IN THE COURT OF APPEALS OF IOWA

No. 1-298 / 10-1054
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HEATH MICHAEL KRABILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, John G. Linn (plea) and Mary Ann Brown (sentencing), Judges.

The defendant appeals his guilty plea to third-degree burglary. **AFFIRMED.**

Robert W. Conrad of Conrad Law, Knoxville, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Darin R. Stater, 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).

VAITHESWARAN, J.

Heath Krabill and a friend broke into a woman's home. Krabill restrained the woman's boyfriend while his friend assaulted the woman. Krabill pleaded guilty to third-degree burglary. On appeal, he contends (1) the plea was not made knowingly or intelligently and (2) his trial attorney was ineffective in failing to challenge the factual basis for the plea.

I. We resolve the first issue on error preservation grounds. To preserve error, a person wishing to appeal the adequacy of a guilty plea must first raise such a challenge via a motion in arrest of judgment. *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."); *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006) ("Straw's failure to move in arrest of judgment bars a direct appeal of his conviction."). Krabill concedes he did not file such a motion but argues the district court's failure to advise him of a forty-five day filing deadline absolved him of the obligation to do so. *See* Iowa Rs. Crim. P. 2.8(2)(*d*) (requiring the court to "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"), 2.24(3)(*b*) ("The motion must be made not later than 45 days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case not later than five days before the date set for pronouncing judgment."); *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa

1994) ("Failure by a judge to comply with [Rule 2.8(2)(*d*)] operates to reinstate the defendant's right to appeal the legality of his plea.").

The district court told Krabill

> that any challenge to your plea of guilty based on alleged defects in the court proceedings just completed must be raised in a Motion in Arrest of Judgment, *which motion must be filed no later than five days prior to the time and date set for sentencing*, and a failure to so raise such a challenge shall preclude or waive your right to raise them on appeal.

(Emphasis added.) While Krabill is correct that the district court did not mention the forty-five day deadline, the court told him the motion would have to be filed no later than five days before sentencing, which is essentially the alternate deadline set forth in rule 2.24(3)(*b*). The court also clearly informed Krabill of the consequence of failing to file such a motion. As the court's comments "conveyed the pertinent information," *Straw*, 709 N.W.2d at 132, Krabill was bound by the rule that a failure to file a motion in arrest of judgment bars a challenge to the adequacy of the plea.[1]

II. Krabill next claims his trial attorney was ineffective in failing to challenge the factual basis for his plea. To prevail, Krabill must show that counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Because prejudice is presumed under these circumstances, the focus is on the first prong of the claim. *State v. Ortiz*, 789 N.W.2d 761, 764–765 (Iowa

[1] Krabill does not alternately raise this issue under an ineffective-assistance-of-counsel rubric. *See Straw*, 709 N.W.2d at 133 (stating a defendant's failure to file a motion in arrest of judgment does not bar a challenge to a guilty plea if the failure resulted from ineffective assistance of counsel).

2010). To succeed on that prong, Krabill must show the record lacks a factual basis to support his guilty plea to third-degree burglary. *Id.* at 765.

The record, including the minutes of testimony and the district court's colloquy with Krabill, contains a factual basis for the plea. *Id.* at 767–68; *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public, or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (2009). The district court carefully discussed each of the elements, going so far as to revisit and clarify certain aspects of the crime. The following exchange is illustrative:

> THE COURT: . . . So, Mr. Krabill, do you admit that on the day in question you entered a specific place?
> THE DEFENDANT: Yeah.
> THE COURT: Was this an apartment or a house?
> THE DEFENDANT: House.
> THE COURT: So it would be an occupied structure as I earlier defined for you; would you agree with that?
> THE DEFENDANT: Yeah.
> THE COURT: And it was not open to the public, do you agree with that?
> THE DEFENDANT: Right.
> THE COURT: Did you enter the place with the intent to commit an assault?
> THE DEFENDANT: Me personally, no.
> THE COURT: We've got a problem with the factual basis, Mr. Ort.
> [DEFENSE COUNSEL]: Well, the individual that was with Mr. Krabill did commit an assault, and we're willing to concede that under the definition of aiding and abetting, he would be considered a principal in that assault in the event of a trial.

The court proceeded to explain the aiding and abetting theory to Krabill and then asked him:

> Do you agree in this case that you aided and abetted another who committed the assault?
> THE DEFENDANT: Yes.
> THE COURT: And you knew when the entry occurred that an assault was going to be committed?
> THE DEFENDANT: Yeah.

See Iowa Code § 703.1 (providing that those who aid and abet in the commission of a public offense "shall be charged, tried and punished as principals"); *State v. Hearn*, ____ N.W.2d ____, ____ (Iowa 2011) ("To sustain a conviction under a theory of aiding and abetting, 'the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission'" (citation omitted)). Based on the entire record, we conclude Krabill's attorney did not breach an essential duty in failing to challenge the factual basis for the plea.

We affirm Krabill's judgment and sentence for third-degree burglary.

AFFIRMED.