

**IN THE COURT OF APPEALS OF IOWA**

No. 3-908 / 13-0139  
Filed October 23, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JEREMY WILLIAM LILLICH,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman (plea) and Jeffrey L. Poulson (sentencing), Judges.

Jeremy Lillich challenges the sufficiency of his *Alford* plea to possession with intent to deliver a controlled substance (methamphetamine) and guilty plea to carrying weapons (knives). **AFFIRMED IN PART, SENTENCE ON CARRYING WEAPONS CONVICTION VACATED, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Patrick Jennings, County Attorney, for appellee.

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

**VOGEL, P.J.**

Jeremy Lillich challenges his *Alford* plea to possession with intent to deliver methamphetamine and guilty plea to carrying weapons (knives), claiming trial counsel was ineffective for failing to file a motion in arrest of judgment challenging the factual basis for his pleas. We find a sufficient factual basis exists to support the guilty plea with respect to the possession with intent to distribute charge. However, there is no evidence in the record as to whether the knives found on his person or in his vehicle were concealed, which is a necessary element of the crime as charged. Therefore, we affirm Lillich's conviction for possession with intent to deliver, but vacate his sentence for carrying weapons and remand.

The minutes of testimony establish the following facts. On May 31, 2012, officers observed Lillich driving a car belonging to his girlfriend outside of a Select Mart, which "is a common place for low-level street level drug dealers to hang out . . . ." Because there was an outstanding warrant and pending charges against him, police stopped Lillich as he was driving away, placed him under arrest, and searched his person. Lillich was carrying a small bag of marijuana, as well as 1.64 grams of methamphetamine wrapped in part of a sandwich baggie, a digital scale, and approximately one dozen unused plastic bags. Lillich also had two knives on his person—a pocket knife and a black Smith and Wesson. Police further found a "Japanese-type sword" approximately eighteen inches long and another knife eight to nine inches long near the center console in the car, both sheathed, as well as two large black folding knives elsewhere in the vehicle.

Lillich's cell phone was also confiscated. Upon a search of the phone, police found various text messages sent immediately prior to and leading up to Lillich's arrest. According to the minutes of testimony, an officer was prepared to testify these messages "indicate[] sales of illegal substances or the planning of the future sales of illegal substances." Further testimony would explain that, based on the text messages and a letter Lillich wrote while in jail, Lillich had intended to distribute the methamphetamine and then later receive payment.

On January 7, 2013, Lillich entered an *Alford* plea to possession with intent to distribute, and on January 8, a written guilty plea was entered with regard to the carrying weapons charge. On January 24, the district court sentenced Lillich to a term of imprisonment not to exceed ten years on the possession with intent charge and a term not to exceed two years on the carrying weapons count, the terms to be served concurrently.

Lillich now appeals, claiming a lack of factual basis showing he intended to distribute the methamphetamine. He asserts the amount of methamphetamine found on his person is more consistent with personal use, and he did not have large amounts of cash in his possession, which he claims indicates that he had not recently sold any drugs. He further asserts he was not properly charged with a violation of Iowa Code section 724.4(1) (2011), because the language of the plea agreement in combination with the minutes of testimony do not prove Lillich went armed with a knife concealed on or about his person. Therefore, counsel was ineffective for failing to file a motion in arrest of judgment challenging the factual basis of his pleas.

We review ineffective assistance of counsel claims de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). To establish an ineffective assistance claim, the defendant must show trial counsel failed to perform an essential duty and that he was prejudiced by this failure. *Id.* Counsel fails in an essential duty when the defendant is permitted to plead guilty and then waives his right to file a motion in arrest of judgment when there is no factual basis supporting the defendant's guilty plea. *Id.* In such a case, prejudice is inherent. *Id.* To determine whether a factual basis exists, we review all evidence in the record before the district court. *Id.*

To establish the crime of possession with intent to distribute a controlled substance, the State must prove the defendant knowingly possessed the drug with the intent to deliver it to another. See Iowa Code § 124.401(1)(c)(6); *State v. Scalise*, 660 N.W.2d 58, 63 (Iowa 2003). Here, the record establishes a sufficient factual basis showing Lillich intended to deliver the methamphetamine found in his pocket. He was located in a "known drug hot spot" with a scale, baggies, and methamphetamine packaged in a manner consistent with distribution. Additionally, the text messages found in his cell phone, in combination with the letter, are enough to establish Lillich intended to "front" the methamphetamine to others and receive payment later. This further negates his argument little money was found on his person at the time of his arrest, given he was to collect the money later. Therefore, a sufficient factual basis supports his

*Alford* plea,<sup>1</sup> and counsel was not ineffective for failing to file a motion in arrest of judgment.

With regard to the crime of carrying weapons, Iowa Code section 724.4(1) states:

Except as otherwise provided in this section, a person who goes armed with a *dangerous weapon concealed on or about the person*, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

Iowa Code § 724.4(1) (emphasis added). “A ‘dangerous weapon’ is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed,” which includes a dagger, switchblade knife, and knife with a blade exceeding five inches. Iowa Code § 702.7. If a knife is the dangerous weapon in question, it must be “concealed on or about the person . . . .” *Id.* § 724.4(1). In determining whether the weapon is concealed, we apply an objective standard. *State v. Newsom*, 563 N.W.2d 618, 620 (Iowa 1997). When the weapon is in a vehicle, “concealment is considered from the vantage point of one approaching the vehicle.” *Id.* (holding a machete on the floor of a van between two seats was concealed within the meaning of section 724.4(3)); *see also State v. Lamb*, 573 N.W.2d 267, 268–69 (Iowa 1998) (noting “a weapon is concealed within the meaning of section 724.4(3) if it is not discernible by ordinary observation,” and because there was

---

<sup>1</sup> We note Iowa Rule of Criminal Procedure 2.8(2) does not distinguish between an *Alford* plea and a traditional guilty plea. Thus, the fact Lillich entered an *Alford* plea does not alter our analysis. *See State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

no evidence from which the jury could discern whether someone could see the knife when approaching the car, sufficient evidence did not exist to support the defendant's conviction).<sup>2</sup>

Here, four knives were found in Lillich's car, and two on his person. The minutes assert officers "will testify that located on the defendant as well as in the immediate control and possession of the defendant were several knives including a black smith and Wesson [sic], a silver colored knife and two longer bladed knives." Officer Carl Ragar stated in his police report:

Officers also located several knives inside the vehicle, one of them was like a Japanese-type sword and I believe it was probably about 18" long, the blade. Then there was another knife that had a blade probably about 8-9" long. Both of these were evidently sitting in the vehicle next to the center console, but I did not see them in the vehicle, so you will have to see the other officers' dictations in reference to where they actually found them.

Officer Joshua Tyler, who was the one who approached Lillich and placed him under arrest, further noted:

I did locate two knives on his person. When I asked if there was anything illegal, any weapons, contraband, etc. in the vehicle, he stated that he may have a couple of small knives . . . . [T]he other two knives, only described as large black folding knives, were located in the car. You will have to see the other officers' reports and dictation as to who or where located these. Along the gear-shifter of the car were two I'm going to almost call them mini swords . . . . Those two knives or swords were in a sheath leaned up against the gear shifter, basically well within a hand's reach of any occupant sitting in either front seat but especially the driver's side.

---

<sup>2</sup> Both of these cases concern subsection three of Iowa Code section 724.4, whereas Lillich's conviction arises under subsection one. However, both of these subsections contain the words "concealed on or about the person," which is the phrase at issue in these cases. See Iowa Code § 724.4(1), (3). We interpret this case law to apply to subsection one as well as subsection three.

With regard to the two knives found on Lillich's person, there is no evidence in the record stating where these were found, whether they were visible by ordinary observation, or if they were concealed. There is also no evidence concerning where the other two folding knives were located in the car, and whether officers could see the long sheathed blades that were next to the center console from their location outside Lillich's vehicle.

The written guilty plea, with strikethroughs and handwritten words inserted (in italics), stated:

That in Woodbury County, Iowa, on or about the date stated in the Trial Information, I did the following: went armed with a dangerous weapon concealed on or about my person, or within the limits of any city, went armed with a ~~pistol or revolver, or any loaded firearm of any kind~~, *knife* whether concealed or not, or knowingly carried or transported in a vehicle a ~~pistol or revolver~~. *of 5 inches or longer*

The plea was reworded, such that it no longer reflected the elements of Iowa Code section 724.4(1). Rather, this language created a statutory violation not found in the Iowa Code. Additionally, within the same guilty plea, Lillich admitted he "went armed with a dangerous weapon (a knife with a blade which exceeded 8 inches in length) concealed on or about my person." However, that statement cannot be reconciled back to the earlier language in the plea that clearly misstated the elements of the charged crime under Iowa Code section 724.4(1). The plea is faulty when read as an integrated document.

Furthermore, the blade that exceeded eight inches in length was found in Lillich's vehicle, rather than "on or about his person," as stated in his plea. There is no evidence or statement in the plea regarding whether this weapon was concealed from the vantage point of someone approaching the vehicle, as

required by *Newsom*, 563 N.W.2d at 620. Therefore, this plea does not establish an adequate factual basis, especially given the “record, as a whole, must disclose facts to satisfy the elements of the crime.” *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001); see also *Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982) (“A guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further possibilities.”).

Given the lack of evidence in the record regarding where the two knives on Lillich’s person were found, whether or not the two long knives could be seen from outside the vehicle, and where the other two folding knives were found in the car, the record fails to establish that any of the knives were actually concealed. Furthermore, it is unclear whether either the folding knives or the knives found on Lillich’s person would qualify as a dangerous weapon under Iowa Code section 702.7, considering they were inadequately described in the minutes of testimony. Given these facts, the element of concealment necessary to establish a conviction for carrying weapons is not met, and the factual basis in the record does not support Lillich’s guilty plea. See *Lamb*, 573 N.W.2d at 269 (where there is no evidence of whether or not a knife is visible to an ordinary observer, there is not sufficient evidence supporting a guilty verdict). Therefore, Lillich received ineffective assistance of counsel when he waived his right to file a motion in arrest of judgment challenging the sufficiency of the factual basis for his guilty plea.

Where a guilty plea has no factual basis in the record, but it is possible a factual basis could be established, it is appropriate to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a



factual basis. *Schminkey*, 597 N.W.2d at 792. Though the appropriate facts do not appear in the record, the State may be able to establish whether any of the knives found on or by Lillich were concealed, and whether the concealed knives would qualify as “dangerous weapons” under Iowa Code section 702.7. Therefore, we vacate Lillich’s sentence with regard to the carrying weapons conviction and remand for further proceedings consistent with this opinion.

**AFFIRMED IN PART, SENTENCE ON CARRYING WEAPONS  
CONVICTION VACATED, AND REMANDED.**

Tabor, J., concurs; Danilson, J., dissents in part.

**DANILSON, J.** (partially dissenting)

I agree with the majority that a factual basis existed for the crime of possession with intent to distribute a controlled substance but respectfully dissent to the majority's same conclusion in regard to the charge of carrying a concealed weapon in violation of Iowa Code section 724.4(1).

The elements of the offense in the written guilty plea were identified in the alternative by the use of the disjunctive participle 'or,' and the word 'or' "generally corresponds in meaning to the word 'either.'" *Caster v. McClellan*, 109 N.W.1020, 1021 (Iowa 1906). The first alternative of the offense identified the elements in the written plea as, "I did the following: went armed with a dangerous weapon concealed on or about my person." The first alternative properly identified the elements of the offense charged and pled to—carrying a concealed dangerous weapon. I do not disagree that the remaining recitation of elements is inconsistent with Iowa law, but those other alternatives have no applicability here. Thus, the portion of the written guilty plea relied upon by the majority was mere surplusage.

The written plea set forth the factual basis for the plea. It stated, "What I actually did in Woodbury County, Iowa, on or about the date state in the trial information was: went armed with a dangerous weapon (a knife with a blade that exceeded 8 inches in length) concealed on or about my person." A dangerous weapon includes a knife with a blade exceeding five inches in length. Iowa Code § 702.7. I agree with the majority that the minutes of testimony did not describe the length of the blade that was concealed upon Lillich's person. However, in his

written plea Lillich admitted concealing a knife with a blade that exceeded eight inches, which provides a factual basis for the plea. I would affirm.