IN THE COURT OF APPEALS OF IOWA

No. 2-1158 / 12-0372
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID NEAL BEENKEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Rustin T. Davenport, Judge.

David Neal Beenken appeals from his conviction of second-degree theft by deception for collecting over $15,000 from an elderly man for business services he never performed. **AFFIRMED.**

George W. Appleby of Carney & Appleby, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Eric Simonson, County Attorney, and Barbara Jo Westphal, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

David Neal Beenken, the defendant, appeals his conviction for second-degree theft by deception. On appeal, Beenken contends his trial counsel was constitutionally ineffective because the record does not establish a factual basis for an *Alford* plea to second-degree theft. Additionally, he argues trial counsel was constitutionally ineffective in failing to file a motion to suppress in a timely manner. We affirm.

I. Background Facts & Proceedings

This case first came to the State's attention when a family member of ninety-five-year-old Merle Poulson discovered Beenken had charged Poulson over $115,000 for home repairs on a residence with a total land and structure value of $64,800. These charges included $15,023 to install 672 feet of sewer liner in the spring of 2010.

Police officers obtained a search warrant to search Beenken's vehicles and home for business documents and invoices related to relevant business transactions with Poulson. Officers and two city employees used a sewer video camera to determine Beenken did not install sewer lining in Poulson's residence as he had indicated to Poulson prior to charging him over $15,000. Police then hired a plumbing technician to scope the sewer line, and confirmed Beenken had not installed the sewer lining. The State charged Beenken with first-degree theft, and the court issued a warrant for his arrest.

Pursuant to a plea agreement, Beenken entered an *Alford* plea to second-degree theft. At a lengthy sentencing hearing, Beenken presented testimony and

entered exhibits to explain his actions. The judge sentenced Beenken to a suspended five-year prison term. Beenken now appeals his conviction.

II. Standard of Review

Appellate review for a lack-of-a-factual-basis challenge to a guilty plea is for correction of errors of law. *State v. Martin*, 778 N.W.2d 201, 202 (Iowa 2009). Where, as here, the defendant raises such a claim in an ineffective-assistance-of-counsel context, our review is de novo. *Id.*

We review Beenken's challenge to probable cause supporting the search warrant de novo. *See State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). Our task on review is to determine whether the issuing judge had a substantial basis for concluding probable cause existed. *Id.* We will address the merits of an ineffective-assistance claim on direct appeal where the record is adequate. *Martin*, 778 N.W.2d at 202. We find the record adequate to address both of the Beenken's ineffective-assistance-of-counsel claims in this case.

III. Analysis

A. Factual Basis

The defendant argues the defense attorney provided ineffective assistance because the defendant's *Alford* plea to second-degree theft was without a factual basis.[1] "The district court may not accept a guilty plea without first determining that the plea has a factual basis. This requirement exists even where the plea is an *Alford* plea." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (internal citations omitted).

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[1] An *Alford* plea allows a defendant to consent to the imposition of a sentence without admitting to participating in the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Beenken entered an *Alford* plea to second-degree theft by deception for allegedly collecting money from an elderly man as payment for services he never performed. A person commits theft by deception when he "[o]btains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception." Iowa Code § 714.1(3) (2011). "Deception" is defined as knowingly doing any of the following:

> 1. Creating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true.
>
> 2. Failing to correct a false belief or impression as to the existence or nonexistence of a fact or condition which the actor previously has created or confirmed.
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> . . . .
>
> 5. Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to perform.

Id. § 702.9. To determine if there is a factual basis for the plea, "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.

At the plea hearing, the county attorney explained that "the evidence would show that sanitary sewer slip lining was never installed nor would it—could it have been installed at the length and through the process that Mr. Beenken indicated it had been done" and "the State's evidence would show that Mr. Beenken told Mr. Poulson that it had, in fact, been done before receiving payment for that work, which was, in fact, never done." The minutes of testimony

indicated that Poulson would testify that Beenken charged him over $15,000 to install approximately 672 feet of sanitary sewer liner but never performed this work. The State incorporated a police officer's report into the minutes of testimony. The report disclosed that police officers and two employees from the City of Clarion Public Works Department used a sewer video camera to inspect the sewer line. The "viewing indicated that no liner had been installed in the sewer line as stated by Beenken." The Clarion Police Department then hired a plumbing technician to use a sewer video camera to determine whether Beenken had installed the sewer lining. The technician determined "that no liner had been installed in the sewer at the Poulson residence." Beenken agreed that the prosecutor's summary of the evidence and the minutes of testimony, including the incorporated police report, "if presented to the jury would be sufficient to find [Beenken] guilty beyond a reasonable doubt."

Upon our de novo review, we find a factual basis to support Beenken's *Alford* plea. *See* Iowa Code §§ 702.9(1)–(2), 714.1(3). As a result, Beenken cannot establish the prejudice necessary to support an ineffective-assistance-of-counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring the defendant to establish counsel's deficient performance and resulting prejudice to support an ineffective-assistance-of-counsel claim).

B. Search Warrant

The defendant argues trial counsel was ineffective in failing to file a motion to suppress in a timely manner. To establish an ineffective-assistance-of-counsel claim in the context of an untimely motion to suppress, the defendant

must establish a reasonable probability that a timely motion would have resulted in the suppression of evidence. *Jones v. Wilder-Tomlinson*, 577 F. Supp. 2d 1064, 1080 (N.D. Iowa 2008) ("Applying *Strickland* and progeny, [the defendant] must show that there was a reasonable probability that the motion to suppress the evidence . . . would have been granted had it been timely filed in order to show prejudice.").

The Fourth Amendment requires probable cause to support a search warrant. *See Gogg*, 561 N.W.2d at 363. To determine whether probable cause exists we must consider

> whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. Probable cause to search requires a probability determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched.

Id. (citations and internal quotation marks omitted). Iowa law adheres to the "totality of the circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed."

(internal citations omitted).

In determining whether the issuing judge had a substantial basis for finding probable cause, our review is "limited to consideration of only that

information, reduced to writing, which was actually presented to the [magistrate] at the time the application for warrant was made." *Gogg*, 561 N.W.2d at 363 (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)). The facts and information before the judge must establish a fair probability that authorities will find evidence or contraband on the person or place to be searched. *State v. Thomas*, 540 N.W.2d 658, 662–63 (Iowa 1995). In recognition of a preference for action pursuant to a search warrant, we resolve any doubt in favor of a warrant's validity. *State v. Beckett*, 532 N.W.2d 751, 753 (Iowa 1995).

Lieutenant Brian Jensen of the Clarion Police Department applied for the search warrant at issue in the present case. The application listed Lindsey German, Poulson's step-son whom held power of attorney over Poulson's financial dealings, as the source of information. The warrant application set forth the following information:

> [S]ince December 2008 over $115,000 has been paid to David Beenken for repairs to the Poulson residence. With $15,000 being since May 4, 2010. Beenken has been hired by Poulson to do some plumbing and heating work at this residence. It is the concern of German that the amount billed does not relate to work being completed. Bank statements show many payments to Beenken during this time span.
>
> German also states that Beenken picked up all the invoices from Poulson yesterday. He stated that he needed to make copies of them.
>
> The Wright County Assessor's site shows a total land and structure value of this residence at $64,800.

The warrant sought to search Beenken's vehicles and home for "[a]ny an all business documents relating to business transactions with Merle Poulson" and "any related supplier invoices relating to these business transactions."

Merely showing that the trial court denied the defendant's motion as untimely is insufficient to establish an ineffective-assistance-of-counsel claim. *Jones*, 577 F. Supp. 2d at 1080. The defendant still bears the burden of demonstrating prejudice—a reasonable probability that the evidence would have been suppressed but for counsel's failure to file in a timely manner. *Id.* Upon our review of the warrant, we find the issuing judge had a substantial basis for concluding probable cause existed. *See Gogg*, 561 N.W.2d at 363. Thus, Beenken cannot establish the requisite prejudice and his claim must fall.

AFFIRMED.