IN THE COURT OF APPEALS OF IOWA

No. 3-560 / 12-2189
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEROY COREY BUTTROM,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Leroy Buttrom appeals his convictions for delivery of the controlled substance known as "ecstasy" and tax stamp violations, contending he received ineffective assistance of counsel at his plea hearing. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Tyler Buller, Assistant Attorney General, John Sarcone, County Attorney, and Stephan Bayens, Assistant County Attorney, for appellee.

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

TABOR, J.

Leroy Buttrom appeals his convictions for delivery of the controlled substance commonly known as ecstasy[1] and tax stamp violations, contending he received ineffective assistance of counsel at his plea hearing. Buttrom argues the district court's colloquy with him did not establish a factual basis to support his guilty pleas.

Our supreme court's recent holding in *State v. Finney*, ___ N.W.2d ___, 2013 WL 3378303, a5 *15 (Iowa 2013), clarified that we may look beyond the plea colloquy to determine whether a factual basis appears on the record to support each crime charged. Because the minutes of testimony, coupled with Buttrom's statements at the hearing, supplied a factual basis to support his convictions, defense counsel was not ineffective for allowing him to enter guilty pleas.

I. Background Facts and Proceedings

The following facts are included in the minutes of testimony. On four separate occasions between November 18 and December 9, 2010, Buttrom sold a total 307 tablets of ecstasy to a confidential informant (CI) working with the Mid-Iowa Narcotics Enforcement Task Force.[2] On December 11, 2010, detectives executed a search warrant at Buttrom's Urbandale residence, where

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[1] Ecstasy is the popular name for MDMA (3,4-methylenedioxy-methamphetamine), a schedule I controlled substance. *See* Iowa Code § 124.204(4)(z) (listing hallucinogenic substances).

[2] On November 18, 2010, Buttrom sold thirty-five tablets. Four days later, he sold forty-six tablets. On December 2, 2010, he sold fifty tablets of ecstasy. One week later, he sold 176 tablets.

they seized two pieces of packaging with residue, $299 in cash, and a broken orange tablet that appeared to be ecstasy.

Between the initial search and December 15, 2010, Buttrom cooperated with law enforcement, providing information about his supplier of the ecstasy tablets. Once he fell out of contact with officers, they obtained warrants for his arrest. On September 24, 2012, officers arrested Buttrom on the outstanding warrants.

On October 15, 2012, the State filed a trial information charging Buttrom with four counts of delivery of a controlled substance, in violation of Iowa Code section 124.401(1)(c)(8) (2011), and four counts of failure to possess a tax stamp, in violation of sections 453B.3 and 453B.12. The State also sought recidivist enhancements under sections 124.411 and 902.8.

Buttrom reached an agreement with the State in which he would plead guilty to one count of delivery of a controlled substance, as a section 124.411 second or subsequent offender, but without applying the section 902.8 habitual offender enhancement provision, and one count of failure to possess a tax stamp, without enhancement, in exchange for the State dismissing all remaining counts. Buttrom additionally agreed to waive time for sentencing, his right to file a motion in arrest of judgment, and his use of a presentence investigation report, for a joint recommendation that he receive an indeterminate term of imprisonment not to exceed twenty years on the delivery count, serving one-third of the time before being eligible for parole, and five years on the tax stamp count.

The terms would run consecutively for incarceration not to exceed twenty-five years.

On November 15, 2012, the district court held a plea and sentencing hearing. Buttrom pled guilty as per his agreement with the State. After reciting the charges, the court entered into a colloquy with Buttrom:

> THE COURT: I need you at this time to tell me in your own words what you did to commit those crimes.
> THE DEFENDANT: On November 28 I delivered ecstasy—I mean, 18th I delivered ecstasy without a tax stamp.
> THE COURT: And at the time you made that delivery did you have in your possession ten or more dosage units of ecstasy?
> THE DEFENDANT: Yes.
> THE COURT: And none of those units had the tax stamp, label or other official indicia attached to it?
> THE DEFENDANT: No.
> THE COURT: And the acts that you have described for me all took place on or about November 18th of 2010 here in Polk County?
> THE DEFENDANT: Yes.
> THE COURT: And, sir, had you previously been convicted of a drug-related felony offense? Specifically, on May 29th, 2007, were you convicted in Polk County district court case number FECR 210045 of the offense of delivery of a controlled substance?
> THE DEFENDANT: Yes.

The court accepted the plea and entered a sentence consistent with the plea agreement. Buttrom now appeals.

II. Scope and Standard of Review

We generally review challenges to guilty pleas to correct legal error. But because Buttrom claims his trial counsel was ineffective for allowing him to enter pleas that lacked factual bases on record, we review his claims de novo. *See State v. Velez*, 829 N.W.2d 572, 575–76 (Iowa 2013). We preserve ineffective-assistance claims for postconviction relief proceedings, unless the record is

adequate to resolve them on direct appeal. *Id.* at 576. Satisfied the record before us suffices, we elect to address Buttrom's claim.

III. Analysis

Buttrom contends because the plea hearing record lacked a factual basis to support the State's charges of delivering a controlled substance and possession of ecstasy without a tax stamp, his counsel rendered ineffective assistance by allowing him to enter guilty pleas to each.

A defendant's claim of ineffective assistance of counsel originates in the Sixth Amendment of the United States Constitution. *State v. Madsen*, 813 N.W.2d 714, 723 (Iowa 2012). To succeed on this claim, a defendant must prove, by a preponderance of evidence, that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Clay*, 824 N.W.2d 488, 495–96 (Iowa 2012) (recognizing test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). When trial counsel permits a defendant to plead guilty and waive the right to file a motion in arrest of judgment absent a factual basis to support the guilty plea, counsel violates an essential duty, and prejudice is presumed. *State v. Ortiz*, 789 N.W.2d 761, 764–65 (Iowa 2010).

Before accepting a guilty plea, a court must determine the plea (1) is made voluntarily, (2) is made intelligently, and (3) has a factual basis. Iowa R. Crim. P. 2.8(2)(b). To determine whether a factual basis exists, a court may examine statements made by the defendant and prosecutor at the guilty plea proceeding, the minutes of testimony, and the presentence investigation. *Velez*, 829 N.W.2d at 576. Because Buttrom waived the presentence investigation, we

look to the statements by the parties at the guilty plea proceeding and the minutes of testimony to determine whether the State established a factual basis for both charges. *See id.*

The parties debate whether our review is limited to Buttrom's plea hearing colloquy or if we may review the entire record to determine whether a factual basis exists to support both pleas. Buttrom relies on *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005), and *State v. Finney*, No. 12-0010, 2012 WL 3027113, at *2 (Iowa Ct. App. July 25, 2012), to contend we can look only to his statements during the plea hearing because the district court did not specify it was relying on other parts of the record to satisfy the factual bases for his guilty pleas. The State acknowledges the district court did not expressly consider the minutes of testimony in its factual-basis finding, but argues, under *State v. Ortiz*, 789 N.W.2d 761, 767–68 (Iowa 2010) and previous caselaw, we may review the entire record to determine whether a factual basis exists.

After both parties filed their briefs, our supreme court decided *State v. Finney*, ___ N.W.2d ___, ___, 2013 WL 3378303, at *1 (Iowa July 5, 2013), vacating the decision cited by Buttrom. The court took the opportunity to trace federal and state precedent to address the precise contention between both parties: "what happens when a district court finds a factual basis for the charge at the plea hearing, but does not identify support in the record for the finding and the plea colloquy preceding the district court's finding does not support an essential element of the crime?" *Finney*, 2013 WL 3378303, at *4.

Reaffirming the district court's obligation to find a factual basis supports the defendant's plea on the record during the plea hearing, the supreme court distinguished between a voluntariness claim and a factual-basis claim to explain why the entire record remains available for a factual-basis review:

> [I]nsubstantial errors should not entitle a defendant to relief. Recourse to the entire record is appropriate [in factual-basis claims] because, unlike a claim of due process involuntariness, the relevant inquiry for purposes of determining the Sixth Amendment claim presented by [the defendant] does not involve an examination of his subjective state of mind at the time the trial court accepted the plea, but instead involves an examination of whether counsel performed poorly by allowing [the defendant] to plead guilty to a crime for which there was no objective factual basis in the record. The failure of the district court in this case to explain on the record the evidence supporting his finding of a factual basis is thus an omission unrelated to the substantive claim being made.

Id. at *14-16.

With the question resolved as to the scope of the record subject to review, we turn to the merits of Buttrom's ineffective-assistance claim.

Regarding the delivery count, Buttrom claims his colloquy with the district court does not establish that he (1) knew the substance he was delivering was ecstasy, (2) intended to deliver ecstasy, and (3) intended to deliver it to a person. As to the tax stamp violation, Buttrom argues the plea hearing did not establish that he (1) was a "dealer," (2) knew he unlawfully possessed a taxable substance, (3) knew the ecstasy had no tax stamp affixed, and (4) knew the dosage amount requiring a stamp.

The State contends there is strong circumstantial evidence in the minutes of testimony showing Buttrom knew the substance he possessed was ecstasy, and that he intended to deliver it to the CI. Under the same rationale, the State

contends the minutes of testimony also provide a sufficient factual basis for the tax stamp offense.

Buttrom pled guilty to delivering a controlled substance, in violation of section 124.401(1)(c)(8) and failing to affix a drug stamp, in violation of sections 453B.3 and 453B.12. Section 124.401(1)(c)(8) reads:

> [I]t is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.
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> . . . .
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> c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, or simulated controlled substances is a class "C" felony, and in addition to the provisions of section 902.9, subsection 1, paragraph "d", shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:
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> . . . .
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> (8) Any other controlled substance, counterfeit substance, or simulated controlled substance classified in schedule I, II, or III, except as provided in paragraph "d".

Section 453B.3 reads, in relevant part:

> A dealer shall not possess, distribute, or offer to sell a taxable substance unless the tax imposed under this chapter has been paid as evidenced by a stamp, label, or other official indicia permanently affixed to the taxable substance.
>
> Taxes imposed on taxable substances by this chapter are due and payable immediately upon manufacture, production, acquisition, purchase, or possession by a dealer.
>
> If the indicia evidencing the payment of the tax imposed on taxable substances under this chapter have not been affixed, the dealer shall have the indicia permanently affixed on the taxable substance immediately after receiving the taxable substance. A stamp, label, or other official indicia shall be used only once and shall not be used after the date of expiration.

See also Iowa Code § 453B.12 (providing civil and criminal penalties for Chapter 453B). A dealer is "any person who ships, transports, or imports into this state or acquires, purchases, possesses, manufactures, or produces in this state . . . [t]en or more dosage units of a taxable substance which is not sold by weight." *Id.* § 453B.1(3)(a)(4). A dosage unit is a measurement unit used to dispense the substance to an ultimate user, such as a pill or capsule. *Id.* § 453B.1(6).

Buttrom's admission that "[o]n November . . . 18th I delivered ecstasy without a tax stamp" provides a factual basis to support his guilty plea. In determining whether the State established a factual basis for both charges, the "'record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate the facts that support the offense.'" *See Velez*, 829 N.W.2d at 576 (quoting *Ortiz*, 789 N.W.2d at 768). As we summarize, the minutes of testimony provide additional facts supporting both charges.

The minutes list ten law enforcement officers and the CI who would testify to the specifics of all four controlled purchases. For each controlled purchase the CI wore a recording device while buying the tablets from Buttrom, and the purchases took place either in Buttrom's or the CI's vehicle. Officers saw none of the tablets carried a drug tax stamp and were prepared to testify the quantity of tablets and items recovered at Buttrom's residence were consistent with the sale of ecstasy rather than personal use.[3]

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[3] Buttrom argues because the criminalist in the minutes of testimony did not specify whether the lab results positively identified the tablets as ecstasy, nothing proves the substance of the tablets. But as the State highlights, on several occasions, the minutes

The minutes reveal when officers executed the search warrant, Buttrom discussed aspects of his drug trade with Detective Ken Brock, including the location of his supplier and how he obtained the tablets.

Accordingly, the minutes of testimony provide a factual basis for his pleas to delivery of a controlled substance and failure to possess a tax stamp. "Our cases do not require that the district court have before it evidence that the crime was committed beyond a reasonable doubt, but only that there be a factual basis to support the charge." *Finney*, 2013 WL 3378303, at *16; *see Ortiz*, 789 N.W.2d at 768; *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (finding district court need not extract a confession from the defendant; it need only be satisfied the facts support the crimes, not necessarily the defendant's guilt). In addition to Buttrom's plea hearing admission, the minutes offer a factual basis for both crimes. Therefore, Buttrom's counsel did not render ineffective assistance by allowing him to plead guilty to each offense.

AFFIRMED.

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assert the tablets were "later determined to be MDMA (ecstasy)." In addition to Buttrom never challenging the identity of the tablets, according to the minutes, his conversation with law enforcement during the search warrant execution further evinces the tablets sold were in fact ecstasy.