

IN THE COURT OF APPEALS OF IOWA

No. 8-575 / 07-1991
Filed August 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LESLIE JAMES SCHROEDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D. McKendrick (plea) and John A. Nahra (sentencing), Judges.

Leslie James Schroeder appeals his sentence, following his guilty plea and conviction, for eluding. **SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Michael L. Wolf, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Leslie James Schroeder appeals his sentence, following his guilty plea and conviction, for eluding.¹ He claims that his trial counsel was ineffective for failing to challenge the factual basis for his guilty plea and the district court erred in imposing a minimum fine larger than the minimum fine required by statute. We vacate the sentence and remand for further proceedings.

The State charged Schroeder, by trial information, with theft in the second degree and eluding. The charges stemmed from a high speed chase that occurred on January 25, 2005. The chase ensued after law enforcement attempted to stop the pickup truck Schroeder was driving because it fit the description of truck that had been reported stolen. The chase was finally ended when an Iowa State Trooper deployed stop sticks in front of the truck causing Schroeder to wreck the vehicle.

On October 11, 2007, Schroeder appeared in open court and submitted guilty pleas pursuant to a plea agreement. Under the terms of the agreement Schroeder pled guilty to eluding, an aggravated misdemeanor, in violation of Iowa Code section 321.279(2) (2005), and to an amended charge of criminal mischief in the second degree. At the plea proceeding Schroeder admitted, among other things, that on the date in question he failed to stop for a law enforcement vehicle, that the vehicle was using its red lights and siren in an attempt to stop him, and that in connection with his failure to stop he exceeded the speed limit by at least twenty-five miles per hour. Schroeder's trial counsel

¹ Schroeder was also convicted of criminal mischief. Although he states he is appealing from that conviction as well, we find no argument in his brief relating to or challenging that conviction and therefore need not and do not address it in this opinion.

told the court that based on his investigation there was a factual basis for the guilty pleas. The court found there was a factual basis to support Schroeder's guilty pleas and accepted them. The court subsequently sentenced Schroeder to an indeterminate term of imprisonment of no more than five years on the criminal mischief charge and a term of imprisonment of no more than two years on the eluding charge. The sentences were ordered to run concurrently. The court also imposed fines of \$750 and \$625 respectively.

Schroeder claims his trial counsel was ineffective for failing to challenge the factual basis for his guilty plea to the charge of eluding. We conduct a de novo review of claims of ineffective assistance of counsel. *State v. Myers*, 653 N.W.2d 574, 576 (Iowa 2002). To prevail on his claim Schroeder must prove (1) his counsel breached one or more essential duties, and (2) he suffered prejudice due to those breaches. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984). Claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Where the record is adequate to address the issue, however, such claims will be considered on direct appeal. *See id.* As will become clear, this is such a case.

The district court may not accept a guilty plea without first determining that the plea has a factual basis. *See* Iowa R. Crim. P. 2.8(2)(b); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

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. Prejudice in such a case is inherent. Therefore, our first and only inquiry is whether the record shows a

factual basis for [Schroeder's] guilty plea to the charge of [eluding]. In deciding whether a factual basis exists, we 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.²

Schminkey, 597 N.W.2d at 788 (citations omitted). A person commits the charged offense of eluding when as the driver of a motor vehicle the person

willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual and audible signal as provided in this section and in doing so exceeds the speed limit by twenty-five miles per hour or more.

Iowa Code § 321.279(2). Schroeder challenges the factual basis for the “uniformed police officer” element of this crime.

From our review of the record before us, we conclude Schroeder is correct that a factual basis for the “uniformed police officer” element of the eluding charge is lacking. At the plea colloquy, the district court did not inform Schroeder that one of the elements the State was required to prove to convict him of eluding was that the law enforcement officer was in uniform. Likewise, when asking Schroeder to admit to the elements of the eluding charge the court did not mention the requirement that the officer be in uniform. Further, Schroeder never admitted the pursuing officer was in uniform. Finally, the minutes of evidence are completely silent as to whether the pursuing officer was in uniform.

² Because we consider only the “record before the district court *at the guilty plea proceeding*,” *Schminkey*, 597 N.W.2d at 788, we may not consider the presentence investigation report unless it was available to the district court at the time of the plea hearing. *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980).

The record thus contains nothing indicating that the pursuing officer was in uniform. Under these circumstances, we conclude the record does not show a complete factual basis for Schroeder's guilty plea to the charge of eluding.

Where a guilty plea has no factual basis in the record, two possible remedies exist. Where the record establishes that the defendant was charged with the wrong crime, we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge. Where, however, it is possible that a factual basis could be shown, it is more appropriate merely to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis.

Schminkey, 597 N.W.2d at 792 (citations omitted). We think this case falls within the latter category. There may be additional facts and circumstances that do not appear in the minutes of testimony that would show the pursuing officer was in uniform. See *id.* Therefore, we vacate the sentence entered on the eluding charge and remand for further proceedings at which time the State may supplement the record to establish a factual basis for the crime of eluding. If a factual basis is not shown, Schroeder's plea of guilty to that charge must be set aside. See *id.*

Our vacation of the sentence entered on the eluding conviction makes it unnecessary to address Schroeder's claim that the district court erred in imposing a fine that it believed to be the minimum fine required by statute on the eluding charge, but was in fact larger than the minimum.³

SENTENCE ON ELUDING CHARGE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

³ Effective July 1, 2006, Iowa Code section 903.1(2), which had required a fine of at least \$500 upon conviction for an aggravated misdemeanor, was amended and the minimum fine was increased to \$625. See 2006 Iowa Acts ch. 1166, § 11 (codified at Iowa Code § 903.1(2) (2007)).