

**IN THE COURT OF APPEALS OF IOWA**

No. 1-393 / 10-1645  
Filed July 13, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**SERGIO ADELMO JUAREZ-LOPEZ,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Henry County, Michael J. Schilling,  
Judge.

Sergio Juarez-Lopez appeals contending he was denied effective  
assistance of counsel. **AFFIRMED.**

Rachel C. B. Antonuccio of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant  
Attorney General, and Darin Stater, County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

**POTTERFIELD, J.****I. Background facts and proceedings.**

The following may be gleaned from the minutes of testimony and attached reports and affidavits. In April 2010, a former girlfriend of Sergio Juarez-Lopez reported to police that she knew Juarez-Lopez as Robert Luna, having met him as a co-worker at West Liberty Foods. She stated she did not like that he was using someone else's identity.

Law enforcement's investigation found a Robert Luna showing an Iowa address that matched the address given for Juarez-Lopez by the former girlfriend, as well as a social security number. Lieutenant Ron Archer contacted the Social Security Administration and was told the social security number was for a Robert Luna born in Texas, and that a replacement card had been issued in March 2010. Lieutenant Archer also contacted law enforcement in Texas and obtained photographs of the legitimate Robert Luna who then resided in Texas; those photographs did not match the photograph on the Iowa identification card of the man known in Iowa as Luna.

On June 3, 2010, Lieutenant Archer and another officer went to West Liberty Foods and had the employee "Robert Luna" escorted to the human resources office. With the help of a Spanish speaker, law enforcement told Juarez-Lopez "why we were there. He advised that he was born in San Juan, Mexico and that this name was Jorge Luis Alvarez Nava." Juarez-Lopez was advised he was being charged with forgery for signing documents with Robert Luna's name. He was taken into custody and a written complaint was filed. That same date the Immigration and Customs Enforcement (ICE) division of the

Department of Homeland Security had an immigration detainer notice made a part of the defendant's criminal file.

On June 14, 2010, a trial information was filed charging Juarez-Lopez in Count I with forgery in violation of Iowa Code sections 715A.2(1) and 715A.2(2)(a)(4) (2009),<sup>1</sup> and in Count II with identity theft in violation of section 715A.8.<sup>2</sup> Count II asserted Juarez-Lopez "on or about January 24, 2009 through April 21, 2010, . . . did unlawfully and willfully use a social security number issued to Robert Stephen Luna to obtain and maintain employment."

On September 13, 2010, Juarez-Lopez entered a written guilty plea to Count II, admitting he did: "[f]rom January 24, 2009 through April 21, 2010 in Henry County, unlawfully & willfully use a social security number issued to Robert S. Luna to obtain & maintain employment in the U.S." The plea agreement reached with the county attorney was described in the written plea as follows: "min. fine—suspended for 2 yrs. Costs, dismiss Count I at def.'s cost. The defendant to get 90 days in jail—with 90 days of credit earned. atty. fees \$60." Juarez-Lopez waived the right to file a motion in arrest of judgment and requested immediate sentencing. No mention of immigration consequences is included in the guilty plea, request for immediate sentencing, and waiver of formal records and presence of defendant. The court did enter judgment that

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<sup>1</sup> Iowa Code section 715A.2(1)(d) provides: "A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person" "[p]ossesses a writing which the person knows to be forged." The forgery is a class "D" felony if the writing possessed is a "document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or employment in the United States." Iowa Code § 715A.2(2)(a)(4).

<sup>2</sup> Iowa Code section 715A.8(2) states, "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."

date on Count II—identity theft, aggravated misdemeanor—and sentenced the defendant in accordance with the plea agreement.

Juarez-Lopez now appeals, contending he received ineffective assistance of counsel.

## **II. Ineffective-assistance-of-counsel claim.**

Juarez-Lopez did not file a motion in arrest of judgment. A defendant's failure to move in arrest of judgment may be excused if the failure is due to ineffective assistance of counsel. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). We review ineffectiveness claims de novo. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

*A. Factual basis.* Juarez-Lopez contends his defense counsel was ineffective in allowing him to plead guilty to identity theft without the requisite factual basis.

Defense counsel fails to perform an essential duty when counsel allows the defendant to plead guilty to a charge for which there is no factual basis and thereafter does not file a motion in arrest of judgment challenging the plea.

*State v. Allen*, 708 N.W.2d 361, 366 (Iowa 2006).

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. Therefore, our first and only inquiry is whether the record shows a factual basis. . . . In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing . . . .

*Schminkey*, 597 N.W.2d at 788 (citations omitted).

Iowa Code section 715A.8(2) states “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.” “Identification information” includes the name and social security number of another person. See Iowa Code § 715A.8(1)(a). Section 715A.8(3) provides two different levels of offense depending on whether the “value of the credit, property, or services” exceeds \$1000 or does not exceed \$1000. “If the value of the credit, property, or services does not exceed one thousand dollars, the person commits an aggravated misdemeanor.” *Id.* § 715A.8(3). There is no provision for the level of offense when the defendant allegedly obtains or attempts to obtain an “other benefit,” the value of which is not readily ascertainable or proven. *Id.*; see *State v. Armstrong*, 787 N.W.2d 472, 476 (Iowa Ct. App. 2010).

In *Armstrong*, this court recognized that the statutory provision applies when someone fraudulently uses another’s identification information to obtain a benefit, financial or otherwise. *Id.* We affirmed a conviction of identity theft where the defendant used his brother’s identification information to avoid arrest on an outstanding warrant. *Id.* However, there must be proof of the value of the benefit obtained. See *id.* at 476–77.

Here, the defendant states “the trial information and minutes of testimony make no mention of the dollar amount of the benefit that the State alleged Mr. Juarez-Lopez unlawfully and willfully used identification documents to obtain.” He attempts to analogize this case to an unpublished opinion of this court where we vacated a sentence and remanded for further proceedings because the value of the “other benefit” was not readily ascertainable or proven. *State v. Diego-Mateo*, No. 09-1235 (Iowa Ct. App. Aug. 25, 2010). Unlike the

case before us, Diego-Mateo's written guilty plea did not state he used the identification information to obtain employment. He simply admitted he "used false documentation" of another. We found, however, that the defendant's possession of false documentation, including an employee card, raised a fair inference that he used the false identification information to obtain employment, which falls within the definition of "other benefit" in section 715A.8(2). Thus, we remanded for further proceedings at which the State might supplement the record to establish a factual basis for aggravated misdemeanor.

Here, Juarez-Lopez specifically admitted to the "use of a social security number issued to [another] to obtain & maintain employment" for a period spanning more than one year. "The value of property or services is its highest value by any reasonable standard at the time the identity theft is committed." Iowa Code § 715A.9. The value of credit, property, or services obtained in a "single scheme, plan, or conspiracy . . . may be considered as a single identity theft and the value may be the total value of all credit, property, and services involved." *Id.*

The written guilty plea, trial information, and supporting documentation show the defendant obtained wages as a result of his employment at West Liberty Foods from January 24, 2009, through April 21, 2010, using Luna's identity. Under section 702.14, the term "property," means "anything of value," and includes "both tangible and intangible property, labor, and services."

We conclude there is a factual basis in the record to show defendant fraudulently used the identification information of Luna to receive a benefit, wages, of some value. Since there is no proof the value exceeded \$1000, the

court properly entered judgment for an aggravated misdemeanor. Defendant has not shown he received ineffective assistance due to defense counsel's decision to permit him to plead guilty to identity theft. We affirm defendant's conviction for identity theft.

*B. Padilla v. Kentucky.* Juarez-Lopez asserts defense counsel was ineffective in failing to advise him that his guilty plea could have adverse immigration consequences. He asserts that as a result of his guilty plea he has been placed in deportation proceedings.

Defense counsel must inform a client whether a plea carries a risk of deportation. *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, \_\_\_ (2010). In order to prevail on a claim of ineffective assistance, a defendant must show not only that counsel failed to advise of the risk of adverse immigration consequences, the defendant must meet the prejudice requirement by showing "a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at \_\_\_, 130 S. Ct. at 1485, 176 L. Ed. 2d at \_\_\_. Ordinarily, we preserve claims of ineffective assistance of counsel for postconviction relief proceedings. *State v. Reyes*, 744 N.W.2d 95, 103 (Iowa 2008). There is no indication in the record on appeal whether defense counsel discussed immigration consequences with the defendant. We conclude this issue must be preserved for possible postconviction proceedings.

**AFFIRMED.**