IN THE COURT OF APPEALS OF IOWA

No. 1-994 / 11-0472
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VALENTIN VELEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Richard H. Davidson, Judge.

Valentin Velez appeals his convictions for two counts of willful injury causing serious injury. **SENTENCE ON ONE WILLFUL INJURY CAUSING SERIOUS INJURY VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Stephen J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier and Amy Zacharias, Assistant County Attorneys, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Valentin Velez appeals his guilty plea to two counts of willful injury causing serious injury in violation of Iowa Code section 708.4(1) (2009). He argues his plea to two counts of willful injury causing serious injury was not supported by a factual basis because there was only one incident. Upon our review, we vacate the sentence for the amended charge of willful injury causing serious injury and remand for further proceedings.

I. Background Facts and Proceedings.

According to the minutes of testimony, on July 5, 2010, Shawn Kennedy was staying at the residence of Tracee Crawford. In the early morning hours, as Kennedy and Crawford slept on the couch, Velez and Jarred Welsh entered the residence through a backdoor. Crawford awoke to find Velez and Welsh standing over her and Kennedy. Velez was holding a 12-inch metal pole. Velez grabbed a baseball bat hanging in the room and handed it to Welsh. Crawford then ran and hid in a closet. Velez proceeded to strike Kennedy several times while saying, "Give me my money" continuously. Welsh also struck Kennedy both with his fists and the baseball bat. At some point, Velez patted Kennedy down for money, but did not find any. Velez struck Kennedy between twenty and forty times. As a result of the attack, Kennedy suffered breaks in both of his arms, breaks to two fingers on his right hand, a lacerated scalp, and other various contusions.

In December 2010, Velez was charged by trial information with robbery in the first degree and willful injury causing serious injury. Velez initially entered a

plea of not guilty. However, four days before his trial was set to begin, Velez entered into a plea agreement with the State. Pursuant to the agreement, the State moved to amend the first degree robbery charge to a second charge of willful injury causing serious injury, and Velez agreed to plead guilty to both willful injury causing serious injury charges. The agreement further provided the State would recommend the imposition of consecutive sentences, and Velez would request immediate sentencing.

At the plea proceedings, the district court entered into a colloquy with Velez. The district court recognized that the two counts were identical and may have arisen from similar instances, but asked Velez to state in his own words what he did to commit each charge. In response, Velez's counsel reiterated that the charges "arose from the same incident concerning the same person," but then proceeded to focus on the multiple serious injuries suffered by Kennedy. No additional facts were actually set forth regarding the attack. After the colloquy, the district court accepted the pleas.

Velez was sentenced to ten years imprisonment on both counts to be served consecutively for a total term of incarceration of twenty years. The district court waived the minimum fine, but ordered the payment of restitution, costs, court-appointed attorney fees, and any applicable surcharges.

After the plea and sentencing, the parties entered into an additional stipulation stating that to the extent it was not explicitly stated on the record, the parties also agreed the State would not file any new or additional charges

stemming from the July 5 incident, nor refile prior charges[1] that had been voluntarily dismissed. The district court later entered a supplemental order approving the stipulation.

Velez now appeals, contending there was no factual basis supporting his guilty pleas and therefore his trial counsel was ineffective for failing to file a motion in arrest of judgment to challenge the adequacy of the pleas. He further asserts his sentence violates the constitutional provision against double jeopardy, the doctrine of collateral estoppel, and the merger doctrine.

II. Standard of Review.

Normally we review challenges to guilty pleas for correction of errors at law. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). But, because Velez claims his guilty plea results from ineffective trial counsel, a claim of constitutional dimensions, our review is de novo. *Id*.

To prove ineffective assistance, Velez must demonstrate by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. *Id*. Defense counsel violates an essential duty when counsel permits defendant to plead guilty to a charge without a factual basis. *Id*. Prejudice in such a case is inherent. *Id*. at 764-65.

III. Factual Basis.

Velez argues his actions were a part of a single course of conduct, and thus there is no factual basis for two "acts" to support two counts of the same crime. The State counters arguing that since there were two injuries serious

[1] These prior charges included burglary in the first degree, assault while participating in a felony, conspiracy, willful injury causing bodily injury, and going armed with intent.

enough to satisfy that part of the statute, and it took at least two strikes with the pipe to accomplish those injuries, then two acts occurred. Although it offends the sensibilities that Velez struck a plea bargain that was very favorable and now seeks to avoid the consequences of his voluntary action, it is not enough that the plea was voluntary or even that it was made with adequate consideration, "[t]he district court may not accept a guilty plea without first determining that the plea has a factual basis." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Where a defendant pleads guilty to two crimes, the record must minimally support a factual basis for two separate crimes. *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000). "Whether certain criminal acts constitute one crime or more must depend upon the nature and circumstances of the acts themselves." *State v. Egglesht*, 41 Iowa 574, 577 (1875).

In *Walker*, the supreme court determined that the district court did not err when it refused to merge a willful injury conviction with a voluntary manslaughter conviction. 610 N.W.2d at 527. The record in *Walker* showed that the defendant approached the victim and struck him in the face with several shift punches, knocking the victim to the ground. *Id*. at 526. The defendant's rage then so consumed him that he proceeded to kick the victim in the head while he was down. *Id*. at 526-27. The supreme court determined the kicking was a "separate act of uncontrolled aggression," which was sufficient to minimally support a factual basis to two crimes. *Id* at 527. Contrary to the State's argument in this appeal, the supreme court did not determine that each of the punches or kicks were sufficient to sustain a factual basis to the willful injury and voluntary

manslaughter convictions. Rather, it was the defendant's second distinct act of kicking which permitted the finding of two separate and distinct assaults. *Id*. In looking to the nature and circumstances of the acts in *Walker*, one could find that a factual basis for two crimes was supported by both the change in the nature of the assault (i.e. punching then kicking), and the change in the circumstances (i.e. resuming the assault after the short break in the action while the defendant fell to the ground).

Since *Walker*, our courts have continued to focus on the nature and circumstances of assaults to determine whether two crimes are shown. For instance, in *State v. Tribble*, 790 N.W.2d 121, 129 (Iowa 2010), the supreme court affirmed a felony murder conviction because there was evidence of two separate and distinct acts in the form of blunt force trauma and asphyxiation. Furthermore, relying on *Walker*, our court has repeatedly focused on whether a "break" in the action has been shown for two crimes. *Compare Calhoun v. State*, No. 07-1688, 2009 (Iowa Ct. App. May 6, 2009) (holding a factual basis for guilty plea to attempted murder and voluntary manslaughter was shown when the State alleged at the plea proceeding that a "break" for a telephone call to 911 was made between the multiple stabs of the victim); *State v. Rowley*, No. 07-0168, (Iowa Ct. App. Oct. 29, 2008) (holding a factual basis for guilty pleas to second degree murder and willful injury was sufficiently shown by the minutes of testimony which established that noises of assault coming from the apartment "would end at times and then start up again"); *with State v. Negrete-Ramirez*, 07-1059, (Iowa Ct. App. Oct. 1, 2008) (affirming a first degree robbery conviction,

but vacating an assault causing serious injury conviction even though the defendant committed an attack that resulted in cuts to the victim's face, thumb, and arm because "[t]he case was presented to the jury as one continuous course of conduct"); *State v. Goins*, No. 05-0557, (Iowa Ct. App. April 26, 2006) (merging conviction for assault causing serious injury with conviction for willful injury causing serious injury when the evidence showed the defendant stabbed the victim multiple times in a continuous attack where the defendant "just kept coming, kept coming"). Using a break in the action as a factor is supported by several other jurisdictions. *See Spencer v. State*, 868 A.2d 821, 824 (Del. 2005) (finding a sufficient "temporal and spatial separation" to support two second degree assault convictions when the defendant shot the victim in knee and four to six seconds later, after victim had turned around, shot victim in buttocks); *State v. Maddox*, 583 S.E.2d 601, 604-05 (N.C. Ct. App. 2003) (holding "a distinct interruption" was not shown for five assault charges to be made from five gunshots); *State v. Haney*, 842 A.2d 1083, 1085 (R.I. 2004) (affirming two domestic assault convictions when a fifteen minute interval occurred between the two assaults); *State v. Pelago*, 881 S.W.2d 7, 10-13 (Tenn. Ct. Crim. App. 1994) (dismissing one count of aggravated assault due to the continuous nature of the attack).

We further note that determinations regarding whether the nature and circumstances support two crimes will often depend upon how the State presents the evidence to the fact finder. *Compare State v. McKettrick*, 480 N.W.2d 52, 56 n.2 (Iowa 1992) (single assault), *with State v. Delap*, 466 N.W.2d 264, 265-66

(Iowa Ct. App. 1990) (series of assaults); *see also State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982); *State v. Holderness*, 301 N.W.2d 733, 740 (Iowa 1981); *State v. Flanders*, 546 N.W.2d 221, 224-25 (Iowa Ct. App. 1996). Here, the minutes of testimony show a continuous course of conduct, and the State did not offer any comments to the contrary at the plea proceedings.

To allow separate counts for separate blows delivered during an assault would lead to an impermissible multiplicity of charges. *See* 1A Charles Alan Wright et al., Federal Practice and Procedure § 142, at 10-15 (4th ed. 2008); *see also U.S. v. Roy*, 408 F.3d 484, 491 (8th Cir. 2005); *U.S. v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990); *U.S. v. Kazenbach*, 824 F.2d 649, 651-52 (8th Cir. 1987).

Here, the record made during the guilty pleas does not support a finding of two separate crimes, but rather only one continuous assault. The record does not show whether Velez changed the manner in which he attacked Kennedy. In addition, the record is not sufficiently clear to determine whether Velez paused and restarted the attack each time he demanded money from Kennedy, whether he stopped hitting Kennedy while Welsh beat him and then resumed the attack, or whether he attacked Kennedy again after patting him down. Accordingly, we find the nature and circumstances of the assault as shown by the record in this case does not minimally support a factual basis for two separate crimes.[2]

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 sentence and remand the

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[2] Because we remand due to the lack of a factual basis in the record, we need not address Velez's double jeopardy, collateral estoppel, and merger claims.

case to allow the State an opportunity to establish a factual basis, unless the defendant was charged with the wrong crime. *State v. Philo*, 697 N.W.2d 481, 488 (Iowa 2005). Based on the record before us, we cannot say whether it is possible for the State to show a factual basis for two separate assaults. Therefore, the remedy in this case is to vacate the sentence as to Count I (the amended charge) and remand to the district court to allow the State an opportunity to supplement the record to try to establish a factual basis for an assault separate and distinct from that used as the factual basis for Count II (the original charge). *Id*.[3]

SENTENCE ON ONE WILLFUL INJURY CAUSING SERIOUS INJURY VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

Danilson, J., concurs; Tabor, J., dissents.

[3] If a factual basis is not shown, we offer no opinion as to whether *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) would permit reinstatement or reindictment.

TABOR, J., (dissenting)

I respectfully dissent. I do not believe Velez's trial counsel breached a material duty in allowing his client to plead guilty to two counts of willful injury causing serious injury or in declining to file a motion in arrest of judgment challenging the factual basis for those two offenses. I would affirm.

The majority opinion finds that no factual basis was established for Velez's guilty pleas to two counts of willful injury because the minutes of evidence did not show a "break in the action" between the defendant's multiple assaults on his victim. The majority cites cases from other jurisdictions which require a "temporal and spatial separation" or a "distinct interruption" between assaults to support multiple convictions. *See Spencer v. State*, 868 A.2d 821, 824 (Del. 2005) (upholding two convictions where evidence was sufficient for jurors to surmise defendant's intent when he shot the victim in the leg was distinct from his intent when he shot the victim in the buttocks a few seconds later); *State v. Maddox*, 583 S.E.2d 601, 604-05 (N.C. Ct. App. 2003) (holding evidence supported only single assault where defendant fired five shots in quick succession with semi-automatic weapon without "employing his thought process" each time he fired the gun).

I do not believe that our Iowa precedents have heretofore mandated that trial courts find a similar separation or interruption between acts before imposing sentence on multiple assault-related convictions stemming from a single incident. The majority relies on *State v. Walker*, 610 N.W.2d 524 (Iowa 2000) to support of

its break-in-the-action test for permitting more than one assault conviction.[4] But *Walker* does not impose any such requirement.

In *Walker*, our supreme court found counsel was not ineffective in allowing his client to enter guilty pleas to both voluntary manslaughter and willful injury, based on one incident, described in the following passage:

> The district court, however, specifically found "that a factual basis exists independently for each of the two crimes to which the Defendant pleaded guilty." In particular the court identified Walker's initial assault on Trogden, the willful injury, during which he threw several swift punches, knocking Trogden to the ground. The court then found that, instead of stopping the fight right there, Walker's rage so consumed him that he proceeded to kick Trogden in the head while he was down. This separate act of uncontrolled aggression, resulting in Trogden's death, furnished the factual basis for Walker's plea of guilty to voluntary manslaughter.

Walker, 610 N.W.2d at 526-527.

The *Walker* court did not suggest that the defendant paused between throwing punches and kicking the victim on the ground. The words "break," "separation," and "interruption" do not appear in the *Walker* decision. Rather, *Walker* stands for the proposition that a defendant may be convicted of more than one assault-based offense when he attacks a single victim in one continuous incident. *Id.* The majority decision suggests that the discrete acts of punching and kicking the victim in *Walker* supported a factual basis for two assault crimes—while Velez's numerous acts of smashing a metal pole against the victim's right arm, right hand, left arm, and skull demonstrate only one

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[4] Velez's appellate counsel does not contend *Walker* supports his client's position, and in fact asserts in his routing statement that this case presents an issue of "first impression in Iowa: whether an individual may be charged with multiple counts of Willful Injury based upon one incident."

continuous assault. Surely, what body part the defendant employs to cause injury to the victim cannot form the legal distinction between establishing a factual basis and not establishing a factual basis for multiple assault crimes.

When our legislature defined willful injury, it referred to "an act" which is not justified and which is intended to cause serious injury; if the "act" causes serious injury, the offense is a class "C" felony. Iowa Code § 708.4(1). Black's Law Dictionary defines an "act" by quoting the Model Penal Code § 1.13 ("'[A]ct' or 'action' means a bodily movement whether voluntary or involuntary.") Black's Law Dictionary 26 (8th ed. 2004).

The State expected to offer testimony from Velez's confederate that Velez struck the victim with a metal pole between twenty and forty times. Under the Model Penal Code definition, each time Velez landed a blow with the pipe, he committed a separate act. Accordingly, the minutes of evidence support the "actus reus" for more than one count of willful injury.

On the issue of "mens rea," Velez argues that "[a]ssuming the legislature intended that multiple counts of willful injury could arise from a single transaction or occurrence, then it logically follows that an individual specific intent for each act within the transaction or occurrence be proven." Because this case involved a guilty plea, counsel was entitled to accept his client's admission that he harbored an intent to seriously injure Kennedy each time he struck him with sufficient force to break a different bone or to lacerate his scalp.

At the plea hearing, Velez admitted having an "altercation" with the victim, in which the victim suffered multiple serious injuries described in the minutes of

evidence. The victim's injuries included "a scalp laceration, his right forearm comminuted distal fourth ulna fracture, and right fourth and fifth metacarpal fracture, [and] left proximal ulnar fracture." The prosecutor pointed to additional minutes of testimony disclosing that the victim suffered a protected loss of function in regard to both of his broken arms. Velez acknowledged that a jury would "more than likely" find he caused those serious injuries.

A plea-taking court can look to several sources when determining if the record discloses a factual basis. *State v. Keene,* 630 N.W.2d 579, 581 (Iowa 2001). Those sources include the minutes of testimony, statements made by the defendant and prosecutor at the guilty plea proceeding, and the presentence investigation report. *Id.* 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.* The court accepting Velez's plea properly determined that the facts supported two distinct counts of willful injury causing serious injury.

The majority's concern about "an impermissible multiplicity of charges" is not well-founded in this case. The State charged two counts in the original trial information: robbery in the first degree, a class "B" felony, and willful injury causing serious injury, a class "C" felony. The State reached a plea agreement with Velez in which he would plead guilty to two counts of willful injury causing serious injury, with the indeterminate ten-year terms to be served consecutively. Velez accepted the plea agreement to avoid the mandatory minimum sentence of seventeen years on the first-degree robbery count. Using the same dubious strategy as the defendant in *Walker*, Velez's "appeal seeks to transform what

was a favorable plea bargain in the district court to an even better deal on appeal." *Walker*, 610 N.W.2d at 526.

Under existing Iowa law, multiple charges may stem from a single criminal transaction. Iowa R. Crim. P. 2.6(1); *State v. Clarke*, 475 N.W.2d 193, 195 (Iowa 1991). When a defendant engages in more than one "act" intended to cause serious injury to the victim, he may be charged with multiple counts under section 708.4. *See State v. McKettrick*, 480 N.W.2d 52, 56 n.2 (Iowa 1992) (opining that trier of fact could find inmate was victim of "series of assaults" when he received "multiple kicks and blows" from fellow inmates); *see also State v. Tribble*, 790 N.W.2d 121, 129 (Iowa 2010) (upholding felony murder conviction where the evidence supported two felonious assaults, without requiring any specific separation of the acts causing the two assaults).

The majority nods to the *McKettrick* decision, but asserts that the prosecution did not "offer any comments" at the plea hearing to characterize the incident as a series of assaults rather than "a continuous course of conduct." It is not clear to me that the State was required to do more than amend the charges to allege two counts of willful injury as part of the plea agreement. "A plea of guilty, if voluntarily and intelligently made, relieves the prosecution of the burden of proving any facts necessary to support the conviction." *State v. Young,* 293 N.W.2d 5, 7 (Iowa 1980). The minutes of evidence along with the statements of the prosecutor and Velez at the plea hearing supported at least two counts of willful injury causing serious injury.

The current state of Iowa law is consistent with those jurisdictions which have determined that a single beating can support multiple convictions, as long as there are multiple acts or multiple injuries. *See, e.g., People v. Johnson,* 59 Cal. Rptr. 3d 405, 412 (Cal. Ct. App. 2007) (upholding three convictions based on multiple injuries inflicted during single course of conduct); *Wilkinson v. State,* 679 S.E.2d 766, 771 (Ga. Ct. App. 2009) (finding defendant's actions, "although occurring sequentially," constituted separate offenses where victim suffered "an injury unique to each count"); *People v. Dixon*, 438 N.E.2d 180, 185 (Ill. 1982) (finding four or five separate blows, even though closely related, were not one physical act).

Unless our supreme court disavows *Walker* and *McKettrick* to follow the North Carolina or Delaware models, I believe criminal defense attorneys should be able to rely on those precedents to obtain a favorable plea deal for their clients.