

**IN THE COURT OF APPEALS OF IOWA**

No. 0-455 / 09-1235  
Filed August 25, 2010

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

**vs.**

**FRANCISCO SEBASTIAN DIEGO-MATEO,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Henry County, Emily S. Dean,  
District Associate Judge.

Defendant appeals contending he was denied effective assistance of  
counsel resulting in his guilty plea to a charge of identity theft. **SENTENCE ON  
IDENTITY THEFT CHARGE VACATED AND REMANDED FOR FURTHER  
PROCEEDINGS.**

Dan Vondra of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney  
General, Darin Strater, County Attorney, and Ed Harvey, Assistant County  
Attorney, for appellee.

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

**POTTERFIELD, J.****I. Background Facts & Proceedings**

In a July 2, 2009 complaint and affidavit, Francisco Sebastian Diego-Mateo was charged with forgery in that he did “intend to defraud the U.S. Government by using a false name & SSN on a social security card & Iowa driver’s license or other instruments issued by the U.S. Government.” In the attached affidavit, Mt. Pleasant police officer Dana Kuster stated that on July 1, 2009, the defendant

was arrested for forgery, having a false social security card & false IA driver’s license under the name of Ruben Roberto Leyva . . . . This info came from a tip by DOT investigator John Riddick who brought it to my (Officer Kuster’s) attention. Francisco Mateo admitted to being in possession of false documents & assuming another person’s identification & was subsequently arrested for forgery.

According to a July 6, 2009 “Officer’s Supplemental Report,” Kuster received a call on June 29, 2009, from Iowa Department of Motor Vehicle investigator John Riddick stating an individual using the name and social security of Ruben Roberto Leyva had a false Iowa driver’s license. Riddick stated the name and social security number belonged to a Hispanic male living in El Paso, Texas. Riddick further stated that the individual using the Leyva name lived at lot #10 in Heritage Trailer Court.

On June 30, Officer Kuster went to lot #10 and saw a Hispanic male matching the Iowa driver’s license photo of Ruben Leyva. Officer Kuster questioned the man, who answered “yes” to questions of whether his name was Ruben Leyva and whether he owned the vehicles in his drive. He responded to questions of his place of birth (he responded Texas) and whether he was

employed (Farmland in Monmouth, Illinois). Further questions were met with a shake of the man's head and his statement that he did not speak English. Officer Kuster informed the man the officer would return the following day with an interpreter and that he should have documentation available.

Officer Kuster returned to the trailer court on July 1 with Officer Cardenas.

Kuster's supplemental report describes the encounter as follows:

I explained to him, with Officer Cardenas interpreting[,] that I had reason to believe that he was not the person he was claiming to be and requested to see any documents which could prove his actual identity.

Ruben stated that he was in fact using a false name and would get his documentation. Ruben stated that he could not find his birth certificate, but produced his wallet. The following items were seized for evidence from Ruben's wallet:

1. Photo ID farmland employee card of Ruben Leyva
2. Two bluecross/blueshield cards of Ruben Leyva
3. Social Security card of Ruben Roberto Leyva
4. Iowa driver's license of Ruben Roberto Leyva
5. Photo ID from the Republic of Guatemala matching that of "Ruben" with the name of Francisco Sebastian Diego Mateo showing a DOB . . . .

I questioned if Ruben was in fact Francisco Mateo and he stated he was. Francisco was informed that he was being placed under arrest for forgery of government documents, based on the information I had received and now validated.

Diego-Mateo was charged with forgery in violation of Iowa Code sections 715A.2(1) and 715A.2(2)(a)(4), and identity theft in violation of section 715A.8(2).<sup>1</sup>

A written arraignment was entered on July 22, which noted that Diego-Mateo "cannot read and understand the English language but [has] had this form explained" by his attorney.

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<sup>1</sup> All references are to the 2009 Iowa Code.

On July 29, 2009, an Immigration and Customs Enforcement notice of action was filed with the district court indicating an investigation had been initiated to determine whether the defendant was subject to removal.

On August 5, 2009, Diego-Mateo entered a written Waiver of Rights and Guilty Plea for Aggravated Misdemeanor Identity Theft. The written plea noted the maximum punishment for an aggravated misdemeanor was imprisonment of up to two years in prison or one year in jail and a maximum fine, the mandatory minimum fine, and an acknowledgment "that if I am not a United States citizen, conviction of this crime may result in my deportation or other adverse immigration consequences." It read further: "I understand that a criminal conviction, deferred judgment or deferred sentence may result in my deportation or have other adverse immigration consequences if I am not a United States citizen."

In the written plea Diego-Mateo waived his jury trial rights; noted that in determining whether there was a factual basis for the plea, the court could examine the minutes of testimony, the investigative reports of law enforcement agents, or by asking defendant or counsel to recite and summarize the facts; and noted that the State would recommend a specific sentence and disposition, which included the "[d]ismissal of all other pending charges."

The written plea provided,

I now state to the Court that I am, in fact, GUILTY of the charge of IDENTITY THEFT, . . . . The present charge against me was committed by me on the 1st day of July, 2009, in this County by my doing the following: I used false documentation, to wit: Social Security Card, IA Driver's License, and other identification issued to Ruben Roberto Leyva.

Judgment was entered that same date, August 5, and Diego-Mateo was convicted of the “amended charge of Identity Theft,”<sup>2</sup> sentenced to pay a fine of \$625 plus costs and surcharges, ordered to pay attorney fees, and given credit for time served.

Diego-Mateo now appeals, contending he received ineffective assistance of counsel.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Ineffective-assistance-of-counsel claims presented on direct appeal are typically preserved for postconviction relief proceedings to allow for a full development of the facts surrounding the conduct of counsel. *Id.* Should we reach the merits because we find the record adequate to review the claim, the defendant must demonstrate (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove that, but for counsel’s breach, there was a reasonable probability he would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

## **III. Ineffective Assistance**

Diego-Mateo did not file a motion in arrest of judgment. A defendant’s failure to move in arrest of judgment may be excused if the failure is due to ineffective assistance of counsel. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

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<sup>2</sup> The record contains an “Order to Dismiss” the forgery charge, filed on September 30, 2009.

Diego-Mateo contends his defense counsel was ineffective in allowing him to plead guilty to identity theft without the requisite factual basis. “Defense counsel fails to perform an essential duty when counsel allows the defendant to plead guilty to a charge for which there is no factual basis and thereafter does not file a motion in arrest of judgment challenging the plea.” *State v. Allen*, 708 N.W.2d 361, 366 (Iowa 2006). A court may not accept a guilty plea without first determining the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

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. Therefore, our first and only inquiry is whether the record shows a factual basis . . . . In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing . . . .

*Schminkey*, 597 N.W.2d at 788 (citations omitted).

Iowa Code section 715A.8(2) provides that a person commits the offense of identity theft if “the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit.” Identification information is defined in section 715A.8(1)(a) and includes the “driver’s license number, . . . social security number, . . . place of employment, [and] employee identification number, . . . of a person.” Section 715A.8(3) states identity theft is an aggravated misdemeanor if “the value of the credit, property, or services does not exceed one thousand dollars.” Iowa Code § 715A.8(3).

Diego-Mateo contends there is no basis for a finding that he “fraudulently use[d] or attempt[ed] to fraudulently use the identification information of another

person”; or that he used the identification of another “with the intent to obtain credit, property, services, or other benefit,” or the value of any such “credit, property, services, or other benefit.”

Intent may be shown by circumstantial evidence and the reasonable inferences drawn from that evidence. *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998). “To deliberately make false statements or give false information in order to gain some advantage is to act with fraudulent intent in the criminal context.” *State v. Acevedo*, 705 N.W.2d 1, 5 (Iowa 2005).

We may examine the minutes of testimony to establish a factual basis for the plea. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The minutes of testimony state that upon questioning by an officer, Diego-Mateo “produced his wallet,” from which the following items were seized:

1. Photo ID Farmland employee card of Ruben Leyva
2. Two bluecross/blueshield cards of Ruben Leyva
3. Social Security card of Ruben Roberto Leyva
4. Iowa driver’s license of Ruben Roberto Leyva
5. Photo ID from the Republic of Guatemala matching that of “Ruben” with the name of Francisco Sebastian Diego Mateo showing a DOB . . . .

Photocopies of these documents were in the record. In the written plea, Diego-Mateo states: “I used false documentation, to wit: Social Security Card, IA Driver’s License, and other identification issued to Ruben Roberto Leyva.” The written plea is in English, but was also signed and dated by the interpreter/translator.

Diego-Mateo stated he used false documentation, i.e., social security card and driver’s license is, issued to Ruben Leyva. He also had an employee card in that same false name. We conclude a fair inference from these documents and

Diego-Mateo's admission is that he used false identification to obtain employment that he could not have obtained by using his true name. "[T]o deliberately make false statements or give false information in order to gain some advantage is to act with fraudulent intent." *Acevedo*, 705 N.W.2d at 5.

We also find that obtaining employment falls within the definition of "other benefit" in section 715A.8(2). In 2003, the legislature amended section 715A.8. The legislative fiscal bureau issued a fiscal note accompanying the bill stating that the bill "expand[ed] the definition [of identity theft] to include the intent to obtain any benefit from the identity theft." H.F. 170 Fiscal Note, 80th Gen. Assemb. (Iowa 2003). After receiving the fiscal note, the house and senate passed the bill. We assume that in passing the bill, the legislature considered the fiscal note and its assumptions. See *State v. Dohlman*, 725 N.W.2d 428, 432 (Iowa 2006). This indicates a legislative intent that "benefit" as used in section 715A.8 include "any benefit."

In *Okoboji Camp Owners Coop. v. Carlson*, 578 N.W.2d 652, 654 (Iowa 1998), the Iowa Supreme Court provided the following definition of "benefit":

A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

We assume the legislature knew of prior judicial interpretations of the term "benefit" and that its use of the term was in the accepted judicially established

context unless there is clear evidence to the contrary. *Jahnke Inc. v. City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971).

When we apply the definition of “benefit” found in case law and the legislative note accompanying the amendment of section 715A.8, it is clear that this section requires “any form of advantage.” The statute clearly states that one commits the crime of identity theft by fraudulently using another’s identification information with the intent to obtain “other benefit.”

However, we are troubled by the absence in the statute of a means to determine the level of offense when the charge is that the defendant obtained an “other benefit,” the value of which is not readily ascertainable or proven. See Iowa Code § 715A.8(3).<sup>3</sup> Where a statute declares conduct to be a crime “but no other designation is given, such act shall be a simple misdemeanor.” Iowa Code § 701.8. Without proof of value of credit, property, or services obtained, the fraudulent obtaining of a benefit by the use of another’s identity must be a simple misdemeanor.<sup>4</sup>

Where a guilty plea has no factual basis in the record, we have subscribed to two possible remedies. See *State v. Mitchell*, 650 N.W.2d 619, 621 (Iowa 2002); *Schminkey*, 597 N.W.2d at 792. Where the defendant was charged with

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<sup>3</sup> Section 715A.8(3) provides two different levels of offense depending on whether the “value of the credit, property, or services” exceeds \$1,000 or does not exceed \$1,000. There is no provision for the level of offense when the defendant allegedly obtains or attempts to obtain an “other benefit.”

<sup>4</sup> The Iowa legislature recently passed a bill to enact a new statute, effective July 1, 2010. This new section will be codified at Iowa Code section 719.1A and provides that a person who knowingly provides false identification information to a peace officer commits a simple misdemeanor. See 3 Iowa Legis. Serv. 96 at 392 (West 2010). In addition, Iowa Code section 718.6(1) provides that a person who reports false information to a law enforcement authority commits a simple misdemeanor.

the wrong crime, we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge, allowing the State to proceed under a Code section supported by the evidence. See *State v. Allen*, 708 N.W.2d 361, 368-69 (Iowa 2006) (finding counsel ineffective where defendant pleaded guilty to charge of introducing a controlled substance into a “detention facility” under Iowa Code section 719.8, but allowing State to pursue charge under section 719.7 on remand). Where it is possible that a factual basis might be established, we have found it more appropriate to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis. See *Schminkey*, 597 N.W.2d at 792 (remanding to allow State opportunity to establish defendant intended to permanently deprive owner of motor vehicle).

There may be additional facts and circumstances that do not appear in the minutes of testimony that would support a finding that Diego-Mateo obtained “credit, property, or services” not exceeding \$1000 under section 715A.8(3). We thus vacate the sentence entered on the identity theft charge and remand for further proceedings. If a factual basis is not shown, the defendant’s plea must be set aside.

We have considered the defendant’s remaining arguments and conclude they are either without merit or moot in light of our ruling.

#### **IV. Conclusion.**

Because Diego-Mateo’s counsel was ineffective for not challenging his plea for lack of a factual basis, we vacate Diego-Mateo’s sentence and remand the case to the district court for further proceedings at which the State may supplement the record to establish a factual basis for aggravated misdemeanor

identity theft. If a factual basis is not shown, the defendant's plea must be set aside and the State may reinstate any charges dismissed in contemplation of a valid plea bargain and file any additional charges supportable by the available evidence.

**SENTENCE ON IDENTITY THEFT CHARGE VACATED AND  
REMANDED FOR FURTHER PROCEEDINGS.**