

IN THE COURT OF APPEALS OF IOWA

No. 6-465 / 05-1918
Filed June 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HUBERT (nmn) TODD, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Hubert Todd, Jr. appeals from his conviction and sentence for second-degree fraudulent practice. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Sue Swan, Assistant County Attorney, for appellee.

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

MAHAN, P.J.

Hubert Todd, Jr. entered an *Alford* plea to the charge of second-degree fraudulent practice, see Iowa Code §§ 249A.8, 714.8, 714.10, and 703.1 (2005), as part of a plea agreement involving several other pending cases. He wanted to be sentenced immediately, and therefore waived any ability to challenge the plea by proceeding to sentencing. He appeals from his conviction and sentence, contending he received ineffective assistance of counsel when he pleaded guilty to an offense that was not supported by a factual basis. Our review is *de novo*. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005).

To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Failure to demonstrate either element is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

Counsel fails to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Thus, the issue before us is whether a factual basis existed for Todd's guilty plea to the crime of fraudulent practice. In determining whether a factual basis for the guilty plea exists, we consider the entire record before the district court, including any plea colloquy. *Id.* at 448-49.

Todd did not object to the district court accepting the minutes of testimony and incorporating those minutes into the record as forming a factual basis for his plea. The minutes of testimony set forth a scheme whereby Kassandra Todd,

defendant's niece, paid Tanika Todd for the use of Tanika's Medicaid card to obtain orthodontic treatment. After the dentist's office became aware of the fraud, defendant and his wife, Lola Todd, went to the dentist's office claiming to be the uncle and aunt of "April Smith." Defendant told the dentist "April Smith" had stolen the Medicaid card. He attempted to make arrangements for repayment.

In an interview with the investigator assigned by the Iowa Department of Inspections and Appeals, Todd admitted he knew all along about Tanika selling the use of her Medicaid card to Kassandra. He knew the women would get into trouble for fraudulent use of the card, and he concocted the "April Smith" story to conceal any wrongdoing.

Todd's admission that he knew "all along" about the scheme supports his conviction as an aider and abettor. See *State v. Wedebrand*, 602 N.W.2d 186, 189 (Iowa Ct. App. 1999) ("Aiding and abetting in a crime occurs when a person assents to or lends countenance and approval to another's criminal act either by active participation or by encouraging it in some manner prior to or at the time of commission."). Upon our review of the record before the trial court, we conclude a factual basis existed to support Todd's plea. Therefore, Todd's trial counsel was not ineffective for failing to challenge the plea. We affirm Todd's conviction and sentence.

AFFIRMED.