

IN THE COURT OF APPEALS OF IOWA

No. 3-181 / 12-0972
Filed March 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER SEAN DREW,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

A defendant appeals his conviction for two counts of child endangerment
causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John Sarcone, County Attorney, and Susan A. Cox, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

The defendant, Christopher Sean Drew, appeals from the judgment, conviction, and sentences for two counts of child endangerment causing bodily injury, in violation of Iowa Code section 726.6(6) (2011), following the court's acceptance of his *Alford*¹ pleas. Drew's main claim is that his pleas lacked a factual basis. He makes this claim utilizing several arguments: (1) his counsel was ineffective in allowing him to plead when a factual basis had not been established; (2) his counsel was ineffective in failing to file a motion in arrest of judgment; (3) Drew did not knowingly, intelligently, and voluntarily waive his right to appeal; and (4) if he did waive his right appeal, his counsel was ineffective in allowing him to do so. On our review of the record, we find there was a sufficient factual basis for the *Alford* plea and therefore affirm.

I. Background Facts and Proceedings

On January 5, 2012, Drew was charged by trial information with two counts of neglect of a dependent person in violation of Iowa Code section 726.3, and two counts of child endangerment causing bodily injury, stemming from two incidents on December 14 and December 15, 2011. Drew had a relationship and fathered a child with Urasaline Firth; he lived with her, their child, and her two other children. On December 14, Drew assaulted Firth's twelve-year-old son. On December 15, Drew assaulted the boy again, including slamming his head into the back of the couch and pressing his thumb into the child's eye.

¹ An *Alford* plea allows a defendant to consent to the imposition of prison sentence without admitting participation in the acts constituting the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

The matter came on for trial on March 26, 2012, but following a recess during jury selection, the parties informed the district court they had reached a plea agreement. The agreement provided Drew would consent to the entry of *Alford* pleas on the two counts of child endangerment causing bodily injury and waive of his right to appeal. In exchange, the State would dismiss the other two charges, and a pending unrelated harassment charge.² Drew agreed to the terms, and after a lengthy on the record colloquy, his plea was accepted by the court.

Drew was sentenced on May 8, 2012, to five years for each child-endangerment count, with the sentences to be served consecutively, for a total term of imprisonment not to exceed ten years. He now appeals.

II. Standard of Review

To the extent we review Drew's claim through the guise of ineffective assistance of counsel, we review it de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998).

III. Ineffective Assistance

We can resolve all of Drew's arguments on appeal by reviewing whether his counsel was ineffective for allowing him to enter an *Alford* plea where there was not a sufficient factual basis.³ "To prove an ineffective assistance of counsel claim, 'a defendant must prove by a preponderance of the evidence that

² The agreement also included, "[t]he State will also not pursue the joint investigation with the Department of Inspections & Appeals regarding food stamp fraud."

³ Drew argues the district court did not engage him in the required colloquy as to waiving his right to appeal. In the alternative, he asserts his trial counsel was ineffective for counseling him to waive his right to appeal and enter into an *Alford* plea that lacked a factual basis. Our finding of a factual basis determines the entirety of Drew's appeal and it is therefore unnecessary for us to discuss the substance of whether Drew waived his right to appeal.

(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom.” *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citation omitted).

Before accepting a guilty plea, the court must ensure the plea is not only voluntarily and intelligently made but also supported by a factual basis. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). If an attorney allows a defendant to plead guilty to an offense for which there is no factual basis and to waive the right to file a motion in arrest of judgment, the attorney breaches an essential duty. *See State v. Doggett*, 687 N.W.2d 97, 101–02 (Iowa 2004). This requirement exists even where the plea is an *Alford* plea. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). In determining 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. *Id.*

Drew claims his attorney breached an essential duty because there was no factual basis to support the first element of child endangerment causing bodily injury—that is, whether he had custody or control over a child or was a member of the household in which the child resided. *See* Iowa Code § 726.6.

The child endangerment statute is applicable to a “member of the household.” *Id.* While this term is not specifically defined, there was ample evidence in the record so show Drew was a member of the household. Copies of the depositions of the victim, the victim’s brother, a Department of Human Services (DHS) worker, and the investigating police officer were incorporated by reference into the plea proceedings. Each mentioned in some way the fact Drew was living with the children and the mother at the time of the incidences. Drew

admitted at the plea hearing, as well as to the DHS worker, he resided with the children and their mother for several months. Further evidencing Drew's status as a member of the household was the fact that just before the incident, the children's mother began eviction proceedings against Drew, resulting in a court order requiring Drew to move out of the home. Drew also told the presentence investigator he was living with the victim, the victim's mother—his girlfriend—and her other children.

The minutes of testimony included that Drew "was left with custody and control over [the child victim]." After reviewing the minutes of testimony, the court asked Drew "if the State presented this evidence to the jury and if the jury accepted that evidence, do you believe that they would have sufficient evidence to find you guilty beyond a reasonable doubt if they accepted that evidence?" Drew responded, "Yes." We find there was a sufficient factual basis for the guilty plea and because counsel has no duty to raise a meritless claim, trial counsel was not ineffective. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009).

IV. Conclusion

Because there was a sufficient factual basis for the plea, counsel was not ineffective in allowing Drew to enter the plea, in not filing a motion in arrest of judgment, and in allowing Drew to waive his right to appeal where the sole basis for Drew's claim was a lack of factual basis for the plea.

AFFIRMED.