

IN THE COURT OF APPEALS OF IOWA

No. 9-1008 / 09-0472
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHI DESHAWN PALMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink (pleas) and Carla T. Schemmel (sentencing), Judges.

Defendant appeals his conviction and sentence following his guilty plea to possession of cocaine with intent to deliver and possession of a firearm as a felon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, Daniel C. Voogt and Robert DiBlasi, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

On November 15, 2007, Michi Palmer was charged with possession of a controlled substance (cocaine) with intent to deliver, second offense, while in the immediate possession or control of a firearm; failure to possess a drug tax stamp; and possession of a firearm as a felon. On November 9, 2008, he was charged with possession of a controlled substance with intent to deliver (cocaine base), possession of a controlled substance with intent to deliver (marijuana), disarming a police officer, and assault of a police officer causing bodily injury. Additionally, the State alleged Palmer had violated his parole.

Palmer entered into a plea agreement whereby he would plead guilty to possession of a controlled substance (cocaine) with intent to deliver while in the immediate possession or control of a firearm, in violation of Iowa Code sections 124.401(1)(c)(2)(d) and 124.401(1)(e) (2007), and possession of a firearm as a felon, in violation of section 724.26. Also, as part of the plea agreement the other charges against Palmer would be dismissed. The parties agreed that Palmer could argue that the sentence on these two charges would run concurrently, while the State could argue that they would be consecutive. The defendant and the State agreed to recommend that the previous sentence for which Palmer was on parole would run concurrently to the sentence on these two charges.

The trial information alleged Palmer had been in possession of a firearm on March 13, 2006. In the guilty plea proceedings held on January 20, 2009, while establishing a factual basis for the charge of possession of a firearm as a felon, the following exchange occurred:

The Court: Okay. On March 13th of 2006, were you in Polk County, Iowa? Defendant: I'm not sure.

The Court: Well, the Trial Information claims that on March 13th of 2006, you were in Polk County, Iowa, at the time that you possessed a firearm.

Prosecutor: Your Honor –

Defendant: I believe I was in prison.

Prosecutor: Your Honor, it was October 7th of 2009.

The Court: Do you wish to amend your Trial Information?

...

Prosecutor: Judge, it would appear there's a typographical error in Count 3 and that date in March – I mean, October 10th of 2007, and ask the court to accept an oral amendment to that.

The Court: Do you have any objection?

Defense Counsel: We do not, Your Honor.

The Court: Very well. On October 10th of 2009 under Count 3, did you have possession of a firearm? Defendant: Yes.

The Court: At that time were you a convicted felon? Defendant: Yes.

The Court: Was that in Polk County, Iowa? Defendant: Yes.

The court granted the amendment to the trial information, crossed out the date of March 13, 2006, in the trial information, and wrote in "10-10-07." The court accepted Palmer's guilty pleas to possession of a controlled substance with intent to deliver and possession of a firearm as a felon.

At the sentencing hearing, the State recommended that the twenty-year sentence for possession of a controlled substance with intent to deliver run consecutively to the five-year sentence for possession of a firearm as a felon, and that both of these sentences run concurrently to Palmer's parole revocation.¹

¹ Violation of section 124.401(1)(c), possession of a controlled substance with intent to deliver, is a class "C" felony, punishable under section 902.9(4) to a term of imprisonment not to exceed ten years. Because Palmer was in the immediate possession or control of a firearm at the time, his sentence was doubled under section 124.401(1)(e), and he was sentenced to twenty years on this charge. Possession of a firearm as a felon is a class "D" felony. Iowa Code § 724.26. The maximum sentence for a class "D" felony is a term not to exceed five years. Iowa Code § 902.9(5).

Defense counsel argued that the twenty-year sentence should be concurrent to the five-year sentence, and that these should also be concurrent to the parole revocation sentence. The court sentenced Palmer to a term not to exceed twenty years on the charge of possession of a controlled substance with intent to deliver, and a term not to exceed five years on the charge of possession of a firearm as a felon, to be served consecutively to each other, and concurrent to his parole revocation. The court stated it had, “further considered the age of the defendant, as well as the defendant’s prior criminal record and that probation would lessen the seriousness of the offense.” Palmer appeals his guilty plea and sentence.

II. Guilty Plea

Palmer contends he received ineffective assistance because his defense counsel permitted him to plead guilty to the charge of possession of a firearm as a felon when there was not an adequate factual basis for the plea. He asserts he actually pled guilty to having the immediate possession and control of a firearm on October 10, 2009, which was an impossibility at the time of the hearing on January 20, 2009. Palmer claims defense counsel should have filed a motion in arrest of judgment.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). In a guilty plea

proceeding, a defendant must show that but for counsel's alleged error the defendant would not have pleaded guilty and would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006).

Generally, a challenge to a guilty plea must be raised by a motion in arrest of judgment. See Iowa R. Crim. P. 2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."). A defendant's failure to file a motion in arrest of judgment, however, is not a bar if the failure is due to ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008).

Before accepting a guilty plea, a court must determine that there is a factual basis for the plea. Iowa R. Crim. P. 2.8(2)(b). If defense counsel permits a defendant to plead guilty in the absence of a factual basis, counsel has failed to perform an essential duty. *State v. Hallock*, 765 N.W.2d 598, 603 (Iowa Ct. App. 2009). Prejudice is presumed in this circumstance. *Id.* In determining whether there is a factual basis for a plea, "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." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

In this case, the trial information was amended to allege Palmer had possession of a firearm on "10-10-07," or October 10, 2007. The minutes of testimony state that Palmer was stopped by an officer on October 10, 2007, and during a search of the vehicle the officer "located a high point .380 caliber model

CF-380ACP handgun.” It is clear that the mention of the date October 10, 2009, at the time of the plea proceeding was in the nature of a typographical error, and the parties were aware they were discussing October 10, 2007, the date Palmer was stopped and the search of the vehicle was conducted. Palmer admitted he was in possession of narcotics on October 10, 2007, and had possession or control of a firearm at the same time.

We conclude there was a factual basis for Palmer’s plea of guilty to the charge of possession of a firearm as a felon. We determine he has failed to show he received ineffective assistance due to counsel’s failure to file a motion in arrest of judgment to challenge the factual basis for the plea.

III. Sentence

Palmer contends the district court did not sufficiently articulate reasons for making his twenty-year and five-year sentences consecutive. Our review of the district court’s sentencing decision is for an abuse of discretion. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). Under Iowa Rule of Criminal Procedure 2.23(3)(d), “[t]he court shall state on the record its reason for selecting the particular sentence.” The district court must also give its reasons for imposing consecutive, rather than concurrent, sentences. *State v. Keopasa euth*, 645 N.W.2d 637, 641 (Iowa 2002). “Although the reasons do not need to be detailed, they must be sufficient to allow appellate review of the discretionary action.” *State v. Evans*, 671 N.W.2d 720, 727 (Iowa 2003) (citation omitted).

It is clear the parties and the court were aware there was really only one issue at sentencing—whether defendant’s sentences on the current charges

would be consecutive or concurrent. Based on the plea agreement, the only difference between the recommendations of the State and the defendant were on this issue. At the sentencing hearing defense counsel stated, “the only fighting issue, Your Honor, is whether the court should run the two charges to which Mr. Palmer has pled guilty to in this case concurrently or consecutively.”

Thus, although the court’s reasoning at the sentencing hearing was not explicitly related to whether the sentences should be concurrent or consecutive, the court was aware this was the only real issue to be decided, and the court’s reasoning went to this issue. We conclude the court’s reasoning was sufficiently detailed to allow appellate review of the discretionary action. See *id.* at 727.

We affirm Palmer’s convictions and sentence.

AFFIRMED.