

IN THE COURT OF APPEALS OF IOWA

No. 9-041 / 08-0683
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ZACHARY RYAN ROSENTHAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers and Mark J. Smith, Judges.

Defendant appeals his conviction, following a guilty plea, for carrying weapons. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Michael J. Walton, County Attorney, and Robert Cusack, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

Zachary Ryan Rosenthal appeals his conviction, following a guilty plea, for carrying weapons, in violation of Iowa Code section 724.4(1) (2007). He claims his trial counsel was ineffective for allowing him to enter a guilty plea to a charge that was not supported by a factual basis. We affirm.

On February 8, 2008, Rosenthal appeared in open court. At that time the district court granted the State's motion to amend the trial information to charge Rosenthal with trafficking stolen weapons and carrying weapons. The court also discussed the parties' proposed plea agreement wherein Rosenthal agreed to waiver of these charges from juvenile court and to plead guilty to the carrying weapons charge, and the State agreed to dismiss the trafficking stolen weapons charge. The court personally addressed Rosenthal informing him as to his constitutional rights, the elements of the offense, and the potential penalties that could be imposed following a guilty plea. The court then proceeded to determine whether there was a factual basis in the record for the guilty plea through the following colloquy.

THE COURT: It appears to me, Mr. Rosenthal, that the basic allegation here is that two officers would testify, one from Rock Island, one from Davenport Police Department, that you offered to sell a handgun to the Rock Island officer. The Rock Island officer contacted the Davenport officer and arranged to meet you, it looks like on October 4, 2007, in Davenport. This alleges that you then got into the Rock Island officer's car and directed him to go to 1823 West 6th Street in Davenport, and when they arrived, you called over to a codefendant of yours and he – that codefendant is David Flores - who then delivered a .357 caliber handgun to the Rock Island Police Officer. In this particular case we're not alleging that there was a delivery or before you were charged with trafficking weapons, this is just about having the weapon on your person or in

your possession at some time on this date when this conduct was occurring. Do you understand that?

THE DEFENDANT: Yes.

Rosenthal then gave his own account of the crime.

THE COURT: I need to have you tell me in your own words, Mr. Rosenthal, what happened on October 4, 2007, that causes you to be here today pleading guilty to this charge of carrying weapons.

THE DEFENDANT: I was at Dave Flores's house and there was some guns over there. And I got a phone call from somebody, which was Will Smith. It wasn't the cop. And Will Smith called me asking me to buy a gun and I told David about it. He said, sell it to him. And that's when I met them and I took 'em around into the alley behind David's house and—and then I called David over to the car. That's when it all happened.

THE COURT: What was your relationship with the weapon? Tell me what kind of a weapon it was.

THE DEFENDANT: It was a .357. A gun.

THE COURT: All right. It was the .357. And what did you do with the gun?

THE DEFENDANT: When we took it over there?

THE COURT: Yes.

THE DEFENDANT: I didn't touch it during the transaction, but I was just in this negotiating prices. But I had touched it before.

THE COURT: And you were aware of the fact that this gun was being taken by you or others to another location, is that right?

THE DEFENDANT: Yes.

The court ended its inquiry into the factual basis with a discussion of the theory of aiding and abetting.¹

THE COURT: I just want to be sure that you are telling me that you did something that you believe constitutes a crime, and I'm trying to explain this to you . . . I'm just simply saying that in any particular criminal conduct, sometimes multiple people are involved, not everybody does each and every element within that crime, but things they do aid or abet or assist somebody else to commit that crime. And I think what you're telling me today is that you knew David Flores had a gun that he wanted to sell and that you were at some point involved with that transaction, perhaps by going with somebody else to a scene where that sale was to take place,

¹ Persons who aid and abet in the commission of a public offense "shall be charged, tried and punished as principals." Iowa Code § 703.1.

knowing that the gun was there and that the sale was going to take place. Is that what you are saying you did?

THE DEFENDANT: Yes, Your Honor.

Following the colloquy, the court determined there was a factual basis in the record for Rosenthal's guilty plea to carrying weapons, accepted the plea, and informed him that he needed to file a motion in arrest of judgment to challenge the plea. The court sentenced Rosenthal to one year in the county jail. Rosenthal did not file a motion in arrest of judgment to challenge the plea. On appeal he claims his trial counsel was ineffective for not challenging the factual basis for the guilty plea and allowing him to plead guilty to a charge which was not supported by a factual basis.

This appeal is brought as an ineffective assistance of counsel claim. Generally we review challenges to guilty pleas for correction of errors at law.² Iowa R. App. P. 6.4. However, when, as here, a defendant claims trial counsel is ineffective for permitting him or her to plead guilty to a charge not supported by a factual basis our review is de novo. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

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

² Rosenthal's failure to file a motion in arrest of judgment after entry of his guilty plea bars a direct appeal of his conviction. Iowa R. Crim. P. 2.24(3)(a). However, because he attributes this failure to the ineffective assistance of his trial counsel, the failure does not bar this challenge to his guilty plea. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

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 [Rosenthal's] guilty plea to the charge of [carrying weapons]. 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.³

Schminkey, 597 N.W.2d at 788 (citations omitted). Subject to statutory exceptions which are neither supported by evidence in the record nor asserted by Rosenthal to have any application, the charged offense of carrying weapons is committed by

a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver.

Iowa Code § 724.4(1). Conviction of a crime on a theory of aiding and abetting requires sufficient evidence that the defendant “assented to or lent countenance and approval to the act by active participation in it or by encouraging it prior to or at the time of its commission.” *State v. Keopasaeth*, 645 N.W.2d 637, 640 (Iowa 2002). Sufficient evidence exists to establish aiding and abetting if the trier of fact concludes, or the guilty plea’s factual basis shows, that the defendant “‘associate[d] himself with the venture,’ that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.” *State v. Galvan*, 297 N.W.2d 344, 348-49 (Iowa 1980) (quoting *State v. Lott*, 255 N.W.2d

³ Because we consider only the “record before the district court at the guilty plea hearing,” *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), *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990).

105, 108 (Iowa 1977)). A trial information need not contain allegations that the accused is an aider and abettor. *State v. Rydel*, 262 N.W.2d 598, 601 (Iowa 1978).

Based on the record before us, we conclude the in-court colloquy during Rosenthal's guilty plea hearing established that he aided and abetted David Flores in the commission of the crime of carrying weapons. Rosenthal admitted that he and Flores worked together to sell a gun. He saw the guns at Flores's house, met with the undercover officers, rode in their car to direct them to Flores's house, and negotiated the price of the weapon. Rosenthal called Flores out of his house to bring the gun for sale to the officers. Rosenthal knew Flores would have to carry the gun from the house to the location of the sale, here the undercover officer's car, which was within the Davenport city limits. Therefore, Rosenthal's conduct not only lent countenance and approval to Flores's going armed with the pistol within the limits of the City of Davenport, Rosenthal in fact set up the transaction and requested that Flores engage in the very act of carrying the weapon. See *State v. Allen*, 633 N.W.2d 752, 757 (Iowa 2001) (finding sufficient evidence of defendant's guilt as aider and abettor even though he did not actually handle the drugs but he had "facilitated the transfer and stood by while the transaction took place."). Accordingly, because Rosenthal set up the sale of the weapon, negotiated the price, and actually caused Flores to carry the weapon to the undercover police officers within the city limits, there was a factual basis in the record before the court that Rosenthal aided and abetted the commission of the crime.

We conclude the guilty plea is supported by a factual basis, trial counsel therefore did not breach an essential duty by allowing Rosenthal to plead guilty to the charge of carrying weapons, and Rosenthal's claim of ineffective assistance is thus without merit.

AFFIRMED.