IN THE COURT OF APPEALS OF IOWA

No. 6-382 / 05-1522
Filed June 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN GLENN PORTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek and Steven Van Marel, District Associate Judges.

Benjamin Porter appeals from his conviction of burglary in the third degree and criminal mischief in the fourth degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Stephen Holmes, County Attorney, and Mary Howell Sirna and Daniel Rothman, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Benjamin Porter appeals from his convictions following his guilty pleas to burglary in the third degree in violation of Iowa Code section 713.6A (2003) and criminal mischief in the fourth degree in violation of section 716.6. Porter alleges the district court did not follow the requirements of Iowa Rule of Criminal Procedure 2.8(2)(*b*). Specifically, he claims the district court failed to (1) establish a factual basis for the pleas; (2) advise him of the maximum penalties; and (3) obtain a valid waiver of his constitutional rights. Based upon this alleged error, he then claims his trial counsel was ineffective for failing to object to the plea.[1] We affirm.

I. Background Facts and Proceedings

Porter pleaded guilty to burglary in the third degree and criminal mischief in the fourth degree on May 13, 2004. On June 1, 2004, the district court accepted Porter's guilty pleas and deferred judgment, placing Porter on probation for one year. On May 31, 2005, the State filed an application to revoke Porter's probation. It alleged Porter violated the conditions of his probation. A hearing was held during which Porter admitted to the probation violations and agreed his deferred judgment should be revoked. The district court revoked its deferred judgment from 2004, and adjudged Porter guilty of both burglary in the third degree and criminal mischief in the fourth degree. In contravention of the agreement made by counsel, the court sentenced Porter to two years in prison

[1] The brief submitted by Porter is unclear in that it alleges district court error but then goes on to state the appeal must be raised as an ineffective assistance of counsel claim. Our review will include both.

for the burglary charge and one year in prison for the criminal mischief charge. The sentences are to be served concurrently. Porter appeals.

II. Standard of Review

Generally, where the defendant alleges a guilty plea failed to comport with rule 2.8(2)(*b*) we review for errors at law. *State v. Doggett*, 687 N.W.2d 97, 99 (Iowa 2004). However, where the defendant's claim is raised through ineffective assistance, we review de novo. *Id.*

III. Merits

Porter alleges that the district court erred in accepting his guilty pleas and that his counsel was ineffective for failing to object when those pleas did not comport to the requirements of rule 2.8(2)(*b*). He argues the written guilty plea he signed does not (1) contain a sufficient factual basis for either charge; (2) indicate the maximum penalty possible; and (3) show he understood the rights he waived when he pleaded guilty.

To establish ineffective assistance of counsel, Porter must show (1) his counsel failed to perform an essential duty and (2) that failure prejudiced Porter's defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Normally, we preserve ineffective assistance claims for postconviction relief. *Doggett*, 687 N.W.2d at 100. The record here, however, is adequate for us to address Porter's claim. *See id.*

A. Factual Basis

When evaluating whether a plea contains a factual basis, we look to more than the written plea entered by the defendant. "[W]e consider the entire record before the district court at the guilty plea hearing, including any statements made

by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Burglary is defined in section 713.1 as

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure . . . or any person having such intent who breaks an occupied structure commits burglary.

Burglary in the third degree includes breaking into unoccupied motor vehicles. Criminal mischief is defined in section 716.1 as "[a]ny damage, defacing, alteration, or destruction of property. . . when done intentionally by one who has no right to act." Criminal mischief in the fourth degree is defined as when "the cost of replacing, repairing, or restoring the property so damaged, defaced, altered, or destroyed exceeds two hundred dollars, but does not exceed five hundred dollars." Iowa Code § 716.6.

The record clearly indicates a factual basis for the plea. In his written plea, Porter admitted entering vehicles with the intent to commit theft. At his plea hearing, he admitted going with his roommate to "open up car doors" to take whatever might be in the car. The minutes of testimony indicate that the car windows were broken. A "Statement of Pecuniary Damages" filed by the State lists damages and stolen items worth a total of $2257.86.[2] Thus, the record clearly shows a factual basis for the charges.

B. Maximum Penalty

The State concedes that Porter was not advised of the maximum penalties for these offenses at the time of the original plea proceedings. However, the State points out that Porter received a deferred judgment on June 1, 2004 and

[2] The trial information initially charged Porter with twelve offenses.

was not "adjudged guilty" at that time. *See State v. Stessman*, 460 N.W.2d 461, 462-63 (Iowa 1990). The State argues that the district court substantially complied with this requirement of rule 2.8(2)(*b*) at the probation revocation hearing and that Porter was indeed advised of the maximum penalty *before* he was adjudged guilty. We agree.

The following colloquy took place between the district court and Porter at the proceedings held on September 13, 2005:

> THE COURT: If the Court accepts your admissions that you violated your probations, the next stage of the proceedings will be a disposition. At the time of the dispositions, the court will determine what penalty, if any, to impose for the violations of probation. If the Court accepts these admissions, the Court may at the time set for disposition revoke all three deferrals of judgments that were previously granted to you, and in the case of burglary in the third degree, order you committed to the custody of the Director of the Division of Corrections of the State of Iowa for a period of not to exceed two years and order you to pay a fine in the sum of $5000. Do you understand the maximum penalty for the burglary charge?
>
> PORTER: Yes.
>
> THE COURT: On the charge of criminal mischief in the fourth degree, the Court could sentence you to be incarcerated in the Story County Jail for a period of one year and to pay a fine in the sum of $1500. Do you understand the maximum penalty the Court could impose on the criminal mischief in the fourth degree charge?
>
> PORTER: Yes.
>
> THE COURT: And on the charge of domestic abuse assault, simple misdemeanor, the Court could sentence you to be incarcerated in the Story County Jail for a period of thirty days and to pay a fine of up to $500. Do you understand the maximum penalty in that regard?
>
> PORTER: Yes.
>
> THE COURT: If these matters are ordered to be served in a consecutive fashion, the total period of confinement you could receive on revocations of probations in these three matters would be three years imprisonment in the Iowa State Penitentiary—excuse me—three years and thirty days imprisonment in the Iowa State Penitentiary and fines totaling $7000. Do you understand that?
>
> PORTER: Yes.

> THE COURT: In addition, do you also understand you will be required to pay any associated surcharges as required by Iowa law, and you will also be required to pay court costs, which may include a requirement that you repay attorney fees. Do you understand all of that?
>
> PORTER: Yes.
>
> THE COURT: And do you understand that the Court is not bound to follow the recommendations made by the parties in these matters and could conceivably impose any penalty up to that maximum?
>
> PORTER: Yes.

Thus, it is clear Porter was advised of the maximum penalties before the entry of judgment and sentencing on these two offenses.

C. Waiver of Trial Rights

Porter was not advised of his trial rights in either the written plea or the plea proceedings conducted on June 1, 2004. Therefore, the State concedes the requirements of rule 2.8(2)(*b*) were not followed at that time. However, the State again notes that Porter received a deferred judgment and argues the requirements of rule 2.8(2)(*b*) were substantially complied with at the probation revocation proceedings held on September 13, 2005. We agree.

The colloquy between the district court and Porter that took place on September 13, 2005, *before* he was adjudged guilty and sentenced was extensive and thorough. The colloquy included the discussion of each and every trial right set out in 2.8(2)(*b*). While it is true that the district court was stating these rights in connection with the new offenses making up the probation revocation, these are the same rights that apply to all offenses including burglary in the third degree and criminal mischief in the fourth degree. Porter advised the district court that he understood these rights and was waiving them. Once again, this colloquy occurred before the entry of judgment and sentence. We therefore

conclude the district court substantially complied with the requirements of rule 2.8(2)(*b*). *See State v. Myers*, 453 N.W.2d 574, 578 (Iowa 2002).

D. Ineffective Assistance of Counsel

Because Porter's underlying claims concerning the adequacy of his plea have no merit, his attorney had no duty to raise them. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005). Porter's ineffective assistance claim must also fail.

IV. Summary

Porter received a sweet deal at the original proceedings conducted on June 1, 2004. He was granted a deferred judgment on both charges and ten serious charges were dismissed by the State. He did not complain to the district court at that time about any violations of his rights. In addition, he did not challenge the guilty plea at any time prior to the probation revocation proceedings. Porter failed to follow the rules of probation, thereby necessitating the revocation proceedings of September 13, 2005. On that date, he was thoroughly advised of his rights and advised of the maximum penalties of burglary in the third degree and criminal mischief in the fourth degree. At no time during the proceedings, did Porter raise any objections concerning the adequacy of his guilty plea of June 1, 2004. Things turned sour only after the district court failed to follow counsels' agreement and sentenced Porter to prison. We conclude the district court substantially complied with rule 2.8(2)(*b*) and that trial counsel was not ineffective. His conviction and sentence is affirmed.

AFFIRMED.