

IN THE COURT OF APPEALS OF IOWA

No. 8-491 / 07-2151
Filed July 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TARA LYNN MICKENS SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee,
Judge.

Defendant appeals multiple convictions for child endangerment entered
after her guilty plea. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant
State Appellate Defender, for appellant.

Tara Smith, Des Moines, pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney
General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant
County Attorney, for appellee.

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

EISENHAUER, J.

Tara Lynn Mickens Smith appeals three of her four convictions¹ for child endangerment entered after her guilty plea. She alleges ineffective assistance of counsel. We affirm.

Based on the police reports and the minutes of testimony, the following occurred. In November 2007, after a joint bowling outing with seven children, Smith's boyfriend was driving a minivan containing Smith, his children and her children. Police officers observed a child leaning out of the driver's side of the minivan and yelling stop and then jumping out of the van while yelling "he is drunk" when the van stopped. The minivan then squealed its tires and moved forward, so the police activated the emergency equipment. While stopped by the police, the boyfriend admitted he drank earlier at the bowling alley. The police observed he had the "smell of alcohol on [his] breath, slurred speech, bloodshot eyes, and seemed very confused." A breathalyzer test registered a blood alcohol level of .260. Smith, the front-seat passenger, told the police her boyfriend was driving recklessly and all over the road and she knew "he was drunk all day." Smith stated some kids were also hanging out of the passenger side of the van and four kids had jumped out of the van in fear for their safety.

In December 2007, Smith pled guilty to four counts of child endangerment under Iowa Code sections 726.6(1)(a), .6(7) (2007). Smith signed a written guilty plea stating: "I allowed 4 minor children in my care to ride w/a reckless driver and hang out van doors & jump out of the van. Ages of juveniles were: 12, 13,

¹ Smith appeals Counts II, III and IV concerning endangerment of her boyfriend's children. Smith does not appeal Count I, endangerment of her twelve-year-old child.

17², and 10.” Smith was sentenced to two years on each count, to run concurrently, and, except for thirty days, her sentences were suspended. Additionally, she was given credit for thirty days served. Smith’s sentences ran consecutively to probation. Smith filed a pro se appeal in December 2007, and in January 2008, her attorney filed notice of appeal.

On appeal, Smith argues her counsel was ineffective and failed to perform an essential duty by allowing her to plead guilty to a charge for which no factual basis exists. Smith’s claims are reviewed de novo. See *State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007). In order to prevail, Smith must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *id.* at 393. We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id.* The record is adequate to resolve this issue on direct appeal. We conclude Smith has failed to prove counsel failed to perform an essential duty.

Child endangerment requires “a person having custody or control over a child” to knowingly act in a manner creating “a substantial risk to a child[’s] . . .

² Smith notes Count III of the trial information refers to “J.S. age 17,” but the attached listing of the State’s witnesses identifies “J.S., age 7.” Smith admits “it is possible that the child referred to in Count III was incorrectly identified as seventeen instead of seven.” Although three children identified by J.S. were listed, they all had different ages. The police reports reveal the Count III J.S. was born in 2000 and is seven. Seventeen is a scrivener’s error inadvertently carried over into the plea document. Therefore, we need not address Smith’s argument pertaining to a seventeen-year-old.

physical, mental or emotional health or safety.” Iowa Code § 726.6(1)(a). Smith told the police her boyfriend “was drunk all day,” yet she knowingly allowed the children to be transported by him. Her actions created substantial risk to the children’s safety.

Smith, however, argues she did not have “control” as required by the statute. The legislature has defined “person having control” to include: “A person who has undertaken or assumed temporary supervision of a child . . . without explicit consent from the parent.” *Id.* § 726.6(3)(b). Smith argues her boyfriend “had control over the instrumentality that posed the risk to the children” because he was the driver³ and argues she has no responsibility. We disagree.

Control refers to restricting or governing power, the power of oversight, and “applies to a person who has the ability to control the risk the statute prohibits.” *State v. Anspach*, 627 N.W.2d 227, 234-35 (Iowa 2001). Smith was not a mere passenger sharing a ride, but was one of two adults leading and controlling a joint bowling outing. She knew her boyfriend “was drunk all day” and, therefore, not capable of rational decision-making. We conclude Smith had the ability to control the risk prohibited by statute. She could have prevented the substantial risk to the children’s safety by refusing to allow the children in the vehicle, by driving the vehicle herself, by calling a cab, or by calling a friend for transportation. At the plea hearing she admitted the children were “in my care” and she allowed them to ride with a “reckless driver.” We find there is a sufficient

³ Iowa Code § 726.6(3)(c) identifies a motor vehicle operator as a person having control under the child endangerment statute.

factual basis for her pleas and she “assumed temporary supervision” as required by the statute to meet the control element. See Iowa Code § 726.6(3)(b).

Smith has failed to prove breach of an essential duty; therefore, her ineffective assistance of counsel claim fails.

AFFIRMED.