

IN THE COURT OF APPEALS OF IOWA

No. 1-666 / 10-1753
Filed October 5, 2011

RONALD STOEBE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Ronald Stoebe appeals the summary disposition of his application for postconviction relief. **JUDGMENT AND SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Matthew Wilber, County Attorney, and Margaret Popp Reyes, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

Ronald Stoebe appeals the district court's grant of the State's motion for summary disposition on his application for postconviction relief pursuant to Iowa Code section 822.6 (2009). He contends his postconviction relief counsel was ineffective for failing to argue his original trial counsel was ineffective for not challenging the factual basis of his guilty plea. We find the record does not contain a factual basis to support Stoebe's guilty plea and it does not show that the court determined there was a factual basis; however, because we believe the State may be able to supplement the record to provide a factual basis, we vacate Stoebe's judgment and sentence and remand for further proceedings.

I. Background Facts and Proceedings.

On July 20, 2009, Stoebe was charged by trial information with three counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1(1) and 709.3(1), and one count of distribution of marijuana to a minor in violation of Iowa Code section 124.406(1)(a). Each of the four counts was a class "B" felony carrying a possible sentence of twenty-five years of incarceration. See Iowa Code §§ 124.406(1)(a), 709.3, 902.9. The four counts were also subject to mandatory minimum sentences with the three sexual abuse counts requiring at least seventy percent of the sentence be served, and the distribution count requiring at least five years be served. See *id.* §§ 124.406(1)(a), 902.12(3). Stoebe demanded a speedy trial, and his trial was scheduled to begin on October 13, 2009.

On October 9, 2009, a pretrial hearing was held. At the hearing, the State made a new plea offer to Stoebe to plead guilty to an amended first count of assault with intent to commit sexual abuse, an aggravated misdemeanor, in violation of Iowa Code section 709.11 and receive ninety days in jail with credit for ninety days already served and a special ten year parole under section 903B.2, and have the other three counts dismissed. After an off-the-record discussion with his counsel, Stoebe accepted the State's offer by signing a waiver of rights and plea of guilty. Although the written guilty plea acknowledged that Stoebe had received the State's trial information, it did not set forth or admit any factual allegations.

The written plea was presented to the district court, who immediately engaged in a plea colloquy with Stoebe. During the colloquy, Stoebe was advised of the constitutional rights he was waiving by pleading guilty, including his right to a trial. Stoebe was not asked to make any factual admissions, the State made no offer of facts in support of the plea, and the district court made no reference to the minutes of testimony or any other facts in support of the guilty plea. Following the colloquy, the district court determined that Stoebe's plea was knowingly and intelligently made, and accepted the plea. The district court did not state on the record whether the plea was supported by a factual basis. The district court entered a sentencing order confirming the plea agreement on October 13, 2009. The sentencing order did not recite that there was a factual basis for accepting the guilty plea. Stoebe did not file a direct appeal.

On December 1, 2009, Stoebe filed a pro se application for postconviction relief. Stoebe alleged that he “was scared into a plea because my lawyer did not protect my best interest knowing that the only evidence against me was 3 different stories of alleged incident[s].” Stoebe requested that he be allowed to withdrawal his guilty plea and proceed to trial.

On September 13, 2010, the State filed a motion for summary disposition. Accompanying the motion was a copy of Stoebe’s written guilty plea, a transcript of Stoebe’s guilty plea proceeding, the sentencing order, and transcripts of postconviction relief depositions of Stoebe and his trial counsel. The documents revealed that Stoebe was advised and considered many factors in deciding whether to plead guilty, including the strengths and weaknesses of his case, the risks associated with a trial, and the perceived benefits to himself and his wife by pleading guilty. The documents further showed that Stoebe was not truly upset with how he was represented, but simply regretted his decision to plead guilty and wanted the opportunity to show his innocence.

On September 20, 2010, a scheduling order was filed setting the State’s motion for summary disposition for a hearing at 1:30 pm on October 11, 2010. On October 14, 2010, the district court entered an order granting summary disposition to the State and dismissing Stoebe’s application. The order specifically states that an attorney for Stoebe and the State appeared.

Stoebe filed a timely appeal from this postconviction ruling. On appeal, Stoebe now alleges for the first time that his trial counsel provided ineffective assistance for failing to challenge the factual basis of his guilty plea, and that his

postconviction counsel was ineffective in failing to allege the ineffectiveness of his trial counsel.¹

II. Standard of Review.

We typically review summary dismissals of applications for postconviction relief for the correction of errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, to the extent the application raises a constitutional claim like ineffective assistance of counsel, our review is de novo. *Id.*

III. Factual Basis for Guilty Plea.

Stoebe also contends his trial and postconviction counsels were ineffective for failing to challenge the factual basis for his guilty plea. To establish a claim of ineffective assistance of counsel, Stoebe must prove by a preponderance of the evidence that his counsel failed to perform an essential duty, and this failure resulted in prejudice. *Lado v. State*, ___ N.W.2d ___, ___ (Iowa 2011). Although we normally preserve claims of ineffective assistance of counsel for postconviction relief proceedings, we may address them when the record is adequate. *State v. Utter*, ___ N.W.2d ___, ___ (Iowa 2011). We find the record to be adequate in this case.

Iowa Rule of Criminal Procedure 2.8(2)(b) states 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.” Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway,

¹ Stoebe also alleges the district court erred in granting the State’s motion for summary disposition without a scheduled hearing. Given our resolution of the ineffective-assistance-of-counsel claims, we need not address this issue.

counsel has failed to perform an essential duty. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Prejudice in such a case is inherent. *Id.* This charge requires the record show that the court determined there was a factual basis for the plea and there was sufficient evidence to support the conclusion that Stoebe assaulted the victim with the intent to commit sexual abuse. See Iowa Code § 709.11; *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

In this case, neither Stoebe's written guilty plea² nor his plea colloquy with the district court set forth any facts. In addition, no presentence report was available to the district court. The only possible place that may provide a factual basis is the minutes of testimony. Although the minutes may be used to supply a factual basis, it is essential that the record identify and disclose the factual basis from it. See *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005) (“[I]f the district judge finds it necessary to look to evidence other than the defendants’ statements to establish the factual basis for the plea in any situation, these additional facts or evidence must be specifically articulated on the record.”); *State v. Greene*, 226 N.W.2d 829, 831 (Iowa 1975) (“It is essential, whatever source is used, that the factual basis be identified and disclosed in the record.”). Here, no such disclosure or finding was made.

Rule 2.8(2)(b) specifically requires that the court determine that there is a factual basis for the plea. *State v. Randall*, 258 N.W.2d 259, 362 (Iowa 1977). The record does not reveal a factual basis to support Stoebe's plea or a determination by the district court that there was a factual basis. Accordingly,

² A written guilty plea must substantially comply with Rule 2.8(2)(b). *State v. Meron*, 675 N.W.2d 537, 543-44 (Iowa 2004).

both trial counsel and postconviction counsel failed to perform an essential duty and prejudice resulted to Stoebe.

Unless the defendant was charged with the wrong crime, the remedy for a claim of ineffective assistance of counsel based on the lack of a factual basis for a guilty plea is to vacate the judgment and sentence and remand the case to allow the State an opportunity to establish a factual basis, and to allow the court an opportunity to determine whether there is a factual basis. *Philo*, 697 N.W.2d at 488; *Randall*, 258 N.W.2d at 362. Here, upon our review of the minutes of testimony, it is possible for the State to show a factual basis for assault with the intent to commit sexual abuse, an aggravated misdemeanor, under Iowa Code section 709.11. Thus, we vacate the judgment and sentence and remand to the district court for further proceedings. If a factual basis is not shown, Stoebe's guilty plea must be set aside.

JUDGMENT AND SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.