

IN THE COURT OF APPEALS OF IOWA

No. 3-795 / 12-1907
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAY THOMAS SANTANA,
Defendant-Appellant.

Appeal from the Iowa District Court for Louisa County, John M. Wright,
Judge.

Jay Santana appeals his judgment and sentence for theft in the third
degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, and Adam D. Parsons, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Jay Santana appeals, challenging the factual basis for his guilty plea to the charge of theft in the third degree, in violation of Iowa Code sections 714.1 and 714.2(3) (2009). We affirm.

I. Background Facts and Proceedings

Frank Best ran for state representative in Louisa County in 2008. At the outset of his campaign, Best's campaign treasurer, Jean Brauns, opened a checking account with State Bank of Wapello under the name "Best for State House." Brauns was the only authorized signatory on the campaign account's checks.

Following Best's unsuccessful campaign, \$2207.43 remained in the campaign account. In January 2009, Best enlisted his former campaign manager, Jay Santana, to close the checking account and file a campaign finance report. Best gave Santana a box containing financial documents as well as a checkbook and checks for the campaign account.

In March 2009, State Bank of Wapello notified a baffled Brauns that the campaign account had been overdrawn by \$195.56. A criminal investigation revealed that in January and February 2009, Santana had written numerous checks from the campaign account, including checks to Fareway, Kum & Go, Wine & Spirits, Taste of China, AC, Orschlen's, Demonica Ester, and Gwen Ying.¹ No one else had used the account from January through March 2009.

¹ Four of the fourteen checks had been pre-signed by Brauns to be utilized for campaign purposes.

The State charged Santana by trial information with one count of theft in the second degree for the acts occurring in January and February 2009. Pursuant to a plea agreement, Santana entered a plea of guilty to one count of theft in the third degree, in violation of Iowa Code section 714.1 and 714.2(3). At the plea hearing, the district court asked the State to provide a factual basis for Santana's plea. The following colloquy ensued:

COURT: Mr. Parsons, on behalf of the County Attorney's Office, would you please set forth a factual basis that you believe can be proven beyond a reasonable doubt at the time of trial.

STATE: Yes, Your Honor. The State believes that Mr. Santana took a checkbook and uttered checks from that checkbook for an account drawn on—the checks were drawn on the Best for Statehouse account held by the State Bank of Wapello, and that the two victims incurred a dollar loss in excess of \$500; that this uttering of the these checks was done without authorization; that Mr. Santana knew he did not have authorization; and, that it was done with the intent to permanently deprive the owners thereof.

When asked by the court whether he “agree[d] with the set of facts” set forth by the State, Santana responded, “Yes.”

The court thereafter accepted Santana's plea, entered judgment, and sentenced him to a term of imprisonment not to exceed two years. Santana now appeals.

II. Error Preservation and Standard of Review

Santana challenges his conviction and sentence, claiming the record does not establish a factual basis for his guilty plea. Santana's failure to timely file a motion in arrest of judgment after entry of his guilty plea bars a direct appeal of his conviction. See Iowa R. Crim. P. 2.24(3)(a). However, Santana also challenges the guilty plea through an ineffective assistance of counsel claim. See *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). When a defendant claims

trial counsel was ineffective for permitting a guilty plea to a charge not supported by a factual basis, our review is de novo. *Id.*

III. Discussion

To prevail on his claim of ineffective assistance of counsel, Santana must show counsel (1) failed to perform an essential duty and (2) prejudice resulted. See *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). “Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate.” *State v. Bearnse*, 748 N.W.2d 211, 214 (Iowa 2008) (citation omitted). Neither party suggests we preserve Santana’s ineffective assistance claim for a postconviction proceeding and we find the record adequate to address the claim on direct appeal.

It is axiomatic that 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. *Finney*, 834 N.W.2d at 61-62; see also Iowa R. Crim. P. 2.8(2)(b). 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).

Accordingly, in this case, if a factual basis existed in the record to support Santana’s guilty plea, counsel was not ineffective for allowing him to plead guilty and in failing to file a motion in arrest of judgment; if a factual basis does not exist, counsel was ineffective. We determine whether a factual basis existed by

considering “the entire record before the district court” at the guilty plea hearing. *Finney*, 834 N.W.2d at 62.

Santana argues there is no factual basis for the offense to which he pled guilty—theft in the third degree, in violation of sections 714.1 and 714.2(3). As section 714.1(1) provides, “A person commits theft when the person . . . [t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.”² If the value of property stolen exceeds \$500, but does not exceed \$1000, the offense is theft in the third degree. Iowa Code § 714.2(3).

Santana concedes the record demonstrates a sufficient factual basis for a theft by taking under section 714.1(1), but claims “the theft could only be classified as fifth-degree rather than third-degree.” In support of this contention, Santana acknowledges his possession of a checkbook containing checks, but states there is no evidence the value of this property exceeded \$200. *See id.* § 714.2(5) (“The theft of property not exceeding two hundred dollars in value is theft in the fifth degree.”).

The State counters, pointing out that Santana admitted to taking a checkbook from the Best for State House campaign account and uttering checks on the account without authorization and with the intent to deprive. The State claims these admissions demonstrate a sufficient factual basis for a theft by

² Santana ponders the clarity of district court’s discussion at the plea hearing regarding which alternative theory of theft under section 714.1 he was pleading under, but states he “is not raising this issue on direct appeal.” In any event, under these facts, we do not find “[t]he subtle but crucial nuances in the theft statute were left unexplained” to Santana at the plea hearing. *See State v. Galbreath*, 525 N.W.2d 424, 427 (Iowa 1994) (finding the defendant “was permitted to plead guilty to a charge for which there existed no factual basis” where the court called upon the defendant “to determine for himself whether his conduct fell within section 714.1(2)”).

taking under section 714.1(1). We agree. Santana's admissions demonstrate that not only did he take possession of the checkbook and checks; he also took possession or control of the victims' money by uttering checks to obtain goods and services, without authorization, and with the intent to deprive.³ His admissions also demonstrate the checks he uttered exceeded \$500.

Moreover, the minutes of testimony lists thirteen witnesses who would testify regarding Santana's numerous purchases using Best for State House checks in January and February 2009. The minutes also provide twenty-five pages of information detailing the aspects and amounts of the purchases. Accordingly, the minutes of testimony provide a factual basis for his plea to theft in the third degree. "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." *Finney*, 834 N.W.2d at 62; see also *Ortiz*, 789 N.W.2d at 768; *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (finding district court need not extract a confession from the defendant; it need only be satisfied the facts support the crimes, not necessarily the defendant's guilt). In addition to Santana's plea hearing admission, the minutes offer a factual basis for the crime. Therefore, Santana's counsel did not render ineffective assistance by allowing him to plead guilty to the offense.

AFFIRMED.

³ Although not controlling in this case, we observe this court reached a similar conclusion under a similar set of facts in *State v. Rice*, No. 01-1812, 2003 WL 1523576, at *2 (Iowa Ct. App. Mar. 26, 2003) (finding sufficient evidence to support a charge of theft by taking under section 714.1(1) where the defendant "took possession or control" of the victim's money by uttering unauthorized checks from the victim's account).