IN THE COURT OF APPEALS OF IOWA

No. 8-982 / 08-0325
Filed January 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LANCE BRANDON VAUGHN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy Tabor (plea) and John A. Nahra (sentencing), Judges.

Defendant appeals from the judgment and sentenced entered upon his plea of guilty to the charge of theft in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy K. Divine and Robert Weinberg, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Defendant, Lance Brandon Vaughn, appeals from the judgment and sentence entered upon his plea of guilty to theft in the second degree in violation of Iowa Code sections 714.1(1) or (6) and 714.2(2) (2005). He contends he received ineffective assistance of counsel when his attorney permitted him to plead guilty for a charge that lacked a factual basis in the record. We affirm Vaughn's conviction and preserve his ineffective assistance of counsel claim for postconviction relief.

I. BACKGROUND.

On August 29, 2007, a complaint was filed charging Vaughn with one count of second-degree theft and alleging Vaughn wrote nineteen checks to Hy-Vee from June 9 to June 20, 2007 on a bank account with insufficient funds. It stated "[t]he defendant did obtain $1,182.20 in merchandise from Hy-Vee due to this incident knowing the check would not be paid when presented to the bank." On September 13, 2007, another complaint was filed charging Vaughn with second-degree theft for a series of bad checks written to Mother Hubbard's between July 24 and July 29, 2007. On October 16, 2007, the State filed a motion to dismiss the second complaint because the charge was being combined with the first complaint. This motion was granted.

The State and Vaughn entered into a plea agreement. In exchange for Vaughn's guilty plea to one charge of second-degree theft, the State agreed to, among other things, not pursue the additional charge that had been combined with the original complaint. It explained, "[s]hould the Defendant not accept this

plea agreement, the State intends to file the original Theft Second Degree that was dismissed and combined into [this case] . . . ." However, as part of the agreement, Vaughn would be required to pay full restitution for each incident in the sum of $4071.55.

During the plea proceedings, the judge discussed the charge and the factual basis with the attorneys and Vaughn. The judge noted that second-degree theft requires the taking of property exceeding $1000 in value. In determining whether there was a factual basis for Vaughn's guilty plea, the judge asked,

> THE COURT: Do you agree that they're alleging it was around $1,182?
> THE DEFENDANT: With the $35 fees -- with all the fees and things, yes.

The plea was thereafter accepted and judgment entered on December 28, 2007. Vaughn was sentenced to a period of imprisonment not to exceed five years. He did not file a motion in arrest of judgment but did file a timely notice of appeal.

Vaughn asserts he received ineffective assistance of counsel because his attorney allowed him to plead guilty to second-degree theft when the record provided no factual basis for the charge. He claims the record does not show he stole property worth over $1000 and a court cannot include bank fees into the amount of stolen merchandise. He contends the amount in the complaint, $1182.20, included these fees and if they were subtracted, the value of the stolen property may not be in excess of $1000. Vaughn reasons that since there is no accounting in the record to show the amount written on each bad check, there is

not a factual basis to show that he indeed stole the amount required under Iowa Code section 714.2 and therefore his plea should be vacated.

II. ERROR PRESERVATION AND STANDARD OF REVIEW.

Failure to file a motion in arrest of judgment generally precludes challenges to a guilty plea on appeal. Iowa R. Crim. P. 2.24(3)(*a*); Iowa R. Crim. P. 2.8(2)(*d*); *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001). However, the failure to file a motion in arrest of judgment will not preclude the claim if the failure was a result of ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008); *Kress*, 636 N.W.2d at 19.

Our review ineffective assistance of counsel claims is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We typically preserve these claims for postconviction relief although we will resolve them on direct appeal if the record is adequate. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

III. ANALYSIS.

To establish ineffective assistance of counsel, Vaughn "'must prove by a preponderance of the evidence that (1) his counsel failed to perform an essential duty, and (2) prejudice resulted.'" *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (quoting *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004)). The first element is satisfied when the defendant shows the attorney performed "below the standard of a reasonably competent attorney." *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish prejudice, a defendant claiming ineffective assistance during the entry of a guilty plea must prove, "but for counsel's breach, there is a reasonable

probability he or she would have insisted on going to trial." *Tate*, 710 N.W.2d at 240. If counsel allows a defendant to plead guilty to a crime that is unsupported by a factual basis in the record, counsel has failed to provide effective assistance. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). In this situation, prejudice to the defendant is presumed. *Keene*, 630 N.W.2d at 581; *Schminkey*, 597 N.W.2d at 788.

We believe the record is not adequate to address Vaughn's claim. The record is unclear as to whether bank fees were included in the amount presented in the minutes of testimony. It is the amount of the checks written that determines the proper degree of the offense. *See State v. Dillard*, 225 Iowa 915, 918, 281 N.W. 842, 844 (1938) (explaining that under the statute for false uttering of checks, currently Iowa Code section 714.1(6), "the intention of the Legislature [is] to make the amount of the check and not the value of the thing received in exchange therefor determine" the level of the offense). We are unable on this record to determine if counsel was ineffective. Consequently, we preserve this claim for possible postconviction relief proceedings.

AFFIRMED.