

IN THE COURT OF APPEALS OF IOWA

No. 1-631 / 10-1904
Filed September 8, 2011

MARTIN REYES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Marlita A. Greve, Judge.

Martin Reyes appeals from the order denying his application for postconviction relief. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Alan Ostergren, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Martin Reyes pleaded guilty to second-degree burglary and received a deferred judgment and two years probation. After Reyes twice violated the terms of his probation, the court revoked his deferred judgment and sentenced him to a ten-year indeterminate prison sentence. Reyes sought postconviction relief, challenging the factual basis for his guilty plea by alleging ineffective assistance of counsel. The district court denied relief.

On appeal, Reyes contends the court erred in denying his postconviction relief application. He alleges the plea's factual basis was lacking for two elements of the burglary offense: (1) that he did not have permission of the occupants to enter and (2) that he had the intent to commit a theft. Because the record shows a factual basis for Reyes's guilty plea to second-degree burglary, neither plea counsel nor direct appeal counsel was ineffective. We affirm the denial of postconviction relief.

I. Background Facts and Proceedings.

The Muscatine County Attorney charged Reyes with second-degree burglary based upon his participation in events that occurred in the early morning hours of November 5, 2005. Reyes—believing Mike Helm owed him money—went to Helm's house with some friends after a party. The door to the house was unlocked, so the group entered. Helm woke up and Reyes asked if Helm had the money he owed Reyes. Helm stated he did not, but would have it the following week.

Reyes began to unplug Helm's Xbox, intending to take the video game console with him because Helm did not have the money. After Helm told Reyes to stop, the group left the house. Helm discovered \$450 was missing from his wallet. Reyes claimed one of his friends took Helm's cash and gave \$200 of it to Reyes.

On February 10, 2006, Reyes entered a guilty plea to burglary in the second degree; he received a deferred judgment and two years of probation. In June 2006, the district court found Reyes violated the terms of his probation and sentenced him to ninety days in jail for contempt. In March 2008, the court again found Reyes in violation of the terms of his probation. The court revoked his deferred judgment and sentenced him to a term of imprisonment not to exceed ten years.

Reyes appealed the decision to revoke his probation. In June 2008, his appellate counsel filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 6.1005(2).¹ After its independent review of the record, the supreme court dismissed the appeal as frivolous.

On December 23, 2009, Reyes filed an application for postconviction relief. The application alleged: (1) the guilty plea lacked a factual basis because it did not show Reyes formed an intent to commit a theft after his right to remain in Helm's home expired; (2) his counsel was ineffective in failing to advise him to file a motion in arrest of judgment; and (3) his appellate counsel was ineffective in briefing the supreme court on why Reyes's claims were frivolous rather than

¹ At the time the appeal was filed, this rule was numbered 6.104.

acting as his attorney. The State sought summary disposition of the application, which the district court denied.

Following a hearing on the merits, the district court issued an October 18, 2010 ruling denying the application. The court found the colloquy at the plea hearing established the necessary elements of second-degree burglary. The court further found that because a factual basis existed for the guilty plea, his counsel was not ineffective in allowing him to plead guilty. Finally, the court held Reyes produced no evidence of ineffective assistance by his appellate counsel.

Reyes filed a notice of appeal on November 17, 2010. He alleges the district court erred in denying his application for postconviction relief because there was no factual basis for his guilty plea, counsel was ineffective in failing to direct him to file a motion in arrest of judgment, and appellate counsel was ineffective in seeking permission to withdraw on appeal.

II. Scope and Standard of Review.

We review the denial of postconviction relief for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights, our review is de novo and we make our own evaluation of the totality of the circumstances. *Id.* Because Reyes's appeal implicates his right to counsel under both the Sixth Amendment of the U.S. Constitution and article I, section 10 of the state constitution, our review is de novo.

III. A Factual Basis Supports the Guilty Plea.

"The court . . . shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." Iowa R. of

Crim. P. 2.8(2)(b). The factual basis must be disclosed by the record, which includes the minutes of testimony, statements made by the defendant and prosecutor at the guilty plea proceeding, and the presentence investigation report. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The plea-taking court is not required to extract a confession from the defendant, but must be satisfied that the facts support the crime. *Id.*

Reyes contends the record does not reveal a factual basis for his plea. On that basis, he argues his trial counsel was ineffective in allowing him to enter a plea of guilty without a factual basis. Reyes first must show by a preponderance of evidence that his counsel failed to perform an essential duty. Counsel's performance is measured against the standard of a reasonably competent practitioner. Reyes then must establish that counsel's omissions resulted in prejudice. *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009). If he fails to prove either prong, the ineffective assistance of counsel claim must fail. *Id.* If a defendant enters a guilty plea to a crime for which the record fails to disclose a factual basis, defense counsel failed to provide effective assistance and prejudice is inherent. *Keene*, 630 N.W.2d at 581.

Reyes pled guilty to burglary in the second degree. Burglary is defined by statute 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 (2005).

To establish Reyes committed burglary in the second degree, the State had to prove:

1. On or about November 5, 2005, the defendant entered into a house.
2. The house was an occupied structure.
3. The defendant did not have permission or authority to enter the house.
4. The house was not open to the public.
5. The defendant did so with the specific intent to commit a felony, theft or assault.
6. During the incident one or more persons were present in or upon the occupied structure.

Reyes challenges the factual basis for the third and fifth elements.

Contrary to Reyes's argument, the record establishes he entered Helm's residence without permission. When the district court asked Reyes at the plea hearing, "Did you know that you didn't have any right or license to go in the house?" Reyes replied, "Yes. Yes, I did." Reyes argues his earlier statement to the plea court that he "unintentionally" entered the house is insufficient to show he lacked permission. The highlighted statement reads in whole, "I went into the house unintentionally with no permission." This admission, followed by Reyes's acknowledgement that he knew he did not have any right to go into the house, establishes Reyes entered Helm's home without right, license or privilege to do so.

We also conclude there is a sufficient showing Reyes entered the house with an intent to commit a theft. The minutes include Helm's expected testimony that he woke up to "find [Reyes] in the living room unhooking my Xbox." Helm's roommate also provided a statement that he woke up and "saw [Reyes]

disconnecting all of our electronics saying he was going to take them” After Reyes and his group left, Helms and his roommate discovered \$450 was missing from Helm’s wallet.

At the plea proceeding, Reyes stated, “I went to Mike Helm’s house, going with the intention to get some money that he owed me, or to come out with something valuable of the money.” When the court asked if it was his intention to take something from Helms, Reyes replied, “Yes, intention to” and further clarified, “Money or something else.” The court then asked if he intended “to take it and steal it,” to which Reyes replied, “Well, yeah.”

Reyes argues the court failed to explain the words “steal” and “stole,” and because of Reyes’s limited education, he did not understand their meaning. We believe that the plea court used these words in their ordinary sense and did not need to define them to satisfy the need for a factual basis. *See State v. Hoffer*, 383 N.W.2d 543, 548 (Iowa 1986) (holding words in a jury instruction need not be defined if they are of ordinary usage and are generally understood). Reyes himself used the word “steal”—explaining that he “didn’t steal” money from Helm’s house, but that his companions “gave it to me when I went to my house.”

Reyes also argues he was never informed that an element of theft is the intent to permanently deprive someone of his or her property. *See State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999). Because proof of such intent is seldom accomplished with direct evidence, we look to the facts and circumstances surrounding the act, as well as any reasonable inferences that may be drawn from those facts and circumstances. *Id.* Looking at those

surrounding circumstances, we find the record supports Reyes's intent to permanently deprive Helm of his property.

Reyes claims the property (either the Xbox or cash) was repayment for a debt Helms owed to him. But forcibly collecting an alleged debt can still be burglary. See *State v. Miller*, 622 N.W.2d 782, 787 (Iowa Ct. App. 2000) ("While the law supports a claim of right defense, it does not condone the invasion of the sanctity of another's home to regain property rights, when viable legal channels exist to effect a remedy. Expanding the claim-of-right defense to burglary would undermine the purpose of the burglary statute."). Reyes's justification for taking Helm's property as repayment for an obligation does not undermine the factual basis for burglary in the second degree.

Because a factual basis was established for Reyes's guilty plea to second-degree burglary, his trial counsel was not ineffective in allowing him to enter the plea and not filing a motion in arrest of judgment.

IV. Appellate Counsel Breached No Duty.

Reyes also claims his appellate counsel was ineffective for choosing not to file a brief on his behalf. Under rule 6.1005(2), court-appointed counsel may move to withdraw representation when, after a diligent investigation of the entire record, counsel is convinced the appeal is frivolous. The rule requires the motion to be accompanied by a brief that refers to anything in the record that "might arguably support the appeal." Here, appellate counsel stated Reyes was precluded from challenging his plea proceeding on direct appeal because he failed to file a motion in arrest of judgment, but failed to note appellate review

was allowed on the basis trial counsel was ineffective in failing to challenge the factual basis for the plea.

Reyes's argument is premised on his claim that the guilty plea lacked a factual basis. Because we have already determined a factual basis for the plea exists, we conclude appellate counsel was under no duty to discuss a meritless claim challenging that factual basis. See *Luke v. State*, 465 N.W.2d 898, 903-04 (Iowa Ct. App. 1990) (finding appellate counsel breached no essential duty by failing to raise meritless claim concerning of trial counsel's performance). Reyes's ineffective assistance of appellate counsel claim must fail.

V. Conclusion.

Because Reyes's claims of ineffective assistance of trial and appellate counsel both fail, the district court properly denied his application for postconviction relief.

AFFIRMED.