

IN THE COURT OF APPEALS OF IOWA

No. 9-635 / 08-1623
Filed September 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CESAR MADRIGAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Marlita A. Greve, Judge.

Defendant appeals his conviction resulting from his plea of guilty to identity theft. **AFFIRMED.**

Daniel Vondra, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Gary Allison, County Attorney, and Kerrie Snyder, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.*

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

SCHECHTMAN, S.J.**I. Background Facts & Proceedings**

Cesar Madrigal obtained a job at West Liberty Foods in May 1999, using the name and social security number of Pedro Torres. He continued to earn wages at West Liberty Foods using that name. In June 2008, Torres, a resident of Brooklyn, New York, was notified by the Internal Revenue Service (I.R.S.) that he owed back income taxes on wages earned at West Liberty Foods in Iowa. Torres contacted the employer and law enforcement. After being confronted by a police officer with this information, Madrigal admitted purchasing Torres's identification information for \$600 from an unidentified person.

Madrigal, then thirty-one years old, was charged with identity theft of more than \$1000, in violation of Iowa Code section 715A.8 (2007), a class "D" felony, on July 1, 2008. Madrigal obtained the services of an attorney. He filed a written arraignment which stated

I cannot fully read and understand the English language and have completed the following level of education: 6th.

I have been advised by the above named attorney in both English and Spanish and understand that I have a right to arraignment in open court, and I hereby voluntarily waive that right

Madrigal executed a "Waiver of Rights and Guilty Plea" written in English, to identity theft of less than \$1000, an aggravated misdemeanor. It included the following paragraph:

The present charge against me was committed by me on May 1999—June, 20, 2008, in Muscatine County, Iowa, by my doing the following:

fraudulently use identification information of another person, with the intent to obtain credit, property, services or other benefits, the value of which is below \$1,000.

Madrigal specifically signed a waiver of motion in arrest of judgment (“I will never be able to challenge this plea of guilty . . .”), as well as a waiver of right of allocution. He asked for immediate sentencing. The court accepted the plea agreement. Madrigal was sentenced, the same day, to 365 days in jail, with 320 days suspended. In this appeal he claims to have received ineffective assistance of counsel.¹

II. Standard of Review

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. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). A defendant claiming ineffective assistance of counsel concerning a guilty plea must prove that, but for counsel’s breach, there was a reasonable probability he would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Ineffective Assistance

A. Madrigal contends his defense counsel permitted him to plead guilty to identity theft when there was not a sufficient factual basis for the plea.

¹ Madrigal claims the court erred by imposing a sentence without a Spanish interpreter as provided in Iowa Code section 622A.2 or a certification of interpretation. The record is not sufficiently complete (the plea and sentence were in writing without Madrigal’s presence) for this issue to be decided on direct appeal. It is addressed with other allegations of ineffective assistance of counsel, and, the issue is preserved for possible postconviction relief proceedings.

He claims defense counsel should have filed a motion in arrest of judgment to challenge the guilty plea on that ground. A party may be excused from filing a motion in arrest of judgment if the failure is due to ineffective assistance of counsel. *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009).

The trial information alleged:

The defendant, on or about May 1999–June 20, 2008, in Muscatine County, Iowa, did: fraudulently uses or attempts to use identification information of another person, with the intent to obtain credit, property, services or other benefit, the value of which exceeds \$1,000.

Madrigal asserts that if he engaged in identity theft it was in 1999, when he used Torres's identification to obtain the job at West Liberty Foods. He states that identity theft is not a continuing offense, and that either prosecution of the crime is barred by the statute of limitations, or an earlier version of section 715A.8 should apply.²

The State concedes identity theft is not a continuing offense. See *State v. Hippler*, 545 N.W.2d 568, 572 (Iowa 1996) (holding that exercising control over stolen property was not a continuing offense). However, this is of no benefit to this defendant. This statute criminalizes the fraudulent *use* of identity data to

² Section 715A.8 was amended in 2003. 2003 Iowa Acts, ch. 49, § 1. Prior to the amendment, section 715A.8(2) provided:

A person commits the offense of identity theft if the person with the intent to obtain a benefit fraudulently obtains identification information of another person and uses or attempts to use that information to obtain credit, property, or services without authorization of that other person.

The section now provides:

A person commits the offense of identity theft if the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit.

Iowa Code § 715A.8(2) (2007).

obtain a benefit. Our theft statutes (chapter 714) generally indict those who *take* control or possession of the subject property. The purchase of the identity information is not criminalized, but it is the subsequent acts of fraudulently using it to obtain a benefit that are penalized. Madrigal violated the identity theft statute each time he received his employer's paycheck using Torres's identity.

Madrigal contends that the factual basis was insufficient as his written plea does not indicate that he knew he did not have permission to use the identity information, or that he knew the identity belonged to a real person. "Authorization" was deleted from the amended statute in 2003. Nor does our statute require that the defendant know that the identity he was using actually belonged to a real person.³

The written guilty plea provided, "The Court, in determining whether there is a factual basis for this plea of guilty, may make such a determination by examining the Minutes of Testimony attached to the Trial Information" Attached to the trial information was the report of the investigating and arresting

³ In *Flores-Figueroa v. United States*, ___ U.S. ___, ___ 129 S. Ct. 1886, 1888, 173 L. Ed. 2d 853, 856 (2009), the U.S. Supreme Court recently construed a federal identity theft law that makes it an additional crime when the defendant "knowingly . . . uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The Court held that to be convicted under that statute, the defendant must know the identification actually belonged to another person. *Id.* at ___, 129 S. Ct. at 1890-94. 173 L. Ed. 2d at 858-62. The term "knowingly," in other words, applies to all of the subsequent terms, including "another person." *Id.*, 129 S. Ct. at 1894, 173 L. Ed. 2d at 862. The Iowa identity theft statute is worded differently. It makes it a crime if a person "fraudulently uses or attempts to use fraudulently identification of another person. . . ." Iowa Code § 715A.8(2). Applying normal rules of English interpretation, we believe the State only has to establish that the "identification information" was of "another person" and that it was used "fraudulently" by the defendant. A "fraudulent" use requires the defendant to know that his use was illegitimate, but not to know that the identification was actually that of another person. The differences in wording between the federal statute and the Iowa statute compel a different result in this case.

officer. In substance, it related a conversation with Torres wherein he stated he never had been in Iowa, the I.R.S. was pressing him for \$6000 delinquent income tax for earnings from West Liberty Foods, and the employer verified that an employee was using his social security number since 1999. The employer advised the officer that the user was Madrigal. When confronted by the officer, Madrigal identified himself as Pedro Torres. He later admitted his real name and stated he had purchased the identity information for \$600, but did not remember the seller. These minutes complement and further support the factual basis set forth in the written plea itself.

The factual basis in the written plea recited the words of the present statute about verbatim. See Iowa Code § 715.8A.2 (2003). Since each act of the use of the identity information to obtain and receive the benefit from his employment is a separate offense, it is clear that since 2003, Madrigal fraudulently used the identification information of another person to obtain wages, which violated the statute.⁴

We determine there was a factual basis to find Madrigal had violated section 715A.8 as recently as June 2008. Therefore, the prosecution was not barred by the statute of limitations. See Iowa Code § 802.3 (2007) (providing a limitations period of three years for felonies, aggravated and serious misdemeanors). Furthermore, Madrigal was properly prosecuted under the definition of the crime found in the 2007 Iowa Code. See *State v. Buck*, 275

⁴ Section 715A.8(2) applies when the person intends to obtain “credit, property, services, or other benefit.” Property is defined in section 702.14 to include “anything of value.” The wages received by Madrigal would be considered property under the statute.

N.W.2d 194, 195-96 (Iowa 1979) (noting a defendant should be prosecuted under the Iowa Code in effect at the time the offense is committed).

We find Madrigal 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 of guilty. Counsel will not be found ineffective for failing to pursue a meritless remedy. *State v. Hildebrand*, 405 N.W.2d 839, 841 (Iowa 1987).

B. Madrigal raises other claims of ineffective assistance of counsel. He asserts he received ineffective assistance because his defense counsel (1) did not file a motion in arrest of judgment to challenge the lack of appointing a Spanish-speaking interpreter to translate the written guilty plea for him; (2) failed to review the contents and meaning of the plea with him; and (3) improperly advised him of the effect of his guilty plea upon his immigration status.

Claims of ineffective assistance of counsel are generally preserved for postconviction proceedings in order to develop a more complete record. *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997). Where the record is not adequate to address a defendant's claims of ineffective assistance of counsel on direct appeal, we may preserve the issues for possible postconviction proceedings. *State v. Smith*, 573 N.W.2d 14, 22 (Iowa 1997). By doing so, trial counsel has the opportunity to explain strategic and tactical considerations that are not apparent from the record on appeal. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). "Even a lawyer is entitled to his day in court, especially when his

professional reputation is impugned.” *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We determine the record in this case is not sufficient for us to address Madrigal’s additional claims of ineffective assistance of counsel. There is minimal record evidence concerning Madrigal’s level of expertise in the use, understanding, and reading of English. The record is absent of any testimony from Madrigal, or his defense counsel, concerning the extent of any review of the consequences of his written guilty plea on his immigration status or the substance of any advice given on that important subject for this defendant. We conclude these issues should be preserved for possible postconviction proceedings.

We do affirm Madrigal’s conviction for identity theft.

AFFIRMED.