

**IN THE COURT OF APPEALS OF IOWA**

No. 2-744 / 11-2027  
Filed September 6, 2012

**JOHN FOLLOWILL JR.,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Marion County, Paul R. Huscher,  
Judge.

A postconviction relief applicant contends his plea attorney provided ineffective assistance in failing to file a motion in arrest of judgment to challenge the factual basis for his guilty plea. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Ed Bull, County Attorney, Melissa Clarke, Assistant County Attorney,  
and Mary Triick, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ. Tabor,  
J. takes no part.

**VAITHESWARAN, P.J.**

John Followill Jr. pleaded guilty to delivery of a schedule I controlled substance (marijuana), in violation of Iowa Code section 124.401(1)(d) (2009).<sup>1</sup> Followill's attorney did not file a motion in arrest of judgment to challenge his plea. 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."). Followill later filed an application for postconviction relief raising a claim based on misadvice of trial counsel and a claim based on the marijuana recipient's claimed failure to pay for the substance. Following an evidentiary hearing at which Followill testified, the district court denied the application on its merits.

Followill now appeals the denial of his postconviction relief application and raises a claim he did not raise before. He asserts his plea attorney provided ineffective assistance in failing to file a motion in arrest of judgment to challenge the factual basis for his plea, which he claims was lacking. See Iowa R. Crim. P. 2.8(2)(b)(stating court shall not accept a plea of guilty without first determining that plea has a factual basis). He also asserts subsequent attorneys were ineffective in failing to raise this issue.

Although the issue was not previously raised or decided, claimed ineffective assistance of counsel is an exception to the error preservation rule. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). We generally preserve such claims for postconviction relief, but in this case, we find the record adequate to address the issue. See *id.*

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<sup>1</sup> He also pleaded guilty to theft, but that crime is not at issue in this appeal.

To prove his claim, Followill must show counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this particular context, he must simply show that his plea lacked a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). That is because “[w]here a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty” and “[p]rejudice . . . is inherent.” *Id.*

Followill contends there is nothing in the guilty plea record to establish that the substance he was charged with delivering was in fact marijuana. See Iowa Code § 124.101(19) (defining “marijuana”). To the contrary, Followill’s colloquy with the court at the guilty plea proceeding contains an admission by him that the substance was marijuana. That colloquy was as follows:

THE COURT: Tell me what you did to commit the delivery of marijuana.

THE DEFENDANT: I sold marijuana to someone—to a person.

THE COURT: You knew it was marijuana?

THE DEFENDANT: Excuse me?

THE COURT: You knew it was marijuana?

THE DEFENDANT: Yes, sir.

Followill’s admission is dispositive. See *Schminkey*, 597 N.W.2d at 788 (finding that statements made by the defendant form part of the record for consideration). While Followill asserts he was not qualified to opine “regarding whether the substance in question was, in fact, marijuana based upon the statutory definition,” he cites no Iowa authority for this proposition, and we have found none.

On our de novo review, we conclude Followill's plea to delivery of a schedule I controlled substance (marijuana) was supported by a factual basis. Accordingly, trial counsel did not breach an essential duty in failing to challenge the factual basis for the plea, and remaining attorneys were not ineffective in failing to raise the issue.

We affirm the denial of Followill's application for postconviction relief.

**AFFIRMED.**