IN THE COURT OF APPEALS OF IOWA

No. 2-433 / 11-1331
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WAYNE LAMONT CAMP JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A defendant appeals from the judgment and sentence entered following his guilty plea to eluding. **SENTENCE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John Sarcone, County Attorney, and Justin Allen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Wayne Lamont Camp Jr. challenges the factual basis for his guilty plea to felony eluding. He contends that neither the in-court colloquy nor the minutes of testimony establish that the peace officer who pursued him was driving a "marked official law enforcement vehicle." Because Camp's attorney allowed him to enter a guilty plea without a factual basis for that element, we vacate his sentence and remand for further proceedings.

I. Background Facts and Proceedings.

Camp was waiting for a red light in the left turn lane of the intersection at 30th Street and Hickman Road in Des Moines at 11:00 p.m. on March 31, 2011, when Officer Stroope pulled up beside him. Instead of turning left, Camp drove straight ahead into the lane of oncoming traffic. Officer Stroope slowed to allow Camp to merge into the proper lane. The officer noticed Camp's vehicle had lighting violations and initiated a traffic stop.

Camp pulled over. But as Officer Stroope called dispatch, he heard tires squeal and saw Camp's vehicle speed away. According to the minutes of testimony, the officer "initiated a pursuit and activated his lights and sirens."

Camp drove south on 30th Street with Officer Stroope following. The officer tried a PIT (pursuit intervention technique) maneuver to stop the suspect. Camp's vehicle spun, but he regained control and entered the freeway headed east. Camp's vehicle reached speeds of eighty miles per hour during the chase. Camp eventually exited the freeway, pulled into an apartment complex lot, and fled from the vehicle into an apartment. With the help of building maintenance,

officers entered the apartment and arrested Camp. Camp later admitted he was under the influence of alcohol or a controlled substance.

The State filed a trial information charging Camp with eluding or attempting to elude a pursuing law enforcement vehicle, in violation of Iowa Code section 321.279(3)(b) (2011), and operating a motor vehicle while under the influence of alcohol or a drug, in violation of Iowa Code section 321J.2. The State also alleged Camp was an habitual offender.

On August 1, 2011, Camp pleaded guilty to felony eluding. In exchange, the State dismissed the operating under the influence charge. During the plea colloquy, Camp agreed he saw "a law enforcement vehicle come in behind [him] trying to stop [him]." Camp affirmed that a uniformed officer signaled him to stop. Camp admitted exceeding the speed limit by more than twenty-five miles per hour during the chase and being under the influence of alcohol or drugs at the time of the offense. On that basis, the court accepted the plea.

Camp waived the use of a presentence investigation report and opted to be sentenced immediately following his guilty plea. The court cautioned him:

> All right. A couple of things I have to talk with you about here.
>
> First of all, it's my duty to tell you that you have a right to file what's called a Motion in Arrest of Judgment. That's a method by which you can attack the guilty plea that you have entered today and tell the Court, for whatever reason, it's not correct.
>
> The motion has to be filed at least five days before the date set for sentencing or forty-five days from today, whichever comes first. And if you don't file such a motion, then you are precluded from ever attacking the guilty plea that you have entered. So if we go ahead and sentence you today, by definition, that time period will have run and you will never be able to attack the plea.
>
> Do you understand that?

Camp said "yes" and conveyed his wish to be sentenced that day. The court sentenced Camp to an indeterminate term of five years imprisonment and a suspended fine of $750.

II. Scope and Standard of Review.

We generally review guilty-plea challenges for correction of legal error. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006). The district court may not accept a guilty plea without first determining a factual basis exists. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Where no factual basis exists and counsel allows his client to enter a guilty plea, counsel is ineffective. *Id.* We review ineffective-assistance-of-counsel claims de novo. *Tate*, 710 N.W.2d at 239.

III. Preservation of Error

The State argues that Camp cannot directly contest his guilty plea on appeal because he failed to file a motion in arrest of judgment. *See* Iowa R. Crim. P. 2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal.").

Camp counters that this prerequisite does not apply because the plea-taking court did not properly inform him of the consequences of failing to file a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 2.8(2)(d). *See State v. Meron*, 675 N.W.2d 537, 541 (Iowa 2004) (discussing plea-taking court's obligation under the rule to inform the defendant that: (1) "any challenges to a plea of guilty based on alleged defects in the plea proceedings

must be raised in a motion in arrest of judgment" and (2) "failure to so raise such challenges shall preclude the right to assert them on appeal").

In this case, the plea-taking court advised Camp of the timeline for filing a motion in arrest of judgment and told him: "And if you don't file such a motion, then you are precluded from ever attacking the guilty plea you have entered." While it may have been more precise for the court to say Camp could not challenge his plea "on appeal" if he did not file a motion in arrest, the court adequately advised Camp of the consequences of foregoing the motion by saying he would be "precluded from ever attacking" the plea. We find the court substantially complied with rule 8.2(2)(d). *See State v. Burden*, 445 N.W.2d 395, 397 (Iowa Ct. App. 1989) (holding court substantially complied with rule by telling defendant that if he didn't file motion, "it is presumed in the law that you have waived that right").

In the alternative, Camp contends his attorney was ineffective in allowing him to plead guilty without a factual basis. Ineffective-assistance-of-counsel claims stand as an exception to the error-preservation rule. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). To prove ineffective assistance, Camp must prove that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See id.* Prejudice is inherent if the record fails to reveal a factual basis for one or more elements of an offense. *Id*. at 488.

IV. Analysis.

Camp contends his counsel breached an essential duty by allowing him to plead guilty when neither the plea colloquy nor the minutes of testimony

established that the officer who pursued him was driving "a marked official law enforcement vehicle"—an element of felony eluding under section 321.279(3)(b).[1]

We agree the record is insufficient to establish a factual basis for Camp's guilty plea to felony eluding. The court recited the elements of the crime:

> [O]n or about March 31, 2011, in Polk County, Iowa, . . . you eluded or attempted to elude a pursuing law enforcement vehicle with their lights and sirens running, and in doing so exceeded the speed limit by 25 miles or more, and at the time of the offense that you were operating a motor vehicle in violation of Iowa Code section 321J.2.

The court failed to inform Camp that the State was required to prove the officer was pursuing him in a marked vehicle.

The following exchange took place during the guilty plea colloquy:

> THE COURT: Tell me what you did.
> THE DEFENDANT: Well, I eluded officers with their lights flashing while under the influence of alcohol.
> . . . .
> THE COURT: All right. So at some point did you see a law enforcement vehicle come in behind you trying to stop you?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: And did the law enforcement vehicle have its lights and siren running?
> THE DEFENDNT: Yes, sir, Your Honor.

---

[1] The section at issue states:

> The driver of a motor vehicle commits a class 'D' felony 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, and if any of the following occurs:
> . . . .
> The driver is in violation of section 321J.2 or 124.401.

Iowa Code § 321.279(3)(b).

While Camp confirmed a "law enforcement vehicle" tried to stop him with its lights and sirens activated, the record is silent as to whether the vehicle was marked.

The State argues "the overall record supports the factual basis that the vehicle driven by uniformed Officer Stroope was a marked law enforcement vehicle." We disagree. While our legislature did not define "marked" in the code, we find that element to be separate and distinct from the State's burden to show "a uniformed peace officer" at the wheel who is giving "a visible and audible signal." Courts from other jurisdictions have interpreted their eluding statutes in a similar manner. *See, e.g., Lavea v. Woodard*, 555 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (finding "a pursuing peace officer's vehicle is 'distinctively marked' if its outward appearance during the pursuit exhibits *in addition to* a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give reasonable notice to the fleeing motorist that the pursuit is by the police"); *State v. Ritts*, 973 P.2d 493, 496 (Wash. Ct. App. 1999) (upholding dismissal of eluding charge where undercover vehicle was equipped with flashing lights but lacked lettering or a logo on its doors to show it was "marked" as official police vehicle); *State v. Oppermann*, 456 N.W.2d 625, 627 (Wis. Ct. App. 1990) (concluding "legislature did not state that just because a vehicle has flashing red lights and a siren it is automatically considered a police vehicle").

In this case, counsel was ineffective in allowing Camp to plead guilty and to waive his right to file a motion in arrest of judgment when the record did not

indicate the officer chasing Camp was driving an official marked law enforcement vehicle.

Where a guilty plea lacks a factual basis but it is possible the State could establish one, the appropriate remedy is to vacate the sentence and remand for further proceedings. *Schminkey*, 597 N.W.2d at 792. We vacate Camp's sentence and remand to afford the State an opportunity to establish a complete factual basis for the eluding offense.

SENTENCE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.