

IN THE COURT OF APPEALS OF IOWA

No. 1-634 / 11-0013
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW JERDEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak (sentencing hearing) and Arthur E. Gamble (plea hearing), Judges.

Defendant appeals following his conviction contending his attorney rendered ineffective assistance of counsel by failing to file a motion in arrest of judgment attacking the factual basis for his plea. **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Defendant, Andrew Jerden, appeals his convictions for willful injury causing bodily injury and carrying weapons in violation of Iowa Code sections 708.4(2) and 724.4 (2009). Andrew alleges his trial counsel rendered ineffective assistance by failing to file a motion in arrest of judgment challenging the lack of a factual basis to support his conviction for carrying weapons. Because we agree the record does not show a factual basis for Andrew's conviction of carrying weapons, we vacate the sentence and remand for further proceedings.

I. BACKGROUND AND PROCEEDINGS. Based on the minutes of testimony filed with the trial information, the following facts appear in the record. On June 27, 2010, Andrew got into an argument with his father, David Jerden. David asked Andrew to leave, but Andrew armed himself with an ax and started swinging at David. Andrew also had a knife and stabbed David in the hand and the arm. David ran to the bathroom and Andrew refused to let him out to seek medical attention. Andrew threatened David's life through the door, stabbed at the wall and the bathroom door, and carved the word "kill" into the door. David was able to escape and ran to a neighbor's house where the police were called.

When the police arrived, they observed Andrew in the front room of the house holding a knife and talking to himself. Andrew ran upstairs, and left the knife on a pillowcase in a bedroom. The police ordered Andrew out of the house. He complied with the order and told the officers the knife was in the bedroom upstairs on a pillowcase. The knife and the ax were recovered from the home.

On August 6, 2010, the State filed a trial information against Andrew charging him with attempt to commit murder, willful injury resulting in serious injury, and possession of a controlled substance. Later an amended trial information was filed charging Andrew with carrying weapons instead of possession of a controlled substance. Based on a plea agreement, Andrew agreed to plead guilty to the lesser included offense of willful injury resulting in bodily injury and carrying weapons in exchange for the dismissal of the charge of attempt to commit murder.

The plea hearing came before the court on September 21, 2010. Andrew entered an *Alford*¹ plea, and the court relied on the minutes of testimony to provide the factual basis in accepting the guilty plea. On November 24, 2010, Andrew was sentenced to five years incarceration on the willful injury charge and two years incarceration on the carrying weapons charge. The sentences were to be served concurrently.

Andrew appeals claiming his trial attorney provided ineffective assistance of counsel by failing to file a motion in arrest of judgment challenging the lack of a factual basis to support the carrying weapons charge.

II. SCOPE OF REVIEW. We normally review challenges to guilty pleas for correction of errors at law; however, because Andrew raises his claim in an ineffective-assistance-of-counsel context, our review is de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

¹ In *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970), the United States Supreme Court held an accused may consent to the imposition of a sentence even if unwilling or unable to admit participation in the acts constituting the crime charged.

III. FACTUAL BASIS FOR PLEA. To prove counsel rendered ineffective assistance, Andrew must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b) a court cannot accept a guilty plea without first determining that the plea has a factual basis. Where counsel allows a defendant to plead guilty to a charge that is not supported by a factual basis, counsel has failed to perform an essential duty and prejudice is established. *Id.* Therefore, the only question in this case is whether the record shows a factual basis for Andrew's guilty plea to the charge of carrying weapons. *Id.*

Pursuant to Iowa Code section 724.4(2) a person is guilty of carrying weapons when, a person "goes armed with a knife concealed on or about the person, if the person uses the knife in the commission of a crime." Section 724.4(4) sets out a number of exceptions to this crime, and provides a person does not commit the offense of carrying weapons when, among other things, a person "goes armed with a dangerous weapon in a person's own dwelling or place of business, or on land owned or possessed by the person." Andrew alleges two of the essential elements of the crime—the knife was concealed and he was not in his own dwelling—were missing from the trial information.

A. Concealed Knife. We agree with Andrew's argument that the minutes of testimony do not establish he concealed the knife. Both David and the police officers testify they saw Andrew with a knife and there is no doubt the knife was used in the commission of a crime, but no one states that Andrew

in any way concealed the knife. Thus, we find there is a lack of a factual basis to support the conviction of carrying weapons on this ground.

B. Dwelling Exception. Andrew also asserts there is a lack of a factual basis to prove he was not in his own dwelling at the time he possessed the knife, thus he cannot be convicted of carrying weapons. On this ground, we cannot agree. Our courts have held the dwelling exception to carrying weapons under section 724.4(4) is an affirmative defense and not an element of the crime. *State v. Erickson*, 362 N.W.2d 528, 531 (Iowa 1985). Because it is an affirmative defense, Andrew, not the State, bears the burden of submitting evidence to support the defense. *State v. Wells*, 629 N.W.2d 346, 354 (Iowa 2001). Thus, the State did not need to supply a factual basis for the proposition that Andrew was not in his own dwelling when the crime occurred. If Andrew believed he could prove he was in his own dwelling at the time of the incident, it was up to him to supply this evidence. *Id.*

In addition, when a defendant pleads guilty to a crime, the guilty plea waives all defenses that are not intrinsic in the plea itself. *State v. Cole*, 452 N.W.2d 620, 621 (Iowa Ct. App. 1989). When Andrew pleaded guilty to the crime, he waived the affirmative defense that he was in his own dwelling under section 724.4(4)(a). Because the dwelling exception is an affirmative defense and has been waived by Andrew's guilty plea, trial counsel did not rendered ineffective assistance by failing to challenge the factual basis of the guilty plea on this ground.

IV. DISPOSITION. Because we find there was a lack of a factual basis to support the charge of carrying weapons because there was no proof of the element of concealment, we are faced with two possible remedies. *Schminkey*, 597 N.W.2d at 791. If the record establishes the defendant was charged with the wrong crime, we can vacate the conviction and sentence and remand for a dismissal of that charge. *Id.* However, if it is possible that the State could still establish a factual basis, the appropriate remedy is to vacate the sentence and remand for further proceedings to give the State the opportunity to establish a factual basis. *Id.*

Based on the record, we feel this case falls into the second category. The minutes of testimony state that David would be able to describe the attack and weapons used by Andrew in detail. We find there may be additional facts not appearing in the minutes to support the element of concealment. Therefore, we vacate the sentence entered on the carrying weapons charge and remand this case back to the district court for further proceedings to give the State the opportunity to establish a factual basis. If a factual basis cannot be shown, Andrew's plea must be set aside.

SENTENCE VACATED AND REMANDED.