IN THE COURT OF APPEALS OF IOWA

No. 3-766 / 12-2228
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNY TYRONE CLAYTOR JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Kim M. Riley, Judge.

Kenny Claytor Jr. appeals his conviction and sentence following his guilty plea to one count of domestic abuse assault causing bodily injury and one count of harassment in the first degree. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND AFFIRMED IN PART.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Jennifer Miller, County Attorney, and Benjamin Stansberry, Assistant County Attorney, for appellee.

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

MULLINS, J.

Kenny Claytor Jr. appeals his conviction and sentence following his guilty plea to one count of domestic abuse assault causing bodily injury, second offense, in violation of Iowa Code sections 708.1, 708.2A(1), and 708.2A(3)(b) (2011), and one count of harassment in the first degree, in violation of Iowa Code section 708.7(2). He contends his counsel was ineffective and the court imposed an illegal sentence.

We find Claytor failed to prove his counsel was ineffective in allowing him to plead guilty because a factual basis supports his guilty plea. We also find Claytor failed to prove counsel was ineffective in failing to assure the affirmation of his prior conviction was knowing and voluntary. However, because there is nothing in the record to establish that the Domestic Violence Coalition is a local anticrime organization, we vacate the portion of Claytor's sentence ordering him to pay $10 as part of his restitution.

I. BACKGROUND FACTS AND PROCEEDINGS.

Claytor was charged with one count of domestic abuse assault causing bodily injury, second offense, two counts of first-degree harassment, and one count of child endangerment following events that transpired on August 22, 2012. The minutes of testimony indicate that on that date, Claytor and his live-in girlfriend got into an argument. Claytor struck his girlfriend twice in the face and once in the arm while she was holding their child. He then prevented her from calling the police and threatened to kill two witnesses to the argument if he went to jail.

Claytor filed a written guilty plea on October 16, 2012, pleading guilty to the domestic abuse assault charge and one of the harassment charges. The written guilty plea states, "I admit that on Aug. 22, 2012, I did an act causing bodily injury to [my girlfriend], with a prior conviction, and did have personal contact with [a witness] with the intent to alarm her in Marshall County, Iowa." The plea form does not reference the minutes of testimony or set forth the elements of either crime to which Claytor pleaded guilty. The district court accepted the plea the next day.

Following a December 16, 2012 sentencing hearing, the district court sentenced Claytor to an indeterminate term of incarceration not to exceed two years on each charge. The sentences were ordered to run concurrently. In addition to assessing fines and surcharges, the court ordered Claytor to pay a $10 Domestic Violence Coalition fee as part of his restitution on the domestic abuse charge.

II. STANDARD OF REVIEW.

While a defendant's challenge to a guilty plea is generally reviewed for corrections of errors at law, we review infective-assistance-of-counsel claims de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). We normally preserve such claims for postconviction relief proceedings, but will consider the merits on direct appeal where the record is adequate. *Id.*

We review the district court's sentence for corrections of errors at law. *State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005).

III. INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Factual basis.

Claytor first contends his trial counsel was ineffective in allowing him to plead guilty to domestic abuse assault causing bodily injury when the record does not support a factual basis for the plea.

In order to prove a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and prejudice resulted. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Because prejudice is inherent when counsel allows a defendant to plead guilty when a factual basis for the charge does not exist, *id.*, our only inquiry is whether a factual basis exists for Claytor's plea.

In the order accepting Claytor's guilty plea, the district court referenced only the written guilty plea. Claytor argues the written guilty plea was insufficient to establish a factual basis for the domestic abuse assault charge because the plea form does not indicate he had a domestic relationship with the victim. *See* § 708.2A(1) (defining a domestic abuse assault as an assault occuring between persons in a domestic relationship). With respect to the first-degree harassment charge, he argues the plea form is insufficient to establish the essential elements of the crime because it does not indicate he threatened to commit a forcible felony. *See* Iowa Code § 708.7(2) ("A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony . . . ."). Claytor claims counsel was ineffective in failing to direct

him to file a motion in arrest of judgment because the district court did not identify support in the record to establish either of these elements.

Our supreme court recently addressed the question of "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?" *State v. Finney*, 834 N.W.2d 46, 51 (Iowa 2013). It held that because the relevant inquiry is not a defendant's subjective state of mind at the time the trial court accepted the guilty 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," we may examine the entire record before the district court to determine whether a factual basis exists. *Id.* at 62.

Looking at the entire record before the district court, it is clear a factual basis exists to support Claytor's guilty plea. With regard to the domestic abuse assault charge, the minutes of testimony establish Claytor and the victim were in a domestic relationship because they were living together at the time of the assault and also had a child together. *See* Iowa Code § 236.2(2)(a), (c) (defining domestic abuse as an assault occurring between household members who resided together at the time of the assault or persons who are parents of the same minor child). The minutes of testimony also establish Claytor told two witnesses that he would kill them if he went to jail, thus establishing the requisite threat to commit a forcible felony to support the first-degree harassment charge.

See id. § 702.11(1) (including murder in the definition of forcible felony). Because a factual basis exists for both charges, counsel did not breach an essential duty by allowing Claytor to plead guilty and his claim of ineffective assistance of counsel fails.

B. Sentencing enhancement.

Claytor also contends his counsel was ineffective in failing to challenge the enhanced sentence on the domestic abuse assault charge. He alleges he did not properly admit a prior domestic abuse assault conviction and therefore did not voluntarily or intelligently enter into the guilty plea.

Domestic abuse assault causing bodily injury is a serious misdemeanor. *Id.* § 708.2A(2)(a). It is an aggravated misdemeanor if it is a second conviction that occurs within twelve years of the first. *Id.* § 708.2A(3)(b), (6)(a). The State must prove the prior conviction beyond a reasonable doubt in a second trial, or a defendant may affirm the validity of the prior conviction and proceed to sentencing. *State v. Kukowski*, 704 N.W.2d 687, 691-92 (Iowa 2005); *see also* Iowa R. Crim. P. 2.19(9).

In his written guilty plea, Claytor admitted he "did an act causing bodily injury to [the victim], with a prior conviction." The written guilty plea does not specify the crime he was convicted of or when he was convicted. Claytor argues nothing in the written guilty plea supports a finding he had been previously convicted of domestic abuse assault within the past twelve years and, as such, the district court failed to ensure his affirmation was voluntary and intelligent.

If a defendant affirms the prior conviction, the court has a duty to conduct further inquiry before sentencing to ensure the affirmation is voluntarily and intelligent. *Kukowski*, 704 N.W.2d at 692. While this inquiry is similar to the colloquy the court must conduct when accepting a guilty plea under Iowa Rule of Criminal Procedure 2.8(2)(b), a full rule 2.8(2)(b) colloquy is not required. *State v. McBride*, 625 N.W.2d 372, 374 (Iowa Ct. App. 2001). "In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation." *Id.* at 375.

Claytor's written guilty plea states he understands the nature of the charge and the mandatory minimum punishment and maximum punishment for the offense. This discharges the court's duty to ensure Claytor's stipulation was voluntary and intelligent. *See State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000) (holding that where "[t]here is nothing in the record to indicate [the defendant] failed to understand the nature of an habitual offender decree, or the significance of his admission," the court discharged its duty to inform the defendant as to the ramifications of an habitual offender adjudication).

Although *State v. Finney* addressed what record is necessary to establish the objective test for a valid guilty plea, it would be inconsistent for us to rely on that case to establish the factual basis for the plea, as we have done above, and then deny the use of that same record for sentencing purposes. Count I of the information accused Claytor of the crime of "domestic abuse assault causing bodily injury, second offense, in violation of Iowa Code sections 708.1, 708.2A(1), and 708.2A(3)(b)" and alleged a prior conviction of domestic abuse

assault within the past twelve years. The crime alleged in Count I is an aggravated misdemeanor. In his written guilty plea, Claytor stated he was "pleading guilty to the charge(s) of Ct 1 (aggravated) domestic abuse assault . . . ." He did not claim he was pleading to a lesser-included offense of that charged in Count I, but that he was pleading guilty to Count I. Further, an examination of the minutes of testimony clearly establish the domestic abuse committed by Claytor was a second offense that occurred within twelve years of his first conviction.

Claytor does not assert he was misinformed of the consequences of affirming his prior conviction. Nor does he deny the validity of that prior conviction. He only complains he did not affirm the details of that prior conviction with specificity in the written guilty plea. Even assuming counsel had a duty to ensure the court made additional inquiry as to the validity of Claytor's prior conviction, Claytor cannot show he was prejudiced by this failure. The minutes of testimony show the clerk of court was prepared to testify that on January 30, 2001, Claytor was convicted of domestic abuse assault with intent or while using or displaying a dangerous weapon. Even if Claytor had not affirmed the prior conviction in his written guilty plea, the minutes of testimony show the State would be able to prove it under rule 2.19(9). Accordingly, Claytor's ineffective-assistance-of-counsel claim fails. *See McBride*, 625 N.W.2d at 375 (finding any breach of counsel's duty was without consequence where even a full rule 8(2)(b) colloquy would not have prevented the defendant from receiving an enhanced sentence).

IV. ILLEGAL SENTENCE.

Claytor also challenges the legality of the sentence imposed upon him for the domestic abuse assault conviction. Specifically, he argues the district court improperly ordered him to pay a $10 Domestic Violence Coalition fee. While Claytor acknowledges the district court shall include "contributions to a local anticrime organization" in its restitution order, *see* Iowa Code § 910.2(1), he argues the statutory requirements for assessing the fee are not established in the record.

The Iowa Code defines a "local anticrime organization" as "an entity organized for the primary purpose of crime prevention which has been officially recognized by the chief of police of the city in which the organization is located or the sheriff of the county in which the organization is located." *Id.* § 910.1(2). Nothing in the record before us establishes the Domestic Violence Coalition is an entity organized for the primary purpose of crime prevention, or that it has been officially recognized by the Marshall County Sheriff or the local chief of police. The only mention of the Domestic Violence Coalition anywhere in the record is the assessment of the $10 fee. Because the requirements of section 910.1(2) are not shown in the record, the assessment of the fee is not authorized by statute. Accordingly, we vacate the portion of the sentencing order assessing the fee.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND AFFIRMED IN PART.