraband, and the transportation, making, or possession of substances, devices, instruments, materials, or other items.

Palmer specifically argues that contraband for a class D felony must fall within the specific items listed in subsections (1)(a) or (1)(c). The State replies that contraband for a class D felony is “any other contraband,” which includes the items listed in subsections (1)(a) and (1)(c), as well as contraband defined by jail rules. See Iowa Code § 719.7(4)(b).

The statute specifically states that contraband “includes but is not limited” to the items listed in subsection (1). For a class C felony, contraband is defined in subsection (1)(b), which includes items other than those specifically listed that are “fashioned in such a manner as to be capable of inflicting death or injury.” *Id.* § 719.7(4)(a). For a class D felony, contraband is defined as “any other type of contraband,” which includes items listed in (1)(a) or (1)(c). *Id.* § 719.7(4)(b). Under subsection (1)(c), the items need not be specifically listed, but may be items “designed or intended to facilitate escape.” *Id.* § 719.7(1)(c).

According to the minutes of testimony, the Polk County Jail rules provide that ink pens are contraband. Upon booking, inmates are required to watch a video about the rules and a Rule Handbook is provided in each pod of the jail for the inmates. We decline the State’s invitation to rest our finding on the Polk County Jail rules regarding contraband under Iowa Code section 719.7(5). The

sheriffs of the ninety-nine counties in Iowa have the authority to establish rules of conduct and behavior for county jail prisoners.² Iowa Code § 356.44. Additionally, a violation of the sheriff's rules may result in the suspension of privileges and may prevent a reduction in sentence for good behavior. *Id.* §§ 356.26-35; 356.46.

However, defining the scope of contraband for purposes of the felony crimes to include a sheriff's jail rules would result in an impermissible delegation of the Iowa legislature's function separately to the sheriff of each county. Our supreme court has stated:

Only the legislature has the power to create and define crime, the only limitation being that such enactment shall not infringe on constitutional rights and privileges. This exclusive legislative function may not be delegated to any other body or agency without adequate guidelines.

State v. Watts, 186 N.W.2d 611, 614 (Iowa 1971) (citations omitted). The language in section 719.7 does not suggest any such delegation of authority by the legislature, nor are there any clear guidelines provided.³ More importantly, each sheriff and other administrators of juvenile and correctional facilities defining contraband by local facility rule could result in over a hundred different lists of contraband items. Thus, what might constitute a D felony in one county may not be a crime in another county based upon the local definitions and lists of contraband.

² Iowa Code section 719.7(5) also refers to the administrator of any secure facility for the detention or custody of juveniles, detention facility, jail, or other correctional facilities.

³ The State refers us to the Iowa Administrative Code rule 201-50.13, which simply directs the jail administrator to prepare a list of permissible items, and states that "all other items shall be considered contraband." This section provides no limitations on the sheriffs' discretion.

Palmer admitted to taking an ink pen from his attorney, hiding it in his sock, and smuggling it into the jail. He also stated that at the time, he knew the ink pen was contraband. The statute does not limit contraband to the items specified. However, contraband for a D felony must fall within the types of items listed in section 719.7(1)(a) or (c). In this case, the State would need to show the ink pen was an instrument “designed or intended to facilitate escape.” See *id.* § 719.7(1)(c). The record before the court at the time of the plea proceedings does not contain information supporting that element. Accordingly, we vacate the sentence on the contraband charge, and remand “for further proceedings to give the State an opportunity to establish a factual basis.” *Schminkey*, 597 N.W.2d at 792. “If a factual basis is not shown, the defendant’s plea must be set aside.” *Id.*

SENTENCE VACATED AND REMANDED.