IN THE COURT OF APPEALS OF IOWA

No. 3-403 / 12-0950
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRAVIS JAMES JORDAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Ian K. Thornhill (guilty plea) and Mitchell E. Turner (motion in arrest of judgment and sentencing), Judges.

A defendant challenges the factual basis for his plea to second-degree theft and contends his sentence for that crime should have merged with his sentence for first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams and Nan Jennisch, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Brent D. Heeren, County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Travis Jordan challenges the factual basis for his plea to second-degree theft and contends his sentence for that crime should have merged with his sentence for first-degree theft.

I. Background Facts and Proceedings

Jordan stole radiators and tools from a junkyard. To haul away the items, he stole a pickup truck owned by the junkyard.

The State charged Jordan with first-degree theft under Iowa Code sections 714.1(1)[1] and 714.2(1)[2] (2011) and second-degree theft under sections 714.1(1) and 714.2(2),[3] as well as other crimes. Jordan pled guilty to first- and second-degree theft in exchange for dismissal of the other charges.

At the conclusion of the plea colloquy, the district court informed Jordan that any challenge to the plea would have to be raised in a motion in arrest of judgment "made no later than 45 days . . . and not less than five days prior the date set for sentencing." The court also informed him that "failure to raise such a challenge" would preclude him from asserting the issue on appeal.[4]

A new attorney made an appearance after the plea was entered. He belatedly filed a motion in arrest of judgment, asserting in part that the plea

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[1] This provision defines theft as taking "possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." Iowa Code § 714.1(1).
[2] This provision, in part, defines first-degree theft as "theft of property exceeding ten thousand dollars in value." Iowa Code § 714.2(1).
[3] In pertinent part, this provision defines second-degree theft as "theft of a motor vehicle . . . not exceeding ten thousand dollars in value." Iowa Code § 714.2(2).
[4] A failure to provide this advice would have resulted in reinstatement of Jordan's right to challenge the legality of the plea. *See State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

lacked a factual basis. The district court concluded the motion was untimely but, alternately, stated "even on the merits, [the motion] would fail."

On appeal, Jordan contends his attorney was ineffective in failing to file a timely motion in arrest of judgment challenging the factual basis for the plea to second-degree theft.[5] He also contends that the district court should have merged his sentences for first- and second-degree theft. Both arguments are premised on his assertion that the thefts were part of "a single expedition."

II. Analysis

A. Factual Basis

Before a court may accept a guilty plea, the court must determine that it is supported by a factual basis. Iowa R. Crim. P. 2.8(2)(b). An attorney who allows a defendant to plead guilty to a crime that lacks a factual basis breaches an essential duty to the defendant, and prejudice is inherent. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). While we normally preserve ineffective-assistance-of-counsel claims for postconviction relief, we find the record adequate to address this issue. *See id.* That record includes the minutes of evidence, "the entire record before the district court at the guilty plea hearing," the defendant's statements, and "facts related by the prosecutor." *Id.* Our review is de novo. *Id.*

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[5] Jordan concedes the filing was untimely. He preliminarily asserts that the appearance of new counsel constituted good cause for the late filing. Our rules do not recognize a good cause exception to the timeliness requirement. *See* Iowa R. Crim. P. 2.24(3)(b) (stating a motion in arrest of judgment "must be made not later than 45 days after plea of guilty . . . but in any case not later than five days before the date set for pronouncing judgment"). For that reason, we address the issue under an ineffective-assistance-of-counsel rubric, as he alternatively requests.

According to the minutes of evidence, the first-degree theft charge was premised on the taking of radiators worth over $6000 and tools worth $5000. According to the prosecutor, the second-degree theft charge was premised on the taking of the truck. At the plea hearing, Jordan affirmed that the property underlying the second-degree theft charge was separate, and in addition to, the property underlying the first-degree theft charge. He also agreed that the value of the item underlying the second-degree theft charge was greater than $1000 and less than $10,000. Based on this record, we are persuaded that the second-degree theft charge was supported by a factual basis.

In reaching this conclusion, we have relied on the Iowa Supreme Court's analysis of a virtually identical issue in *State v. Chrisman*, 514 N.W.2d 57, 58–60 (Iowa 1994). Chrisman asserted there was insufficient evidence to support two theft convictions. *Chrisman*, 514 N.W.2d at 58. The court rejected this argument. *Id.* at 59–60. First, the court noted that Iowa Code section 714.3, which allows the aggregation of thefts, uses the permissive "may." *Id.* at 59. The court stated "'the prosecution is not required to accumulate thefts no matter how closely they may be connected.'" *Id.* (quoting 4 Ronald L. Carlson and John L. Yeager, *Criminal Law and Procedure* § 324, at 99 (Supp. 1993)). Second, the court declined to apply the "single larceny rule"[6] advocated by Chrisman (and Jordan) and instead concluded that as many crimes were committed as there were successive takings, even if they were all committed in rapid succession. *Id.* at 59–60.

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[6] In *State v. Cabbell*, the court stated that "[u]nder the single larceny rule . . . the stealing of property from different owners at the same time and at the same place constitutes but one larceny." 252 N.W.2d 451, 453 (Iowa 1977) (quotation marks and citation omitted).

Jordan attempts to distinguish *Chrisman* on the ground that the thefts there took place in two different buildings. He asserts he had "a single intent to steal from the same owner, at the same time, from the same location," placing him squarely within the ambit of the single larceny rule. This is indeed a relevant factual distinction and one that was also present in *Cabbell*, which the *Chrisman* court cited. *Cabbell*, 252 N.W.2d at 453 (upholding convictions on two felony shoplifting counts involving "different owners; different locations; and a lapse of time between incidents"). But that factual distinction does not require a legal conclusion that Jordan's theft of the truck was indistinguishable from the theft of the radiators and tools.

The Iowa Supreme Court addressed this very question in *State v. Amsden*, 300 N.W.2d 882, 884 (Iowa 1981). The court stated, "whether the acts of accused constitute several thefts or one single crime must be determined by the facts and circumstances of each case. If each taking is the result of a separate, independent impulse, each is a separate crime." *Amsden*, 300 N.W.2d at 884 (quoting 52A C.J.S. *Larceny* § 53, at 479–80 (1968)); *see also State v. Jacobs*, 607 N.W.2d 679, 688 (Iowa 2000) ("The defendant engaged in numerous, separate, transactions in connection with each theft, and each of the transactions constituted a separate offense.").

As discussed, there is record support for a finding that Jordan committed two crimes: first-degree theft of the radiators and tools and, in a separate impulse, second-degree theft of the truck. The factual differences in *Cabbell* and *Chrisman* do not mandate a different result.

Because the second-degree theft count was supported by a factual basis, Jordan's attorney did not breach an essential duty in failing to file a timely motion in arrest of judgment challenging the factual basis for this plea.

B. Merger

Jordan next argues that the constitutional prohibition against double jeopardy and a statute addressing offenses necessarily included in other offenses require merger of the sentences for first- and second-degree theft. U.S. Const. amend. V; Iowa Code § 701.9. Neither prohibits the imposition of multiple punishments for two offenses that are not the same. *See Jacobs*, 607 N.W.2d at 688–89. We have already found that the record contained a factual basis to support the commission of two distinct offenses. Because the facts support the commission of two offenses, the merger doctrine is inapplicable. *See State v. Parker*, 342 N.W.2d 459, 463 (Iowa 1983) (rejecting a merger argument after concluding "there were two separate, defined offenses committed by defendant even though they occurred as a part of one incident").[7]

AFFIRMED.

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[7] Parker stole a motor vehicle, charged as second-degree theft, and a trailer, charged as first-degree theft. *Parker*, 342 N.W.2d at 459–60. Under the governing 1981 iteration of Iowa Code section 714.2(2), the taking of a motor vehicle could only be charged as second-degree theft. *Id.* at 462. Because that taking could not be charged as first-degree theft, the court easily found that each crime was a separate offense, precluding merger. *Id.* at 463.