

IN THE COURT OF APPEALS OF IOWA

No. 2-092 / 11-0673
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALISSA LYNN MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Carroll County, Frederick E. Breen,
Judge.

Defendant appeals from her conviction claiming she was denied effective
assistance of counsel where there was no factual basis to support her guilty plea.

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, and John Werden Jr., County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Defendant, Alissa Miller, appeals her conviction and sentence for theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2(2) (2009), claiming she was denied effective assistance of counsel when her attorney permitted her to plead guilty to a charge that was not supported by a factual basis. Because we find a factual basis does not support Miller's conviction, we vacate Miller's sentence and remand the case to the district court for further proceedings.

I. BACKGROUND AND PROCEEDINGS. On November 29, 2010, the State filed a trial information against Miller charging her with theft in the second degree, alleging on or between the dates of September 23 and October 11, 2010, Miller wrote checks to obtain goods or services knowing the checks would not be paid when presented, or committed theft by deception. The total amount of the checks written exceeded \$1000, but did not exceed \$10,000.

Miller entered, and the court accepted, her plea of guilty on February 18, 2011. No post-trial motions were filed and Miller was sentenced on April 8, 2011, to a term of incarceration not to exceed five years and ordered to pay a fine of \$750. Her sentence and fine were suspended and she was placed on probation for five years. She was also ordered to pay restitution to the victims in the amount of \$5227.85.

II. SCOPE OF REVIEW. We normally review a challenge to the factual basis supporting a guilty plea for correction of errors at law. *State v. Martin*, 778 N.W.2d 201, 202 (Iowa Ct. App. 2009). However, Miller basis her

appeal on an ineffective-assistance-of-counsel claim, and thus, our review is de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

III. FACTUAL BASIS FOR PLEA. To establish her claim that counsel provided ineffective assistance, Miller must prove (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Id.* While ineffective-assistance-of-counsel claims are generally preserved for postconviction relief actions, we will address them on direct appeal so long as the record is adequate, as we find it here. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

In order for the district court to accept a guilty plea, it must first determine there is a factual basis to support the plea. Iowa R. Crim. P. 2.8(2)(b). Permitting a client to plead guilty to a crime that lacks a factual basis in the record is per se ineffective assistance of counsel. *Schminkey*, 597 N.W.2d at 788. Prejudice is presumed. *Ortiz*, 789 N.W.2d at 764–65. “[U]nder no circumstances may a conviction upon a plea of guilty stand if it appears that the facts of the charge do not state a violation of the statute under which the charge is made.” *State v. Mitchell*, 650 N.W.2d 619, 620 (Iowa 2002). Thus, our only question in this appeal is whether the record demonstrates a factual basis for Miller’s plea. *Schminkey*, 597 N.W.2d at 788. In deciding this question, we consider the entire record available to the district court at the time of the plea hearing, which in this case includes the statements made by Miller, the facts related by defense counsel, and the minutes of testimony. *Id.*

Miller was charged in the trial information with theft by check or theft by deception.¹ These two charges overlap and the only distinction is what intent inferences are acceptable. *State v. Hogrefe*, 557 N.W.2d 871, 878–79 (Iowa 1996). Under theft by check, the statute provides specific circumstances where the fact finder may imply the intent required. See Iowa Code § 714.1(6) (providing intent may be inferred (1) where the maker of the check has not paid the holder within ten days after receipt of notice that the bank has refused payment due to insufficient funds; and (2) where the bank refused payment because maker has no account with the bank). There are no such intent inferences available under theft by deception involving a check. See Iowa Code § 702.9(5) (defining deception and providing the failure to perform, standing alone, is not evidence the maker did not intend to perform). It is not clear from the record whether the district court accepted the guilty plea under theft by check, Iowa Code section 714.1(6), or theft by deception, Iowa Code section 714.1(3), as a result, we will analyze whether a factual basis exists under either theory..

A. Theft by Check. To be found guilty of theft by check under Iowa Code section 714.1(6), the State has to prove Miller wrote a check to the victim, drawn on a bank, received goods or services in exchange for the check,

¹ Miller points out the sentencing order states Miller entered a guilty plea to Iowa Code section 714.1(4), which is the crime of receiving stolen property. Nothing in the trial information, minutes of testimony, plea hearing, or sentencing hearing indicates Miller pleaded guilty to receiving stolen property or that the court intended to impose sentence based on this charge. Based on the record, we find it clear that the citation to subsection four was a typographical error, and the district court intended to impose sentence on the charge of theft by check, which is Iowa Code section 714.1(6), or theft by deception which Iowa Code section 714.1(3).

and knew the check would not be paid when presented due to insufficient funds. See Iowa Code § 714.1(6); Iowa Criminal Jury Instruction 1400.17. In addition, the State had to prove the value of the theft exceeded \$1000 but did not exceed \$10,000. See Iowa Code 714.2(2). The record available to the district court at the time of the plea hearing established Miller wrote checks to various stores, drawn on the Higher One Bank, receiving in exchange goods or services in a total amount exceeding \$1000, but not exceeding \$10,000. Absent from the record is any factual basis to support Miller knew the checks would not be paid when presented to the bank. Miller stated at the hearing,

at this time I'm receiving unemployment, did not know that I would have to re-file to keep my unemployment benefits coming in. It wasn't going in there and I was not aware. If I would have just checked my bank account, I would have known.

Miller's attorney clarified for the court saying,

I think what my client is trying to clarify for the court, although she thought she had money in her account, if she would have accessed on her account the day she wrote the check, she would have known she did not have funds within the account to pay the checks that she wrote.

Miller agreed with the court that when she writes a check, a person will present the check to the bank reasonably promptly and expects to get paid. She also admitted she did not bother to look at her account online to check the balance, but she could have.

While this evidence may show Miller was negligent in her use of her checking account or that she could have known there was insufficient funds to cover the checks she wrote, it does not provide a factual basis to support that she knew the checks would not be paid when presented to the bank. The

evidence presented shows instead Miller thought she had money in her account from unemployment, and did not realize she needed to continue to re-file to receive her benefits. As stated above, the intent requirement of section 714.1(6) can be established if Miller failed to pay the victims within ten days of receiving notice the checks were refused for insufficient funds, or if she wrote checks on an account that did not exist. Facts were not offered at the hearing to support either one of these exceptions. We find the record did not provide a factual basis for Miller's plea to theft by check.

B. Theft by deception. Under Iowa Code section 714.1(3) a person commits theft if he “[o]btains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception.” Deception is defined in Iowa Code section 702.9 to include: “5. Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform.” Thus, theft by deception still requires proof Miller did not intend to honor the checks or knew she would not be able to honor the checks. The court cannot infer the knowledge requirement based only on Miller's failure to perform. See Iowa Code § 702.9(5) (“Failure to perform, standing alone, is not evidence that the actor did not intend to perform.”).

Again we find nothing in the record to provide a factual basis to show Miller did not intend to pay or knew she would not be able to pay when the checks were presented to the bank. While it is not necessary for the court to “wring a confession” out of Miller in order to establish a factual basis for the plea,

there must be some information in the record to support the intent elements required for theft by check or theft by deception. *State v. Smith*, 300 N.W.2d 90, 92 (Iowa 1981).

IV. DISPOSITION. As there is no factual basis to support the guilty plea under either theft by check or theft by deception, we have two possible remedies. *Schminkey*, 597 N.W.2d at 792. If the record shows Miller was charged with the wrong crime, we must vacate the conviction and sentence and remand for a dismissal of the charge. *Id.* If, however, it is possible for a factual basis to be shown to support the charge, we vacate the sentence and remand to give the State the opportunity to establish a factual basis. *Id.*

We find in this case there may be additional facts not currently appearing in the record that could support the intent requirement of either theft by check or theft by deception. We therefore vacate the sentence, and remand for further proceedings to provide the State an opportunity to supplement the record to establish a factual basis for the charge. If on remand a factual basis cannot be shown, Miller's plea must be set aside. *Id.*

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.