

IN THE COURT OF APPEALS OF IOWA

No. 3-788 / 12-1282
Filed November 6, 2013

MARK FOSTER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

A postconviction relief applicant appeals denial of his application.

AFFIRMED.

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Margaret Popp Reyes, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Mark Foster appeals the denial of his application for postconviction relief arguing his trial attorney was ineffective for failing to ensure the court established a factual basis for the plea, and for coercing Foster into taking the plea. Foster also alleges trial counsel was ineffective for failing to ensure he understood the nature of the charges and postconviction counsel was ineffective for failing to raise the issue before the postconviction court. Because the record does not support each claim, trial counsel and postconviction counsel were not ineffective. We affirm the denial of postconviction relief.

I. Background Facts and Proceedings.

On July 18, 2008, two men, Jeff Harriman and Terry Vance, were drinking beer behind the No Frills Redemption Center in Council Bluffs. Charles Armstrong, another man, approached them and began fighting with Harriman over statements Harriman had made about Armstrong's girlfriend. As the men were fighting, Armstrong picked up a wooden board and hit Harriman in the head and back. Both men then sat down, with Harriman bleeding from the nose. After a short break, they began fighting again. This time, Harriman held Armstrong on the ground and tried to gouge Armstrong's eyes with his thumbs. After this, Armstrong said, "I give up," and he and Harriman separated. Harriman lay down on the ground nearby, bleeding heavily. About an hour later, the applicant, Mark Foster, and Herbert Garrett approached Armstrong and observed his injuries from the fight. Foster asked Armstrong if he wanted Foster to "take care of" Harriman or "kick Harriman's ass." Armstrong said yes. Foster then kicked

Harriman in the head about a dozen times. While Foster was kicking Harriman in the head, Garrett began punching Harriman in the ribs and stomach. Once they were done, Armstrong straddled Harriman on the ground and punched him in the head repeatedly. Harriman was unconscious and bleeding heavily from the head. Armstrong then took out a knife and sliced the bridge of Harriman's nose. Armstrong, Foster, and Garrett then left the area.

After this, Vance went to get help. Meanwhile, another witness had found Harriman, who was alone, covered in blood and flies. Harriman was unresponsive, but still breathing. The witness called 911, and Harriman was taken to the hospital where he died due to blunt force injuries to his head and chest. The State charged Armstrong, Foster, and Garrett with first-degree murder. Later, a jury convicted Armstrong of second-degree murder. Garrett pled guilty to lesser charges and was listed as a witness against Foster. On December 8, 2008, Foster pled guilty to attempted murder, in violation of Iowa Code section 707.11 (2007), and willful injury causing serious injury, in violation of Iowa Code section 708.4(1), a class C felony.

The evidence at the postconviction trial established that on December 5, 2008, a Friday, Foster and his trial counsel received a plea offer from the State. The trial was scheduled for the following Tuesday. Their testimony differs as to what happened next. Trial counsel testified that on Friday Foster gave indications he was willing to accept the plea agreement but that trial counsel advised Foster to consider it over the weekend. Trial counsel informed Foster he would notify the State that Foster would likely accept. On the morning of

December 8, 2008, the following Monday, Foster informed trial counsel that he would not accept the plea agreement and would go to trial. Trial counsel testified that he told Foster, “[T]hat’s fine, I’ll have to let the county attorney know,” in case the State wanted to request a continuance. On Monday afternoon, Foster was brought to a hearing at the courthouse. At that point Foster informed trial counsel he would accept the plea agreement. Trial counsel testified the plea hearing and sentencing went forward that afternoon.

Foster, however, testified that as of Friday, December 5, he was not inclined toward accepting the plea offer. On December 8, he informed trial counsel he did not wish to take the plea. Foster testified that trial counsel “became very upset and extremely mad,” and informed Foster that he had already spoken to the prosecutor and arranged for the plea so that Foster had to take it. Foster stated at the postconviction trial, “Yeah, he was pressing me, he said, well, you don’t take this plea, they’re going to get you with murder one. . . . I was just seriously pressured into taking it.”

At the plea hearing the court inquired into Foster’s waiver of trial rights and whether he had the opportunity to read the minutes of testimony and discuss the options with his trial counsel. The court also examined the voluntariness of the plea; informed Foster of his rights of appeal; and recounted the offenses to which Foster agreed to plead guilty and their penalties. The court accepted Foster’s plea and, with Foster’s waiver of a presentence investigation report, sentenced Foster to a period not to exceed twenty-five years for attempted murder, and a period not to exceed ten years for willful injury.

Following the guilty plea, there were no post-plea motions and no direct appeal. Foster filed a pro se application for postconviction relief on October 30, 2009. Court-appointed postconviction counsel then filed an amended and recast application on May 9, 2012, alleging multiple grounds for ineffective assistance of counsel. The court held the postconviction-relief hearing on May 24, 2012. Trial counsel and Foster testified. On July 5, 2012, the court issued its ruling, finding Foster failed to prove any of his claims of ineffectiveness.

On appeal Foster renews two of these claims and asserts a new claim. Foster claims trial counsel was ineffective (1) in failing to ensure there was a factual basis for his plea and (2) in coercing him into taking the plea. Foster now also argues his postconviction relief counsel was ineffective for failing to assert an additional claim that trial counsel was ineffective for failing to ensure Foster understood the nature of the crime to which he pled guilty.

II. Standard of Review.

Postconviction proceedings generally are reviewed for correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). However, when a postconviction petitioner asserts violation of constitutional safeguards, such as effective assistance of counsel, we make our evaluation based on the totality of the circumstances. *Ailes v. State*, 574 N.W.2d 353, 354 (Iowa Ct. App. 1997). This is the equivalent of de novo review. *Id.*

III. Analysis.

To prevail on a claim of ineffective assistance of counsel, the applicant must prove by a preponderance of the evidence (1) trial counsel failed to perform

an essential duty and (2) prejudice resulted. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). The applicant's failure to prove either element is fatal; therefore, we may resolve the claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Judicial scrutiny of counsel's performance is highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Trial counsel owes a duty of effective assistance during the plea bargaining process. *Lafler v. Cooper*, 132 S. Ct. 1376 (2011). In the context of guilty pleas, the prejudice requirement is satisfied when the applicant shows that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

A. Lack of Factual Basis.

When trial counsel permits a defendant to plead guilty and waive the right to file a motion in arrest of judgment absent a factual basis to support the guilty plea, counsel violates an essential duty, and prejudice is presumed. *State v. Ortiz*, 789 N.W.2d 761, 764-65 (Iowa 2010). A trial court may not accept a guilty plea without first determining that the plea has a factual basis and that factual basis must be disclosed in the record. *State v. Finney*, 834 N.W.2d 46, 61-62 (Iowa 2013); see also Iowa R. Crim. P. 2.8(2)(b). Under *Finney*, generally, "the district court is required to provide the factual basis supporting the plea on the record at the plea hearing." *Finney*, 834 N.W.2d at 61. However, when there is no allegation that the plea was rendered involuntary, the reviewing court may disregard the absence of an explanation of the factual basis during the plea

colloquy and base its decision on an examination of the whole record. *Id.* at 61-62. Under these circumstances,

[r]ecourse to the entire record is appropriate because, unlike a claim of due process involuntariness, the relevant inquiry for purposes of determining the Sixth Amendment claim presented by [the applicant] does not involve an examination of his subjective state of mind at the time the trial court accepted the plea, but instead involves an examination of whether counsel performed poorly by allowing [the applicant] to plead guilty to a crime for which there was no objective factual basis in the record. The failure of the district court in this case to explain on the record the evidence supporting his finding of a factual basis is thus an omission unrelated to the substantive claim being made.

Id. at 62. To determine whether a factual basis exists, the reviewing court may examine statements made by the defendant and prosecutor at the guilty plea proceeding, the minutes of testimony, and the presentence investigation. *State v. Velez*, 829 N.W.2d 572, 575-76 (Iowa 2013). “Our cases do not require that the district court have before it evidence that the crime was committed beyond a reasonable doubt, but only that there be a factual basis to support the charge.” *Ortiz*, 789 N.W.2d at 768.

“To be guilty of attempted murder under the statute requires (1) 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) (citing Iowa Code § 707.11). One who does any act that is not justified and which is intended to cause serious injury to another commits willful injury, punishable as a C felony, if the person causes serious injury to another. Iowa Code § 708.4(1). Foster concedes that the record establishes he assaulted Harriman. He argues, however, that it does not establish he had the specific intent to cause a serious injury or death.

“Intent is a state of mind; it may be established by circumstantial evidence and by inferences drawn from that evidence.” *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995) (citing to *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)). The record shows that Foster and Garrett approached Harriman and Armstrong after they had been fighting. Harriman lay bleeding heavily on the ground. Foster observed both Harriman’s and Armstrong’s injuries and asked Armstrong if he should “take care of [Harriman]” or “kick Harriman’s ass.” Foster then kicked Harriman in the head multiple times while Garrett punched Harriman in face and body. Foster was present when Armstrong joined in and also began kicking Harriman in the head. Foster then left the scene, making no attempt to call an ambulance or seek help for Harriman. Foster stated during the plea hearing he had reviewed the minutes of testimony with his attorney and he believed the witnesses would testify consistently with them.

The record provides substantial evidence to support an inference that Foster acted with the necessary specific intent and therefore discloses a factual basis for the plea to both offenses. Foster’s trial counsel did not fail in an essential duty when he did not challenge the factual basis at the plea hearing. Consequently, Foster has not satisfied the first element of his claim of ineffective assistance on this ground.

B. Coercion.

A guilty plea, if induced by promises or threats that deprive it of the character of a voluntary act, is void. *State v. Whitehead*, 163 N.W.2d 899, 902 (Iowa 1969). Foster alleges that his trial counsel coerced him into accepting the

plea agreement offer, becoming angry when Foster informed counsel he did not want to accept the offer and stating that Foster had to take the plea because counsel had already told the prosecutor Foster would accept. However, trial counsel testified that although he had been prepared to go to trial and told Foster to think about the offer over the weekend, Foster made the decision to accept the plea bargain. Trial counsel also testified that he did not become angry or tell Foster he had to take the plea.¹ Additionally, the district court engaged in the following exchange during the plea hearing:

THE COURT: Besides what's been mentioned here in open court, has anybody made you any promises to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you in any way to get you to plead guilty?

THE DEFENDANT: No.

.....

THE COURT: Have you had enough time to talk to [trial counsel] about this plea agreement?

THE DEFENDANT: Yes, I have.

THE COURT: Have you been satisfied with his advice and services up to now?

THE DEFENDANT: Yes.

THE COURT: Do you need any more time to talk to him about this plea?

THE DEFENDANT: No, I do not.

Foster had ample opportunity during the colloquy to raise any concerns about the existence of coercion in his guilty plea. His self-serving statements during the postconviction proceedings were not persuasive to the postconviction court. It found that he failed to show trial counsel coerced him into accepting the guilty

¹ Trial counsel testified, "It's certainly possible we may have gotten agitated with each other, it's happened before, but I would never tell a client he has to take a plea."

plea. We agree; therefore, the claim of ineffective assistance of counsel based on coercion fails.

C. Nature of the Charge.

Foster argues that his postconviction relief counsel provided ineffective assistance when he did not allege that trial counsel had been ineffective for failing to ensure that Foster understood the nature of the crime to which he pled guilty.

Iowa Rule of Criminal Procedure 2.8(2)(b) provides:

The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following:

- (1) The nature of the charge to which the plea is offered.

On review, only substantial compliance with this rule is required. *State v. Ludemann*, 484 N.W.2d 611, 613 (Iowa Ct. App. 1992). The name of an offense may be sufficiently descriptive of its nature to obviate further explanation. *Brainard v. State*, 222 N.W.2d 711, 714 (Iowa 1974). The overriding question in review of a plea hearing is whether the defendant on the whole record, understood the elements of the crime and the nature of the charge against him. *State v. Philo*, 697 N.W.2 481, 487 (Iowa 2005).

In order to prevail on this claim, Foster must prove that postconviction counsel failed to perform an essential duty and that Foster was prejudiced. He presented no argument to show prejudice, but claims the failure to raise this issue before the postconviction court was a structural error and that prejudice is

presumed where structural error exists. *Lado*, 804 N.W.2d at 252. Structural error occurs when

(1) Counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants.

Id. (internal citations omitted). None of these circumstances exist here; therefore we will not presume prejudice.² Because Foster presented no argument to point to any evidence of prejudice, his claim of ineffective assistance by postconviction counsel fails.

IV. Conclusion.

Foster's trial counsel did not fail in an essential duty when he did not raise the factual basis issue at the plea proceeding. Nor did counsel coerce Foster into accepting the plea agreement. Foster's postconviction-relief counsel's failure to raise one ground of ineffective assistance of trial counsel does not constitute structural error; therefore, prejudice will not be presumed, and Foster has failed to otherwise prove prejudice. Accordingly, all three claims fail, and we affirm the decision of the postconviction relief court.

AFFIRMED.

² Foster urges this court to find this case is analogous to *Lado v. State*, 804 N.W.2d 248 (Iowa 2011), where counsel failed to prosecute an application for postconviction relief and failed to request that the case be reinstated. The error here, if any, does not rise to the level of counsel being completely denied, as it did in *Lado*. Postconviction counsel here raised nine different grounds of ineffectiveness before the postconviction court.