

IN THE COURT OF APPEALS OF IOWA

No. 9-815 / 09-0461
Filed November 12, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

XAVIER AMBRIC GORDON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Xavier Gordon appeals contending his guilty plea lacked a factual basis.

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Mahan, S.J.*

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

POTTERFIELD, J.

In August 2008, Xavier Gordon was court-ordered to reside at the Waterloo Residential Correctional Facility. On August 29, 2008, he returned to the facility after being out of place of assignment for some period of time. While being served with a report that he had been out of place of assignment, Gordon ran from the room and out the back door. He remained at large until mid-September 2008 and was thereafter charged with escape.

At a plea proceeding on January 22, 2009, Gordon pleaded guilty to a class “D” felony escape.¹ On February 12, he was sentenced to a term of five years to be served consecutive to sentences in cases FECR114436 and SRCR123078. He now appeals,² contending the record does not establish that he was committed to the correctional facility due to a felony conviction.

We review the defendant’s claim of error with respect to his guilty plea for errors of law. Iowa. R. App. Proc. 6.907.

Because the district court may not accept a guilty plea without first determining that the plea has a factual basis, “our first and only inquiry is whether the record shows a factual basis for [Gordon’s] guilty plea to the charge” of felony

¹ Iowa Code section 719.4(1) (2007) provides:

A person convicted of a felony, or charged with or arrested for the commission of a felony, who intentionally escapes, or attempts to escape, from a detention facility, community-based correctional facility, or institution to which the person has been committed by reason of the conviction, charge, or arrest, or from the custody of any public officer, public employee, or any other person to whom the person has been entrusted, commits a class “D” felony.

² The district court did not advise Gordon that a failure to file a motion in arrest of judgment would bar him from challenging his plea on appeal. He is therefore not subject to usual rules of error preservation. *State v. Love*, 670 N.W.2d 141, 149 (Iowa 2003) (citing *State v. Oldham*, 515 N.W.2d 44, 46 (1994) (stating court’s failure to comply with Iowa R. Crim. P. 2.8(2)(d) “operates to reinstate the defendant’s right to appeal the legality of his plea”)).

escape. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). 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. *Id.*

In order to be adjudged guilty of felony escape, the State must establish that Gordon escaped from a facility to which he “has been committed by reason of the [felony] conviction.” Iowa Code § 719.4(1). This record establishes that Gordon has been convicted of a felony and that he was committed to the Waterloo Residential Correctional Facility. However, it does not establish that Gordon was committed to that facility “by reason of the conviction.”

Where a guilty plea has no factual basis in the record, but 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. We therefore affirm the conviction, vacate the sentence, and remand for further proceedings.

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.