IN THE COURT OF APPEALS OF IOWA

No. 1-162 / 10-1243
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE ROY SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

David Lee Roy Smith appeals following his plea of guilty to first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

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

POTTERFIELD, J.

David Lee Roy Smith appeals his conviction for first-degree theft following his plea of guilty in violation of Iowa Code sections 714.1(1), 714.2(1), and 714.2(4) (2009). The theft involved a motor vehicle. Smith contends that there was no factual basis to support a finding he intended to permanently deprive the owner of the possession of the motor vehicle, an essential element of theft involving a motor vehicle. *See* Iowa Code § 714.1(1); *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999). He also asks that we remand for resentencing because he was denied his right of allocution. Because there was a factual basis to support the conviction, and any failure to formally afford defendant his right of allocution was harmless, we affirm the conviction.

I. Background Facts.

On June 4, 2010, Smith changed his plea of not guilty to guilty on the charge of theft in the first degree. The prosecutor informed the court, "the only plea agreement we really have is if he pleads guilty to this and just goes to prison we won't enhance it to being an habitual offender because he's an habitual offender without any question." The defendant acknowledged this was his understanding of the plea agreement; waived his right to a jury trial, being given several opportunities to state any objections; and stated he understood the maximum penalties for first-degree theft.

> THE COURT: Now, it's my understanding that there's a plea agreement that whereby you would waive time and agree to proceed to immediate sentencing. Other than that, have any statements been made to you about the penalty the court would give in your case?
>
> THE DEFENDANT: No.
>
> . . . .

The minutes of testimony and the court's colloquy with the defendant establish the following facts. A 2009 Chevrolet Silverado truck was stolen during a burglary at Ken's Electric in Oelwein, Iowa. The truck was equipped with OnStar, which allowed tracking of the vehicle. Smith drove the truck to a scrap dealer in Buchanan County, Iowa, and sold more than a pallet of wire taken during the burglary at Ken's Electric. Smith then drove the truck to the drive-up window of a bank in Raymond, Iowa, where he cashed the check he had received for the sale of the stolen scrap. Police stopped the vehicle as he was driving away from the bank and arrested Smith. At the plea proceeding, Smith admitted he took the truck and he knew it was not his. The court asked, "And you didn't intend on bringing it back?" Smith stated, "No." The court accepted his plea.

> THE COURT: I will find at this time, Mr. Smith, that you are voluntarily entering your plea of guilty, that you fully understand your rights, that you fully understand the consequences of your plea and that there is a factual basis for your plea both on what you have told me and on the minutes in the file.
>
> Ordinarily, there is time between the time you plead guilty and the time of sentencing. During that time you have the right to have a presentence investigation prepared by the Department of Correctional Services, who would make a recommendation to the court as far as the disposition of the case is concerned. Also, you would have time to consider and file a motion in arrest of judgment. By such motion you bring to the court's attention any alleged defects or mistakes that may have been made during the plea proceeding.
>
> It is my understanding that you wish to waive those and proceed to immediate sentencing; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: All right. Do you need any more time to consult with your attorney about that?
>
> THE DEFENDANT: No.
>
> THE COURT: Counsel wish to make any further record?
>
> [PROSECUTOR]: No, Your Honor.

> [DEFENSE COUNSEL]: No, Your Honor.
> THE COURT: All right. And is it your wish to be sentenced today, Mr. Smith?
> THE DEFENDANT: Yes.

After imposing a sentence of an indeterminate term of imprisonment not to exceed ten years, the court inquired: "Is there anything else?" The prosecutor and defense counsel said no.

The defendant now appeals.

II. Ineffective assistance claim.

We review ineffective-assistance-of-counsel claims de novo. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Smith contends his trial counsel was ineffective in allowing him to plead guilty where there was no factual basis for his plea. "Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. A defendant's inability to prove either element is fatal." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (citations omitted). The district court may not accept a guilty plea without first determining the plea has a factual basis. *Schminkey*, 597 N.W.2d at 788. "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." *Id*.

Smith contends that there was no factual basis to support a finding he intended to permanently deprive the owner of the possession of the motor vehicle, an essential element of theft involving a motor vehicle. *See* Iowa Code § 714.1(1); *Schminkey*, 597 N.W.2d at 789. We disagree.

> Because proof that the defendant acted with the specific purpose of depriving the owner of his property requires a determination of what the defendant was thinking when an act was done, it is seldom capable of being established with direct evidence.

Schminkey, 597 N.W.2d 789. The facts and circumstances surrounding the act, as well as any reasonable inferences to be drawn from those facts and circumstances, may be relied upon to ascertain the defendant's intent. *Id*. In *Schminkey*, the defendant entered an *Alford* plea and the minutes of testimony did not contain sufficient facts from which one could infer Schminkey intended to permanently deprive the owner of the vehicle. Here, in addition to the information contained in the minutes of testimony, the defendant admitted during the guilty plea proceeding he took a truck from Ken's Electric knowing it was not his and that he did not intend to bring it back. This is sufficient to establish his intent to permanently deprive the owner of the vehicle. Because counsel has no duty to raise an issue that has no merit, *Graves*, 668 N.W.2d at 881, defendant's ineffectiveness claim fails.

III. Right of allocution.

"Our scope of review of a district court's decision regarding sentencing is for an abuse of discretion or for defects in the sentencing procedure." *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995).

Smith argues he was denied his right of allocution. But we note the defendant stated he was in agreement with the state's enunciation of the plea agreement: that he would proceed to immediate sentencing and the State would not seek a habitual offender enhancement. The defendant requested immediate sentencing. The trial court on several occasions asked Smith whether he had

questions regarding the plea or the sentencing. Smith does not suggest what "information helpful to his cause" he could or might have wished to offer. Under the circumstances presented here, we find any failure of the trial court to formally afford defendant the right of allocution was harmless error. *Id.* at 757 (holding any failure to formally afford defendant his right to allocution was harmless where defendant affirmatively stated he agreed with the recommendation of sentence proposed by the State, the trial court on several occasions asked defendant whether he had any questions regarding his plea agreement or the sentencing recommendations, and defendant had several opportunities to state any objections to the proposed sentence); *see also State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968) (holding defendant was not denied right of allocution where trial court carried out colloquy with defendant himself, during which the defendant had ample opportunity to volunteer any information helpful to his cause or which would constitute reason for withholding sentence).

AFFIRMED.