

IN THE COURT OF APPEALS OF IOWA

No. 2-201 / 11-0928
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW DEE BUTCHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Madison County, Terry Rickers,
Judge.

Matthew Butcher appeals from his conviction contending his attorney rendered ineffective assistance by permitting him to plead guilty to charges that were not supported by a factual basis. **SENTENCES VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Julie Forsyth, County Attorney, for appellee.

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

MULLINS, J.

Matthew Butcher appeals from his conviction and sentence for operating a motor vehicle while license is barred as a habitual offender, an aggravated misdemeanor, in violation of Iowa Code sections 321.560 and 321.561 (2011), and eluding a law enforcement vehicle, an aggravated misdemeanor, in violation of section 321.279(2). Butcher asserts his trial counsel rendered ineffective assistance by permitting him to plead guilty to these offenses without the record containing a factual basis to support the conviction. For the reasons stated below, we vacate his sentences and remand for further proceedings.

I. BACKGROUND AND PROCEEDINGS.

The State filed a trial information against Butcher on January 27, 2011, charging him with operating a vehicle while his license is barred as a habitual offender and eluding, as a result of a high speed police chase on January 3, 2011. Butcher filed a written plea of guilty to both charges on April 18, 2011,¹ asking the district court to determine a factual basis for the pleas by examining the minutes of testimony, the investigative reports of the law enforcement officers, or by asking him or counsel to recite and summarize the material facts which would be offered at trial. The district court accepted the written guilty pleas on the same day, ordered a presentence investigation, and set sentencing for June 13, 2011.

Butcher was sentenced to imprisonment not to exceed two years on each count, and the sentences were to run consecutively. He was also ordered to pay

¹ This was the day appointed for the pretrial conference, but it does not appear the hearing was recorded.

a fine, surcharge, restitution, attorney fees, and court costs. He appeals contending his trial counsel was ineffective in permitting him to plead guilty to the charges without a factual basis in the record.

II. SCOPE OF REVIEW AND ERROR PRESERVATION.

We normally review challenges to guilty pleas for correction of errors at law; however, Butcher basis his challenge on an ineffective-assistance-of-counsel claim, and as a result our review is de novo. See *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). In addition, ineffective-assistance-of-counsel claims are an exception to the normal error preservation rules; therefore, Butcher's failure to file a motion in arrest of judgment to challenge his plea does not foreclose his appeal. See *id.*

III. FACTUAL BASIS—INEFFECTIVE ASSISTANCE OF COUNSEL.

To prove counsel rendered ineffective assistance, Butcher must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). The district court may not accept a guilty plea from a defendant without first determining a factual basis supports 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. See *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Prejudice is presumed in such a case. *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). Two questions are presented in this

case: (1) whether the record available to the district court at the time the plea was accepted provides a factual basis to support each and every element of the offenses charged; and (2) whether the district determined that a factual basis existed at the time the court accepted the guilty plea. Iowa R. Crim. P. 2.8(2)(b); *Schminkey*, 597 N.W.2d at 788.

A. Operating While License Barred as a Habitual Offender. Butcher claims the record in this case fails to show he had been found to be a habitual offender as required by Iowa Code section 321.561. This code section provides:

It shall be unlawful for any person *found to be a habitual offender* to operate any motor vehicle in this state during the period of time specified in section 321.560 except for a habitual offender who has been granted a temporary restricted license pursuant to section 321.215, subsection 2. A person violating this section commits an aggravated misdemeanor.

Iowa Code § 321.561 (emphasis added). A review of the record available to the court at the time it accepted the guilty plea, which consisted of only the minutes of testimony and Butcher's written guilty plea, shows Butcher stated, "I drove while barred"; and the investigating officer checked and found Butcher to be barred. Nowhere in the record is there any indication Butcher's license was barred because he had been found to be a habitual offender.² The habitual offender status of Butcher was an essential element of the crime charged. See *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, the record must

² The Iowa Code contains other circumstances that may result in a barred license. See e.g., Iowa Code §§ 321.210C, 321.205, 321.210, and 321J.21.

contain some indication that Butcher was found to be a habitual offender under the applicable statute.³

The State agrees nothing in the minutes of testimony or Butcher's written guilty plea indicates Butcher was barred as a habitual offender, but asks us to look to the presentence investigation report, which was completed after the district court accepted the plea but before sentencing, for the factual basis to support the plea. In the report, the investigator found Butcher had previous convictions that would qualify him to be a habitual offender under Iowa Code section 321.555. The State asserts because the record after the plea contains clear evidence of Butcher's habitual offender status, we should find Butcher was not prejudiced by his trial counsel's actions. We disagree.

In determining whether a plea is supported by a factual basis, we look only to the information available to the district court at the time the plea was accepted. *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 804–05 (Iowa 1990). If the presentence investigation report had been completed and available to the district court on April 18, 2011, when the court accepted the pleas, we could and would consider it. See *Schminkey*, 597 N.W.2d at 788 (“In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report.”).

³ Iowa Code section 321.555 provides the definition of habitual offender under the motor vehicle code. A person is a habitual offender when he/she accumulates a specified number of convictions for certain driving related offenses within a specified number of years. Iowa Code § 321.555.

Unfortunately, the report was not completed and filed with the district court until June 7, 2011. In addition, even if we did consider the presentence investigation report, we note the report only lists the prior offenses Butcher committed, not whether he had been found to be a habitual offender. We find there is no factual basis at the time the plea was accepted to support the essential element that Butcher was found to be a habitual offender.

B. Eluding. Next, Butcher challenges the factual basis underlying his guilty plea for eluding. Under Iowa Code section 321.279(2), a driver commits an aggravated misdemeanor if,

the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a *marked official law enforcement vehicle* that is driven by a *uniformed peace officer* after being given a visual and audible signal as provided in this section and in doing so exceeds the speed limit by *twenty-five miles per hour or more*.

(Emphasis added.) In this case, Butcher asserts the record failed to provide a factual basis to support the elements the officers were in a marked law enforcement vehicle, wore uniforms, or that he was going twenty-five miles per hour or more over the speed limit. Because we agree with Butcher as to his first two assertions, we decline to address the speed issue.

There is no factual basis to support the elements Butcher eluded a *marked* police car being driven by a *uniformed* officer. The minutes of testimony detail the route of the chase and the fact the officers activated their lights and sirens, but nowhere does it state the officers were in marked cars or wearing uniforms. Butcher's written plea of guilty also does not provide support for these elements. Butcher wrote, "I eluded officers when they tried to stopped [sic] me

by not stopping my vehicle when I was ordered to do so.” While this statement makes it clear Butcher recognized police officers were attempting to make him stop, it is unclear whether he knew this based on a marked police vehicle, police uniforms, or simply based on the visual and audible signal that were given. We find there was a lack of a factual basis to support the elements the officers were operating marked police vehicles and wearing police uniforms.

C. Findings by the Court. The Calendar Order entered by the court recited that “Defendant’s written plea of guilty to Counts I and II is accepted by the Court,” and the court ordered a presentence investigation and set sentencing. The court made no finding that a factual basis existed for acceptance of the guilty plea. “The district court may not accept a guilty plea without first determining that the plea has a factual basis.” Iowa R. Crim. P. 2.8(2)(b); *Schminkey*, 597 N.W.2d at 788; see also *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975) (“Whatever the source, the record must disclose the factual basis relied on.”). There is nothing in this record that shows that the court made such a determination.

IV. DISPOSITION.

Because we find the district court failed to find that a factual basis existed for accepting the guilty pleas, and further find that a factual basis does not support the guilty pleas of operating a vehicle while barred as a habitual offender and eluding, we are faced with two possible remedies. See *Schminkey*, 597 N.W.2d at 791. When the record establishes the defendant has been charged with the wrong crime, we vacate the conviction and sentence and remand for a dismissal of the charge. *Id.* But if it is possible for the State to still establish a

factual basis to support the guilty plea, we vacate the sentence and remand to the district court to give the State an opportunity to establish a factual basis. *Id.* If on remand the factual basis cannot be shown, then the plea must be set aside. *Id.*

Because we believe the State may be able to provide a factual basis to support the elements of the offenses charged, we vacate Butcher's sentences and remand to the district court for further proceedings to provide the State an opportunity to offer this evidence.

SENTENCES VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.