

IN THE COURT OF APPEALS OF IOWA

No. 9-397 / 08-1978
Filed June 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRICK JUSTIN GREEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister (motion to suppress) and Margaret L. Lingreen (plea), Judges.

Defendant appeals following his plea of guilty to possession of a controlled substance, third offense, contending trial counsel was ineffective in failing to assert his *Alford* plea was not supported by a factual basis. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Tom Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Derrick Green appeals following his plea of guilty to possession of a controlled substance, third offense, contending trial counsel was ineffective in failing to assert his plea was not supported by a factual basis.

Because ineffective-assistance-of-counsel claims raise issues under the Sixth Amendment to the Federal Constitution, we perform a de novo review, making an independent evaluation of the circumstances as shown by the entire record. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999).

The district court may not accept a guilty plea without first determining the plea has a factual basis. See Iowa R. Crim. P. 2.8(2)(b); *State v. Burtlow*, 299 N.W.2d 665, 668 (Iowa 1980). This requirement exists even where the plea is an *Alford* plea.¹ *North Carolina v. Alford*, 400 U.S. 25, 38 n.10, 91 S.Ct. 160, 168 n.10, 27 L.Ed.2d 162, 171-72 n.10 (1970). 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. See *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Prejudice in such a case is inherent. See *id.* Therefore, our only inquiry is whether the record shows a factual basis for Green's guilty plea to the charge of possession of a controlled substance, third offense. 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. See *id.* This record, as a whole, must disclose facts to

¹ *Alford*, 400 U.S. at 37, 91 S. Ct. at 167, 27 L. Ed. 2d at 171 (holding that an accused may consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime).

satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). However, the trial court “must only be satisfied that the facts support the crime, ‘not necessarily that the defendant is guilty.’” *Id.* (quoting 1A Charles Alan Wright, *Federal Practice and Procedure* § 174, at 199 (1999)).

The record upon which the trial court could draw to determine whether a factual basis existed for Green’s plea of guilty to the possession charge was sufficient. The court had before it the minutes of testimony and the transcript of the suppression hearing. See *Schminkey*, 597 N.W.2d at 790 (noting factual basis for an *Alford* plea may be determined from the minutes).

From the minutes of testimony and the transcript of the suppression hearing, it can be established that officers found Green about midnight walking down the middle of the street when a sidewalk was available to him. As they approached, they could smell the strong odor of burnt marijuana and they saw a cloud of smoke coming from Green’s mouth. The officers told Green to stop; however, he looked behind and continued to walk away from the officers. They exited their patrol car and again told Green to stop, but he refused. The officers then detained Green and, upon checking his mouth, observed “burnt blunt residue” (the remnants of a marijuana cigarette) in his mouth. Green had two previous convictions for possession of a controlled substance. We conclude a factual basis existed to support Green’s *Alford* plea. Accordingly, Green’s counsel was not ineffective for permitting Green to plead guilty.

AFFIRMED.