IN THE COURT OF APPEALS OF IOWA

No. 0-646 / 10-0493
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK WAYNE RYDL,
Defendant-Appellant.

Appeal from the Iowa District Court for Audubon County, James M. Richardson, Judge.

Mark Rydl appeals his conviction for eluding or attempting to elude a pursuing law enforcement vehicle. **SENTENCE VACATED; REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Matthew Remissong, Student Legal Intern, and Francine O'Brien Andersen, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Danilson, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Defendant Mark Rydl entered a written plea of guilty to a charge of eluding or attempting to elude a pursuing law enforcement vehicle, in violation of Iowa Code section 321.279(2) (2009), an aggravated misdemeanor. The district court subsequently entered a judgment of conviction and imposed sentence. Rydl appeals, claiming his plea of guilty is not supported by a factual basis in the record. We vacate the sentence imposed by the district court and remand for further proceedings.

I. Preservation of Error.

The State asserts that Rydl has not preserved error on his present claim, arguing he failed to file the motion in arrest of judgment necessary to appeal a conviction based on a guilty plea. Rydl did not file or pursue such a motion. He argues, however, that he was not obligated to file a motion in arrest of judgment as he was not properly advised of the requirement that he do so.

"Generally, a defendant must file a motion in arrest of judgment to preserve a challenge to a guilty plea on appeal." *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004); *see* Iowa R. Crim. P. 2.24(3)(*a*) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal.").

> Yet, this requirement does not apply where a defendant was never advised during the plea proceedings, as required by rule 2.8(2)(*d*), that challenges to the plea must be made in a motion in arrest of judgment *and that the failure to challenge the plea by filing the motion* within the time provided prior to sentencing *precludes a right to assert the challenge on appeal*.

Meron, 675 N.W.2d at 540 (emphasis added); *see* Iowa R. Crim. P. 2.8(2)(*d*) ("The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal."); *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980) ("No defendant . . . should suffer the sanction of rule 23(3)(a) [now rule 2.24(3)(*a*)] unless the court has complied with rule 8(2)(d) [now rule 2.8(2)(*d*)] during the plea proceedings by telling the defendant that he must raise challenges to the plea proceeding in a motion in arrest of judgment and that failure to do so precludes challenging the proceeding on appeal.").

Rydl's tender of his guilty plea, and the district court's acceptance of it on the same day, involved no personal colloquy between the court and Rydl. However, it is acceptable that there was no direct colloquy between Rydl and the court because

> [i]n *State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002) [the court] determined that it was unnecessary in misdemeanor cases for the trial court to actually engage in an in-court colloquy with a defendant so as to personally inform the defendant of the motion in arrest of judgment requirements. Instead, [the Court] found a written waiver filed by a defendant that properly reflected knowledge of the requirements of rule 2.8(2)(*d*) was sufficient.

Meron, 675 N.W.2d at 541. We employ a substantial compliance standard in determining whether the requirements of rule 2.8(2)(*d*) have been met. *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006); *State v. Loye*, 670 N.W.2d 141, 150 (Iowa 2003). The question thus is whether Rydl's written plea of guilty substantially complied with the informational requirements of rule 2.8(2)(*d*).

Rydl's written plea provided, in relevant part:

> If the court accepts my plea of guilty, I realize:
> (1) . . .
> (2) In order to contest this plea of guilty, I must file a Motion in Arrest of Judgment at least five days prior to sentencing.[1]

Rule 2.8(2)(*d*) "clearly imposes two requirements." *Meron*, 675 N.W.2d at 541. The first is that "the court must 'inform the defendant that any challenges to a plea of guilty *based on alleged defects in the plea proceedings* must be raised in a motion in arrest of judgment.'" *Id.* (emphasis added) (quoting Iowa R. Crim. P. 2.8(2)(*d*)).[2] The second is that "the court must inform the defendant 'that failure to so raise such challenges *shall preclude the right to assert them on appeal*.'" *Id.* (emphasis added) (quoting Iowa R. Crim. P. 2.8(2)(*d*)). "The court must ensure the defendant understands the necessity of filing a motion [in arrest of judgment] to challenge a guilty plea *and the consequences of failing to do so*." *Straw*, 709 N.W.2d at 132 (emphasis added). The "consequence" at issue in Rydl's appeal is the loss of a right to challenge his guilty plea on appeal.

Nothing in Rydl's written plea of guilty informs him that a failure to file a motion in arrest of judgment will preclude him from asserting on appeal an alleged defect in the plea proceeding. We conclude that Rydl's written plea of guilty did not substantially comply with the requirements of rule 2.8(2)(*d*), and

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[1] In the immediately following sentence, Rydl acknowledged that "[t]he right to file a Motion in Arrest of Judgment will be waived by having the court impose a sentence today." However, sentence was not imposed until some eleven weeks after Rydl's written plea of guilty was filed and was accepted by the district court.

[2] Rydl does not claim that his written plea of guilty does not reflect knowledge of this requirement, and so we do not address it.

therefore further conclude that he is not precluded from challenging his plea on appeal.

II. Scope of Review.

We review a claim of error in a guilty plea proceeding for correction of errors at law. Iowa R. App. P. 6.907; *Meron*, 675 N.W.2d at 540.

III. Merits.

Iowa Code section 321.279(2) provides:

> The driver of a motor vehicle commits an aggravated misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle *that is driven by a uniformed peace officer* after being given a visual and audible signal as provided in this section and in doing so exceeds the speed limit by twenty-five miles per hour or more.

(Emphasis added).

A trial court may not accept a guilty plea without first determining the plea has a factual basis, and the factual basis must be disclosed by the record. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The record before the trial court, as a whole, must disclose facts to satisfy the elements of the crime. *Id.* A statutory element of the charged offense of eluding or attempting to elude is that the driver of the law enforcement vehicle is "a uniformed peace officer." Iowa Code § 321.279(2). Rydl asserts that the record before the district court fails to indicate that the pursuing officer was in uniform.

> 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).[3]

Rydl's plea of guilty was filed in writing, and was accepted by the court in writing on the same day. There was no in-court guilty plea hearing, and thus no colloquy between the court and Rydl, no statements made by Rydl (other than those in his written plea, discussed below), and no facts related by the prosecutor (other than in the minutes of evidence, also discussed below). There was no presentence investigation report. As relevant to the issue before us, the written plea of guilty stated:

> The Court, in determining whether there is a factual basis for this plea of guilty, may make such a determination by examining the Minutes of Testimony attached to the Trial Information, by reviewing the investigative reports of law enforcement agents who have investigated the offense, or by asking me or counsel to recite and summarize the material facts that would be offered at trial.

Rydl's plea of guilty did not contain anything indicating the officer driving the law enforcement vehicle was in uniform. Nothing before us indicates that any investigative reports were made a part of the record, or were reviewed or considered by the district court. The record contains no statement by Rydl or his attorney indicating the officer driving the law enforcement vehicle was in uniform. We have carefully reviewed the minutes of evidence, consisting solely of the proposed testimony of the deputy sheriff who pursued and arrested Rydl, and find that those minutes do not in any manner indicate that the deputy was in uniform.

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[3] Because we consider only the "record before the district court at the guilty plea hearing," we may not consider any presentence investigation report unless it was available to the district court at the time of the plea proceeding. *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980).

We conclude the record fails to establish that the law enforcement vehicle was "driven by a uniformed peace officer," and thus fails to establish a factual basis for Rydl's written plea of guilty.[4]

IV. Disposition.

Rydl requests that we reverse his conviction and remand to the district court. The case he cites, however, involved reversal of a conviction and remand for dismissal of a charge where no factual basis for the charge could be shown. *See State v. Miller*, 590 N.W.2d 724, 726 (Iowa 1999). The case relied upon by Rydl is thus inapposite.

> Where a guilty plea has no factual basis in the record, two possible remedies exist. Where the record establishes that the defendant was changed with the wrong crime, we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge. Where, however, it is possible that a factual basis could be shown, it is more appropriate merely to 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 (citations omitted). We conclude this case falls within the latter category. There may be additional facts that do not appear in the minutes of evidence and would show the pursuing officer was in uniform. *See id.* Therefore, we vacate the sentence entered on the eluding or attempting to elude charge and remand for further proceedings at which time the State may

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[4] We note the State's argument that the minutes of evidence state the deputy "was on routine patrol duty," that Iowa Code section 331.657(1) requires that "full-time deputy sheriffs shall wear the standard uniform . . . when on duty," and that this duty thus supports an inference that the deputy was in uniform. However, nothing in the record indicates the deputy was a full-time deputy and thus subject to the requirement of the statute. Further, we question, but need not decide, whether an inference based on a statute can supply the factual basis for a statutory element of a crime that is required for a valid plea of guilty when the cases appear to make clear that "the record" before the district court must itself demonstrate the required factual basis.

supplement the record to establish a factual basis for the charged crime. If a factual basis is not shown, Rydl's plea of guilty to that charge must be set aside. *See id.*

SENTENCE VACATED; REMANDED FOR FURTHER PROCEEDINGS.