

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1076 / 6-0678  
Filed February 28, 2007

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

**vs.**

**HEATHER LYNN COLE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Warren County, Darrell J. Goodhue and Martha L. Mertz, Judges.

Heather Lynn Cole appeals from the judgment and sentence entered following her guilty plea to third-degree burglary and her *Alford* plea to third-degree criminal mischief. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Gary Kendell, County Attorney, and Jennifer Russell, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VAITHESWARAN, J.**

According to police, a surveillance videotape at an Indianola convenience store captured customer Heather Lynn Cole taking money from a cash register situated behind a counter. The video also showed Cole prying open a lottery machine and taking money from the cash box inside.

The State charged Cole with several crimes. She pled guilty to third-degree burglary. Iowa Code § 713.1, 713.6A (2005). She also entered an *Alford* plea<sup>1</sup> to third-degree criminal mischief. Iowa Code § 716.1, 716.5.

Cole argues that there is no factual basis for the crimes. She raises this argument under an ineffective-assistance-of-counsel rubric, contending trial counsel should not have allowed her to waive her right to challenge the factual basis underlying the pleas.

To prevail on this claim, Cole must establish that (1) counsel breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our highest court has stated that both prongs are satisfied where counsel allows a defendant to plead guilty or enter an *Alford* plea to a crime for which there is no factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). The question before us, therefore, is whether there was a factual basis for the burglary and criminal mischief crimes. In answering this question, we review the record de novo. *Id.*

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970) (holding Constitution does not bar sentence where accused is unwilling to admit guilt but is willing to waive trial and accept sentence).

**I. Burglary**

Burglary requires proof that a defendant entered an “occupied structure” that was not “open to the public.” Iowa Code § 713.1. Cole contends “the record does not indicate that she entered an occupied structure not open to the public or without having any right, license, or privilege to do so.” Cole focuses on the store and the cash register in the store. The State responds that the occupied structure was not the convenience store itself, which was clearly open to the public, nor the cash register alone, which arguably falls into an exception to the definition of “occupied structure.” See Iowa Code §702.12 (including in definition of “occupied structure” places “occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value,” but excluding “a box, chest, safe, changer or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it”). Instead, the State argues, the “occupied structure” was the area behind the counter where the cash register was situated. See *Bailey v. State*, 493 N.W.2d 419, 422 (Iowa Ct. App. 1992) *overruled on other grounds by State v. O’Shea*, 634 N.W.2d 150, 159 (Iowa Ct. App. 2001) (finding a private office in a public truck stop to be an occupied structure).

We agree with the State. There is ample documentation that the area behind the counter was not open to the public. A certificate of probable cause prepared by the arresting officer stated, “In order to get to the register, [Cole] reached an area of the business, behind the counter, which is not open to the public.” His minutes of testimony reiterated this statement. In addition, the

minutes of testimony for the designated store employee stated “the register is behind the counter, which is not open to the public.” Based on these recitations, we conclude there was a factual basis for the “occupied structure” element of burglary. Therefore, counsel was not ineffective in allowing Cole to waive her right to challenge this element.

## ***II. Third-Degree Criminal Mischief***

The crime of criminal mischief requires proof of “damage, defacing, alteration, or destruction of property.” Iowa Code § 716.1. In his probable cause certificate, the arresting officer stated “approximately \$1250 of damage was done to slot machines by the suspect attempting to gain entry.”<sup>2</sup> His minutes of testimony reiterated this statement, as did the minutes of the designated store employee. There was also evidence that Cole “pushed up against the machine,” “pushed on it and it opened,” and “did try to forcibly open it . . . .”

This record is sufficient to establish a factual basis for the *Alford* plea. Therefore, counsel was not ineffective in allowing Cole to waive her right to challenge this element.

**AFFIRMED.**

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<sup>2</sup> The crime of third-degree criminal mischief to which Cole entered an *Alford* plea, requires damage of between \$500 to \$1000. Iowa Code §716.5.