

IN THE COURT OF APPEALS OF IOWA

No. 9-042 / 08-0707
Filed March 11, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD FORRESTER HURD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan,
District Associate Judge.

Defendant appeals his guilty plea and conviction for eluding, contending that his trial attorney was ineffective in failing to challenge the factual basis for his guilty plea. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Linda K. Zanders and Jess Vilsack, Assistant County Attorneys, for appellee.

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

VAITHESWARAN, J.

Richard Forrester Hurd appeals his guilty plea and conviction for eluding, an aggravated misdemeanor. Iowa Code § 321.279(2) (2007). He contends his trial attorney was ineffective in failing to challenge the factual basis for his guilty plea.

“Where a guilty plea has no factual basis in the record,” an appropriate remedy is to remand to allow the State to provide a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 792 (Iowa 1999). We cannot use that remedy here because the record is inadequate to determine whether there is a factual basis for the plea.

Specifically, the record contains a written guilty plea, minutes of testimony and attached police reports, but no transcript of the plea colloquy. See *State v. Meron*, 675 N.W.2d 537, 543 (Iowa 2004) (stating written forms are permissible in misdemeanor cases but do not diminish the necessity of some type of colloquy with the court). The transcripts might have disclosed a factual basis for the challenged element of whether the officers were in uniform.

The State concedes the inadequacy of the record as to this element, but argues it was incumbent upon Hurd to provide this court with a record of the plea colloquy. At the same time, the State acknowledges that a postconviction relief action is “the preferred forum for resolving ineffective assistance of counsel claims” where the record is inadequate. Hurd likewise seeks preservation for postconviction relief as an alternate remedy if we “find the record insufficient to address [his] claim.”

Because the record before us is incomplete, we believe a postconviction relief proceeding is the appropriate method for remedying this inadequacy. We preserve this matter for postconviction relief proceedings to allow the development of a record on the challenged element. See *State v. Tejada*, 677 N.W.2d 744, 752 (Iowa 2004).

AFFIRMED.

Vaitheswaran, J. and Eisenhauer, J. concur. Vogel, P.J. dissents.

Vogel, P.J. (dissenting)

I write separately to suggest an alternate remedy. Defendant Hurd asks, and I agree, that we should remand this case to the district court to allow the State to provide a factual basis. See *State v. Royer*, 632 N.W.2d 905, 910 (Iowa 2001) (remanding to the district court in order to allow the State to establish a factual basis).

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

Id. at 909-10. I would find that this case falls within the latter category. However, the majority steers away from this remedy because “the record is inadequate to determine whether there is a factual basis for the plea” and then preserves the issue for possible postconviction relief proceedings “to allow the development of a record.” Although the record on appeal does not contain a transcript of the plea proceeding, remanding to the district court would either allow the district court to determine if a record exists and does in fact provide the factual basis or provide the State with the ability to supplement the record to establish a factual basis. See *State v. Schminkey*, 597 N.W.2d 785, 792 (Iowa 1999) (remanding to the district court where the defendant raised an ineffective assistance of counsel claim based on the lack of a factual basis in the record to support his guilty plea). Thus, I urge the more appropriate remedy is to vacate the sentence and remand to the district court to allow the State to supplement the record, if possible, to

provide the missing factual basis Hurd raises on appeal. See *State v. Philo*, 697 N.W.2d 481, 489 (Iowa 2005); *Royer*, 632 N.W.2d at 910; *Schminkey*, 597 N.W.2d at 792.

In addition, I would make the finding in this appeal that there was a factual basis in the record for two of the three elements of eluding, which Hurd now challenges. First of all, the minutes of testimony in the attached police report state that Hurd was driving “well in excess of” fifty miles per hour in a twenty-five mile per hour zone. Secondly, a supplemental report states: “We were westbound on University with red lights and siren activated.” These two facts support both the excessive speed and the marked official law enforcement vehicle elements of eluding under Iowa Code section 321.279(2). The only remaining element Hurd challenges that does not appear in the record is whether the vehicle was being driven by a “uniformed peace officer.” For that element to be determined, I suggest a remand is appropriate. *Schminkey*, 597 N.W.2d at 792 (remand appropriate where “[t]here may be additional facts and circumstances that do not appear in the minutes of testimony”).