

**IN THE COURT OF APPEALS OF IOWA**

No. 3-843 / 13-0398  
Filed October 2, 2013

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**JESSICA CHRISTINE BURTON,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Scott County, Mary E. Howes (guilty plea), Thomas G. Reidel (deferred judgment), and Joel W. Barrows (revocation and sentencing), Judges.

Burton appeals her conviction and sentence for theft in the second degree, alleging ineffective assistance of counsel at the plea hearing and improper sentence. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Melinda Nye, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Michael Walton, County Attorney, and Melisa Zaehring, Jay Sommers, and Kimberly Shepherd, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

**TABOR, J.**

Jessica Christine Burton appeals her conviction and sentence for theft in the second degree. She alleges ineffective assistance of plea counsel and improper sentencing. Because the minutes of testimony and Burton's own statements show a factual basis supporting the value of the stolen merchandise, Burton cannot prove counsel was ineffective for allowing her to enter the guilty plea. Because the parties agree the district court erred in imposing a fine without the reduction required under Iowa Code section 908.11(5) (2009), we vacate that part of the sentence and remand for entry of an amended sentencing order.

**I. BACKGROUND FACTS AND PROCEEDINGS**

On October 12, 2010, a Gordman's department store loss-prevention officer, Eleanor Stout, saw on surveillance cameras two women removing bottles of perfume from store shelves and placing the bottles in their purses. When Stout approached the two women, they ran. Authorities later identified these women as Christina Castaneda and Jessica Burton. Castaneda struggled with employees of the store, while Burton was able to flee the scene in a car. Store personnel gave a description of the car to Davenport police officers, who were able to find it.

Police originally asked Burton to come down to the police station to help identify the woman with Castaneda at Gordman's. When the officer saw Burton, he realized she was the other woman in the surveillance video. Burton admitted to officers she had stolen the perfume. Officers recovered fourteen bottles of

perfume valued at \$689.86 from Castaneda. Loss-prevention officers determined Burton had taken thirteen bottles worth \$634.82.

On November 30, 2010, the State charged Burton with theft in the second degree, in violation of Iowa Code section 714.2(2). She entered a guilty plea in court on April 13, 2011. The court accepted the plea. The court granted Burton a deferred judgment and placed her on probation for two years. The court also ordered her to pay a civil penalty of \$750 and \$634 in restitution. In November 2012, the court revoked her probation, imposed judgment, and sentenced Burton to a term of incarceration not to exceed five years. The court also imposed and suspended a fine of \$750. Burton appeals.

## **II. STANDARD OF REVIEW**

We review claims of ineffective assistance de novo. *State v. Brothorn*, 832 N.W.2d 187, 192 (Iowa 2013). Although we often preserve ineffective-assistance claims for postconviction relief actions, “we will address such claims on direct appeal when the record is sufficient to permit a ruling.” *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). The record here allows us to address Burton’s ineffective-assistance claim on direct appeal.

We review sentencing issues for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

### III. ANALYSIS

#### A. Was Trial Counsel Ineffective For Allowing Burton To Enter A Guilty Plea To Theft in the Second Degree?

The plea court informed Burton of her right to file a motion in arrest of judgment to challenge her guilty plea. See Iowa Rs. Crim. P. 2.24(3)(a), 2.8(2)(d). Because she did not do so, she raises her challenge on appeal as ineffective assistance of counsel. See *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009) (explaining failure to file motion in arrest of judgment will not preclude challenge if failure resulted from ineffective assistance of counsel).

To prevail on her claims of ineffective assistance of counsel, Burton must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007).

The district court may not accept a guilty plea without first determining that the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b). “A factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence.” *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). When a defendant raises a factual basis issue, “the entire record before the district court may be examined.” *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013).<sup>1</sup> The record, as a

---

<sup>1</sup> Because Burton does not claim her guilty plea was involuntary, and only claims counsel was ineffective for permitting her to enter it without an objective factual basis “on the record,” examination of the minutes of testimony is proper under the analysis in *Finney*. This is true even though Burton did not acknowledge the accuracy of the minutes. The absence of an explanation on the record regarding what evidence is considered to support the factual-basis finding is “an omission unrelated to the substantive claim being made.” See *Finney*, 834 N.W.2d at 62.

whole, must disclose facts to satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). We only need to “be satisfied that the facts support the crime.” *Id.* A factual basis supporting a guilty plea does not have to establish guilt beyond a reasonable doubt. *State v. Sanders*, 309 N.W.2d 144, 145 (Iowa Ct. App. 1981). If a defendant enters a plea of guilty to a crime and the record fails to disclose a factual basis, defense counsel fails to provide effective assistance. *Id.* Prejudice in such a case is inherent. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

The district court advised Burton theft in the second degree required proof she took property not belonging to her which was valued at more than \$1000. See Iowa Code § 714.2(2).<sup>2</sup> Burton argues the record before the district court did not establish a factual basis that she took perfume worth more than \$1000. She does not challenge any facts set forth in the minutes or attached police reports. She also does not dispute she entered the guilty plea knowingly and voluntarily.

As part of her guilty plea colloquy, Burton admitted “[m]e and another girl went to Gordman’s and we stole perfume.” Burton added “[s]he had half, and I had half.” On appeal, Burton contends her statements did not establish she aided and abetted Castaneda’s theft, and the value of the merchandise Burton individually took does not meet the threshold for second-degree theft. But when we look to the minutes, we find a factual basis for aggregating the value of the property taken by both women. The minutes show Burton and Castaneda

---

<sup>2</sup> Under Iowa Code section 714.3, the value of property may be aggregated if two or more thefts are attributable to a single scheme, plan, or conspiracy.

worked together in taking perfume from Gordman's. The minutes also indicated it was Burton's idea to steal the perfume and Burton offered to pay Castaneda \$150 to help her in doing so.

While Burton personally took less than \$1000 worth of perfume, the record establishes a factual basis for finding she aided and abetted her companion's theft. "To sustain a conviction on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission." *State v. Spates*, 779 N.W.2d 770, 780 (Iowa 2010). Burton admits she actively participated in the thefts and knew her accomplice was stealing as well. Burton did not disagree with the court when specifically asked if the total value of the stolen merchandise was more than \$1000. In fact, she admits to taking half of the perfume and Castaneda taking the other half. Given Burton's admissions and the information in the record, a factual basis existed for her plea to second-degree theft. Therefore, counsel had no duty to challenge the entry of Burton's guilty plea.

**B. Did The Trial Court Err In Failing To Reduce The Fine Imposed By The Amount of the Civil Penalty Previously Assessed Against Burton?**

The district court assessed a civil penalty of \$750 when it granted Burton a deferred judgment and placed her on probation. See Iowa Code § 907.14. When the court revoked her probation, it imposed (but suspended) a \$750 fine. Iowa Code 908.11(5) provides: "[I]f the court revokes probation of a defendant who received a deferred judgment and imposes a fine, the court shall reduce the

amount of the fine by an amount equal to the amount of the civil penalty previously assessed against the defendant pursuant to section 907.14.” The provision also states: “[T]he court shall assess any required surcharge, court cost, or fee upon the total amount of the fine prior to reduction.”

The parties agree the court erred in failing to reduce the fine under section 908.11(5). The court should have reduced Burton’s fine to zero. We vacate the \$750 fine and remand for entry of an amended sentencing order reflecting this change.

**CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND  
REMANDED WITH DIRECTIONS.**