

**IN THE COURT OF APPEALS OF IOWA**

No. 8-483 / 07-1969

Filed July 30, 2008

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

**vs.**

**JASON JAMES ALLEN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Defendant appeals his conviction and sentence for first-degree robbery following his guilty plea. **SENTENCE SET ASIDE AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**SACKETT, C.J.**

The defendant, Jason James Allen, appeals contending his attorney was ineffective in allowing him to enter a plea to robbery in the first-degree in violation of Iowa Code sections 711.1 (2007) and 711.2. He contends there was an insufficient factual basis to support a finding he was guilty of robbery in the first degree and his sentence should be vacated. The State contends Allen's conviction should be affirmed and the issue should be preserved for possible postconviction proceedings. We set aside the sentence and remand for further proceedings.

**I. ERROR PRESERVATION AND SCOPE OF REVIEW.**

A defendant must file a motion in arrest of judgment in order to challenge a guilty plea on appeal. Iowa R. Crim. P. 2.24(3)(a); *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001). A guilty plea may nonetheless be challenged on appeal if the failure to file the motion resulted from ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008); *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Allen contends acceptance of his plea of guilty and his election to waive his right to file a motion in arrest of judgment resulted from his attorney's failure to object to the plea as lacking a factual basis. We review an ineffective-assistance-of-counsel claim such as this de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

"If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for [postconviction relief proceedings]." Iowa Code § 814.7(3); *Bearse*, 748 N.W.2d. at 214. To establish

his claim, defendant “must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted.” *Ondayog*, 722 N.W.2d at 784; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

An attorney 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.” *Brooks*, 555 N.W.2d at 448. Prejudice in this instance is inherent. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). “[U]nder no circumstances may a conviction upon plea of guilty stand if it appears that the facts of the charge do not state a violation of the statute under which the charge is made.” *State v. Mitchell*, 650 N.W.2d 619, 620 (Iowa 2002). Should this occur, there is per se ineffective assistance of counsel. *Id.* If there is no factual basis for the plea there are two remedies. Where the record establishes the defendant was charged with the wrong crime the conviction and sentence may be vacated and the case remanded for dismissal. *Schminkey*, 597 N.W.2d at 792; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). However where it is possible a factual basis could be shown the sentence may be vacated and the case remanded to give the State an opportunity to establish a factual basis. *Schminkey*, 597 N.W.2d at 792.

## **II. BACKGROUND.**

Allen was charged by trial information with robbery in the first degree for robbing John’s Grocery Store in Iowa City, Iowa, on September 15, 2007. Minutes of testimony indicate the clerk in the store at the time of the robbery

would testify that a man she later identified as Allen<sup>1</sup> entered the store, brought a can of beer and chips to the counter, and after she rang them up she asked him if that was all. As to the robbery, the minutes indicated she would testify:

He said, "No" and to give him all the money. She looked at him and told him "No." He looked at her and pulled out a gun from under his sweatshirt. It appeared to be a handgun. He did not point it directly at her, but made sure she saw it. She told him "No" again. She had a change bag on the counter. . . . Defendant, then grabbed the bank/change bag from the counter and went out the door. The bag had around \$15.00 in it.

No gun was ever found. However, an acquaintance of Allen, whose home Allen visited the morning of the robbery, told officers a CO<sub>2</sub> powered pistol he had last seen on a table in his home the day before the robbery was missing after the robbery.

Allen pled guilty to robbery in the first degree. His attorney noted it was against her advice; however, her reasons for the advice are not in the record. The district court found a factual basis for the plea. Defendant waived his right to file a motion in arrest of judgment and was sentenced immediately.

### **III. FACTUAL BASIS FOR THE PLEA.**

Allen contends his counsel was ineffective in permitting him to plead guilty because the evidence did not supply a factual basis for robbery in the first degree. He argues there was no evidence to elevate the robbery to first degree. "A person commits robbery in the first degree when, while perpetrating a robbery, *the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon.*" Iowa Code § 711.2 (emphasis supplied).

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<sup>1</sup> The clerk identified Allen from a line-up and others identified Allen from a videotape of the robbery. Other evidence also connected Allen with the robbery.

In addressing the factual basis of Allen's plea the following colloquy occurred:

THE COURT: Mr. Allen, if this matter were to proceed to trial, the State would have to prove by competent evidence beyond a reasonable doubt . . . that on or about September 15, 2007, in Johnson County, Iowa, with the intent to commit a theft, you threatened another or purposely put another in fear of immediate serious injury[,] . . . that you demanded money in the drawer of John's Grocery, and when the clerk refused, that you displayed a handgun and grabbed a bank bag and thereafter took flight . . . . Do you understand, sir, what I have just indicated?

THE DEFENDANT: Yes, your honor.

...

THE COURT: Have you read the Minutes of Testimony?

THE DEFENDANT: Yes, I have.

...

THE COURT: And on September 15, 2007, in Johnson County, Iowa, with intent to commit a theft, did you threaten another or purposely put another in fear of immediate serious injury,<sup>2</sup> again, repeating that you demanded money from a clerk at John's Grocery, and when refused, you displayed a handgun and grabbed a bank bag and ran?

THE DEFENDANT: Yes, ma'am.

No inquiry was made by the district court about the type or nature of the handgun. There is no evidence Allen purposely inflicted serious injury nor did he admit he did. The question then is did the evidence support a finding Allen either purposely attempted to inflict serious injury or was armed with a dangerous weapon. Both questions revolve around whether the handgun that Allen was to have exhibited, met the definition of a dangerous weapon.

A "dangerous weapon" is defined in Iowa Code section 702.7 which provides:

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<sup>2</sup> This language appears in Iowa Code section 711.1 while section 711.2 provides: "A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon."

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. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switch-blade knife, or knife having a blade exceeding five inches in length.

There are no facts or circumstances to support a finding that the handgun Allen showed met this definition. Consequently there was not a factual basis to support Allen’s plea to robbery in the first degree. His trial attorney was ineffective in failing to object to the plea on these grounds. Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty and prejudice is inherent. *Schminkey*, 597 N.W.2d at 788; *Hack*, 545 N.W.2d at 263.

We vacate the sentence entered on the conviction of robbery in the first degree and remand for further proceedings. There may be additional facts to support a finding Allen was armed with a dangerous weapon when the robbery occurred so as to support a conviction of robbery in the first degree. If so, the State may supplement the record to establish the factual basis for the charge. If a factual basis is not shown, the first degree conviction must be set aside but Allen could be found guilty of robbery in violation of Iowa Code section 711.1 as there is a factual basis for conviction on this charge.

**SENTENCE SET ASIDE AND REMANDED FOR FURTHER PROCEEDINGS.**