

IN THE COURT OF APPEALS OF IOWA

No. 9-437 / 08-1386
Filed July 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAUN LEE THOMPSON,
Defendant-Appellant.

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

Shaun Lee Thompson appeals from his conviction and sentence for
harassment in the first degree. **SENTENCE VACATED AND REMANDED FOR
FURTHER PROCEEDINGS.**

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

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, John P. Sarcone, County Attorney, and Mark J. Sandon, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Shaun Thompson appeals from his conviction and sentence for harassment in the first degree, in violation of Iowa Code section 708.7(2) (2007), an aggravated misdemeanor. He contends his defense counsel was ineffective in handling his guilty plea. Upon our review, we vacate his sentence and remand for further proceedings.

On May 14, 2008, Thompson was charged by trial information with harassment in the first degree in violation of section 708.7(2), and domestic abuse assault causing bodily injury in violation of section 708.2A(2)(b). According to the trial information, minutes of testimony, and attached police report, Thompson got into an argument with his former wife on March 2, 2008. The argument escalated to an altercation when Thompson got on top of her and told her he was going to kill her.

On July 1, 2008, Thompson entered a written plea of guilty to the harassment charge. In making the written plea he waived his right to file a motion in arrest of judgment, his right to speak at sentencing, his right to a delay in sentencing, and the right to have a court reporter make a record of the proceedings.¹ He requested immediate sentencing. The court accepted Thompson's plea and sentenced him to a period of incarceration of two years,

¹ We note that Iowa Rule of Criminal Procedure 2.8(2)(b)(5) provides in cases of serious and aggravated misdemeanors, the "court may, in its discretion, and with the approval of the defendant" waive the mandatory colloquy between court and defendant concerning nature of the charge, the minimum and maximum punishment, the effect on status under federal immigration laws, the right to trial by jury, the right to counsel, the right to confront and cross-examine witnesses, the right not to incriminate oneself, right to present witnesses on his own behalf with subpoena powers to obtain their attendance, and that there will not be a further trial. See *State v. Meron*, 675 N.W.2d 537, 541-44 (Iowa 2004). The plea form utilized in this case does not indicate whether Thompson approved a waiver of the mandatory rule 2.8(2)(b) colloquy.

with the sentence being suspended. A fine was imposed, and he was ordered to attend and complete a batterer's education class. Thompson's domestic abuse assault charge was then dismissed, as was the no-contact order.

Thompson now appeals. He contends his counsel provided ineffective assistance in permitting the guilty plea.

Our review of 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). We conclude the record in this case is adequate to decide this issue.

Thompson claims his counsel was ineffective in permitting him to plead guilty to a charge for which no factual basis existed. To establish his claim of ineffective assistance of counsel, Thompson "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) (citation omitted). If he fails to prove either prong of the claim, it must fail. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). Under the first prong of this test, counsel's performance is measured "against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner." *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004).

The district court may not accept a guilty plea without first determining that the plea has a factual basis. . . . 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. Prejudice in such a case is inherent.

State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999) (internal citations omitted).

“A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony” Iowa Code § 708.7(2). Murder is a forcible felony. *Id.* § 702.11. In order for an assault to be felonious, it must cause serious injury. *Id.* § 708.2(4).

Thompson’s hand written admission contained within the printed “Guilty Plea & Sentencing Order” form states: “On March 2, 2008 I verbally threatened to cause physical injury to my ex-wife in Polk [County]” On appeal, Thompson argues a threat to cause “physical injury” is insufficient to support a factual basis for a felonious assault, which requires a threat to cause “serious injury” as defined in section 702.18. We agree.

Our first and only inquiry is whether the record shows a factual basis for Thompson’s guilty plea to the charge of harassment in the first degree.

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.

Schminkey, 597 N.W.2d at 788. The plea form makes no mention of the minutes of testimony or essential elements of the crime, nor any acknowledgment thereof by Thompson. Thompson’s handwritten admission included on the plea form establishes a factual basis for harassment in the second degree under section 708.7(3), but nothing on the plea form establishes a factual basis for harassment in the first degree, which, in this case, would require a showing of a threat to commit murder or a threat to commit assault causing serious physical injury.

One must then look to evidence other than Thompson's written statement on the plea form to establish a factual basis for the plea. If a "district [court] judge finds it necessary to look to evidence other than the [defendant's statement] to establish the factual basis for the plea in any situation, these additional facts or evidence must be specifically articulated on the record." *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005) (citations omitted). A record by a court reporter was waived, so there is nothing in the record before us to indicate that the district court considered or relied upon anything other than the plea form in accepting Thompson's plea. Under these circumstances, we conclude the record before the district court does not show a factual basis for Thompson's guilty plea to the charge of harassment in the first degree. Consequently, we must conclude Thompson's counsel provided ineffective assistance in permitting Thompson's guilty plea.

Where a guilty plea has no factual basis in the record, but where it is possible that a factual basis could be shown, it is appropriate to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis. *Schminkey*, 597 N.W.2d at 792. Here, the guilty plea has no factual basis in the record, but the minutes of testimony and attachments could support a factual basis for harassment in the first degree.² Therefore, we vacate the sentence entered on the harassment charge and remand for further proceedings at which time the State may supplement the record to establish a

² We note that this case is unlike *State v. Hurd*, No. 08-0707 (Iowa Ct. App. Mar. 11, 2009). In *Hurd*, the written guilty plea, minutes of testimony, and attached police report were inadequate to establish a factual basis for a challenged element of the crime to which the defendant pled guilty.

factual basis for the crime of harassment in the first degree. If a factual basis is not shown, Thompson's plea must be set aside.

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.