

IN THE COURT OF APPEALS OF IOWA

No. 0-907 / 10-0570
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER ZACHARIAH HINES,
Defendant-Appellant.

Appeal from the Iowa District Court for Butler County, Chris Foy, Judge.

Defendant appeals his conviction, based on his guilty plea, for possession of a controlled substance with intent to manufacture a controlled substance.

SENTENCE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, and Greg Lievens, County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.**I. Background Facts & Proceedings**

Based on events that occurred on June 17, 2009, Christopher Hines was charged with multiple drug-related offenses in Butler County Case FECR008801. Subsequently, as a result of events that occurred on January 16, 2010, Hines was charged with additional drug-related offenses in Butler County Case FECR008984.

Hines entered into a plea agreement whereby he pled guilty on March 8, 2010, to possession of a controlled substance with the intent to manufacture a controlled substance,¹ in violation of Iowa Code section 124.401(1)(b)(7) (2009), with an enhancement for being within 1000 feet of a school, section 124.401A, in case FECR008801. He also pled guilty to possession of a controlled substance with the intent to manufacture a controlled substance,² in violation of section 124.401(1)(c)(6), in case FECR008984. In exchange for the guilty pleas, the State dismissed the other charges against him from the June 2009 and January 2010 incidents.

Hines waived his right to file a motion in arrest of judgment and the preparation of a presentence investigation report. He was sentenced immediately after the plea colloquy to a term of imprisonment not to exceed twenty-five years on the first charge, plus five years due to the enhancement in section 124.401A, and a term of ten years on the second charge, to be served

¹ This charge involved “more than 5 grams of a mixture or substance containing a detectable amount of a substance purporting to be Methamphetamine.”

² This charge involved “5 grams or less of a mixture or substance containing a detectable amount of a substance purporting to be Methamphetamine.”

consecutively. Hines appeals only his conviction in case FECR008984, claiming he received ineffective assistance of counsel. Therefore, his conviction and sentence in FECR008801 stands as entered on March 8, 2010.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). 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. Merits.

Hines contends he received ineffective assistance of counsel in FECR008984. Specifically, he claims there was no factual basis to support the plea of guilty he entered on March 8, 2010. We agree. There is no factual basis in the record to show Hines had been engaging in the manufacturing process and had produced "any compound or mixture which contains any quantity or detectable amount of methamphetamine." *State v. Royer*, 632 N.W.2d 905, 909 (Iowa 2001); *State v. Rivera*, 614 N.W.2d 581, 584 (Iowa Ct. App. 2000).

Two possible remedies exist when a guilty plea has no factual basis in the record. *Royer*, 632 N.W.2d at 909-10. First, if the wrong crime was charged, we may vacate the conviction and sentence and remand to the district court to enter an order of dismissal. *Id.* Second, if it is possible that a factual basis could be

shown, it is “more appropriate to vacate the sentence and remand for further proceedings in which the State might have an opportunity to establish a factual basis.” *Id.* We cannot say with certainty that the State would be unable to establish a factual basis on this charge. Therefore, it is possible a factual basis could be established. We conclude the second remedy is more appropriate in this case.

We vacate the sentence in Butler County case FECR008984 and remand to the district court for further proceedings consistent with this opinion. If a factual basis can be established, the case may proceed to sentencing. If a factual basis cannot be established, an order of dismissal shall be entered of record, and the district court can assess the status of the plea agreement.

SENTENCE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.