

IN THE COURT OF APPEALS OF IOWA

No. 2-519 / 12-0010
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG ANTHONY FINNEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, Judge.

Defendant appeals his conviction, based on his guilty plea, to attempted murder. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Sean M. Conway of Dornan, Lustgarten & Troia, Omaha, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Christine Shockey, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Danilson, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.**I. Background Facts & Proceedings.**

Craig Finney was charged by trial information with the following counts: (I) attempted murder of P. Harker; (II) attempted murder of B. Shimmin; (III) first-degree burglary; (IV) assault of P. Harker causing serious injury; (V) going armed with intent; (VI) assault of P. Harker while participating in a felony; (VII) assault of B. Shimmin while participating in a felony; and (VIII) flight to avoid prosecution. Finney entered into a plea agreement whereby he agreed to plead guilty to count (I) attempted murder of P. Harker, and the State agreed to dismiss the other charges against him.

The plea proceedings were held November 29, 2011. The court informed Finney attempted murder was punishable by twenty-five years in prison, with a mandatory minimum of eighty-five percent. When asked to explain why he was pleading guilty, Finney replied, "I shot Patty." The court then asked, "is that Patty Harker?" to which Finney replied affirmatively. The court found there was a factual basis for the plea and accepted Finney's guilty plea to attempted murder, a class "B" felony, in violation of Iowa Code section 707.11 (2011). The case immediately proceeded to sentencing. Finney was sentenced to a term of imprisonment not to exceed twenty-five years.

On the same day as the plea proceeding, Finney's defense counsel, who practiced in Nebraska, filed an application for admission to practice in Iowa pro hac vice. On December 2, 2011, the court found the application was moot

because the case had been completed. Finney obtained new counsel and appealed his guilty plea and sentence.

II. Ineffective Assistance.

Finney contends he received ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008).

A. Finney claims he received ineffective assistance because defense counsel permitted him to plead guilty to attempted murder without establishing a factual basis to support the charge. He contends there is no factual basis in the record to show he specifically intended to cause Harker's death. He asserts his bare statement, "I shot Patty," is insufficient to show he intended to cause her death.

A court may not accept a guilty plea without first determining whether the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). There must be a showing that the facts support the crime, but not necessarily a showing that the defendant is guilty. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The "record, as a whole, must disclose facts to satisfy the elements of the crime." *Id.*

A defendant receives ineffective assistance if counsel permits the defendant to plead guilty where there is no factual basis for the charge. *Id.* If

defense counsel permits a defendant to plead guilty when there is no factual basis, we will presume prejudice. *State v. Ortiz*, 789 N.W.2d 761, 764-65 (Iowa 2010).

In relevant part, section 707.11 provides:

A person commits a class “B” felony when, with the intent to cause the death of another person and not under circumstances which would justify the person’s actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.

This code section requires: (1) a specific intent to cause the death of another and (2) an overt act in furtherance of the required specific intent. *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004); *State v. Kehoe*, 804 N.W.2d 302, 313 (Iowa Ct. App. 2011). The specific intent element “refers to the actor’s expectation of the consequences of his or her act, not the probability of the act’s success.” *Young*, 686 N.W.2d at 185.

The factual basis for a guilty plea must be disclosed in the record. *State v. Rodriguez*, 804 N.W.2d 844, 849 (Iowa 2011). A factual basis for a guilty plea may be found from: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence. *Ortiz*, 789 N.W.2d at 768. Whatever the source of the factual basis, “the record must disclose the factual basis relied on.” *State v. Johnson*, 234 N.W.2d 878, 880 (Iowa 1975) (citing *State v. Williams*, 224 N.W.2d 17, 18-19 (Iowa 1974) (“It is essential, whatever sources used, that the factual basis be identified and disclosed in the record.”)). If a court “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. Philo*, 697 N.W.2d 481, 485 (Iowa 2005) (citation omitted).

The district court did not articulate that it was relying on the minutes of evidence or any other source beyond Finney’s statement in court to find a factual basis for the plea. We determine Finney’s statement that he shot Harker, standing alone, is not sufficient to show he specifically intended to cause her death. The circumstances of the shooting were not discussed at the plea proceeding, and so there is no factual basis to show whether the shooting was done intentionally or accidentally. We conclude Finney received ineffective assistance because defense counsel permitted him to plead guilty to attempted murder when there was not a sufficient factual basis in the record.

Where we have determined there has been ineffective assistance of counsel based on the lack of a factual basis for a guilty plea, we vacate the sentence and remand the case to allow the State an opportunity to establish a factual basis. *Philo*, 697 N.W.2d at 488; *Ryan v. Iowa State Penitentiary*, 218 N.W.2d 616, 620 (Iowa 1974). If a satisfactory factual basis is made on remand, the defendant should be resentenced. *State v. Randall*, 258 N.W.2d 359, 362 (Iowa 1977). On the other hand, if a sufficient factual basis is not made on remand, the plea should be set aside. *Williams*, 224 N.W.2d at 18.

B. Finney asserts he received ineffective assistance because defense counsel failed to prepare an adequate defense for his case. He claims defense counsel failed to inspect or independently test the State’s evidence, seek an expert witness to assess the State’s evidence, or otherwise investigate the case.

He additionally complains defense counsel did not file an application for admission pro hac vice until the end of the case.¹

A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove that, but for counsel's breach, there was a reasonable probability he would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). "When complaining about the adequacy of an attorney's representation, it is not enough to simply claim counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). A defendant "must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Id.*

Finney has not stated specifically how defense counsel was inadequate. He also has not shown how different or additional actions by defense counsel would have changed his decision to plead guilty. He has not stated what he believes more discovery or investigation would have revealed. We conclude he has not shown he received ineffective assistance due to counsel's failure to prepare an adequate defense.

III. Sentencing.

Finney contends the district court improperly ordered him to serve eighty-five percent of his twenty-five year sentence. Even if the court misspoke, which we are not convinced was the case, we have already determined the sentence should be vacated and the case remanded for further proceedings.

¹ We note that failure to follow the procedures to be admitted pro hac vice "does not constitute per se ineffective assistance of counsel." *State v. Chadwick*, 586 N.W.2d 391, 393-94 (Iowa Ct. App. 1998).

We vacate the conviction and sentence and remand for further proceedings to allow the State to supplement the record to establish a factual basis for the charge of attempted murder under section 707.11. See *Philo*, 697 N.W.2d at 488.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.