IN THE COURT OF APPEALS OF IOWA

No. 3-903 / 13-0051
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAUNDERS E. PIKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve (plea) and Joel W. Barrows (sentencing), Judges.

A defendant appeals his forgery conviction and sentence. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, Joseph Grubisich and Joel Barrows, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

The State charged Saunders Pike with theft in the fourth degree and forgery of a financial instrument. In return for Pike's guilty plea to forgery, the State agreed to dismiss the theft charge. Then the plea agreement took an unusual turn. If Pike deposited $685 in restitution into his attorney's client trust account by the date of sentencing, the State agreed not to pursue the habitual offender enhancement. If Pike did not make the deposit, he agreed to stipulate to his habitual offender status. Ultimately, Pike was unable to come up with the money and received an indeterminate fifteen-year sentence. Pike now appeals, alleging no factual basis for his guilty plea and constitutionally deficient representation in negotiating the plea agreement. He also contests the imposition and suspension of a fine on his habitual offender sentence.

Because the plea record provides a factual basis for forgery, we affirm Pike's conviction. As for his Sixth Amendment claim, we find the record inadequate to gauge the effectiveness of counsel's performance and preserve the issue for possible postconviction proceedings. We vacate the portion of his sentence imposing the fine and remand for entry of a revised sentencing order.

I. Background Facts and Proceedings

According to the minutes of testimony, Pike worked for KJS Janitorial. On April 3, 2012, he was cleaning the offices of Diotte Chiropractic Center in Davenport when he found checks belonging to the business. Chiropractor Ron Diotte was away on vacation in early April. When he returned to his office he noticed four checks were missing from his business accounts with Blue Grass

Savings Bank. In checking with his bank, Dr. Diotte learned that so far only one of the checks had been cashed. Dr. Diotte told the police the amount of that check was approximately $300.

Ken Anderson, an employee of Sub Express gas station, recalled Pike coming into the station on a recent Sunday and asking him to cash a "pay check" from a doctor's office. Pike told Anderson he needed the money and all the banks were closed. Anderson said he checked with the owner of Sub Express and received approval to cash the check for Pike. On Monday Pike returned to the gas station and told Anderson the doctor's office had been broken into and the doctor was stopping payment on all the checks. Pike promised to repay Sub Express. Anderson submitted a restitution claim in the amount of $385 for the check cashed by Pike.

In response to Dr. Diotte's complaint, Davenport police officers interviewed Pike on April 13, 2012. Detective Brandon Noonan read Pike his *Miranda* warnings, and Pike signed a waiver form, agreeing to speak with the officer. Pike admitted stealing several checks and writing his name on them. The detective compared Pike's signature from the *Miranda* form and from the copy of the check provided by Dr. Diotte and "noticed the signatures were very similar in nature."

The Scott County Attorney filed a trial information charging Pike with theft in the fourth degree, a violation of Iowa Code sections 714.1(1), 714.1(6), and 714.2(4) (2011), and forgery of a financial instrument, a violation of Iowa Code section 715A.2(1)(b) or (c) and 715A.2(2)(a)(3). The trial information also

alleged Pike was an habitual offender. Pike reached a plea agreement with the State and entered a plea of guilty to forgery on October 12, 2012. The court continued his sentencing hearing from November 29 to December 28, 2012. Pike stipulated to prior offenses qualifying him as an habitual offender. The court sentenced Pike to an indeterminate term of fifteen years with a mandatory minimum of three years under Iowa Code section 902.8. The court also fined Pike $750 but suspended his obligation to pay that fine. Pike challenges his plea and sentence.

II. Standards of Review

We review the guilty plea and sentencing issues for errors at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). But Pike's claim of ineffective assistance of counsel calls for de novo review. *See State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Analysis

A. Did the Plea Record Show a Factual Basis for Forgery?

1. Preservation of Error

We first address error preservation. Filing a motion in arrest of judgment is essential to preserving a direct appellate challenge to one's guilty plea. Iowa R. Crim. P. 2.24(3)(a). But the failure to file such motion will not prohibit a defendant from alleging defects in the guilty plea on appeal if the district court did not comply with Iowa Rule of Criminal Procedure 2.8(2)(d).[1] *Meron*, 675 N.W.2d at 540.

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[1] Iowa Rule of Criminal Procedure 2.8(2)(d) states:

Here, the district court told Pike he had the right to file a motion in arrest of judgment to challenge any mistake in the plea and informed him of the deadline for doing so. But when articulating the consequences, the court strayed from the language of rule 2.8(2)(d). The court said: "If you fail to file that motion in that time frame, then you can lose your right to file your plea of guilty later to the Iowa Supreme Court." Pike contends the right to "file a plea" does not inform a lay person that he has the right to challenge the plea on appeal. The State argues the court substantially complied with rule 2.8(2)(d). *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006).

While the district court does not have to quote the arrest-of-judgment rule verbatim, it must ensure the defendant understands the necessity of filing the motion and the appeal consequences of not doing so. In *Straw*, the court "commendably" used plain English to explain a motion in arrest of judgment. *Id*. Here, the district court failed to use the word "appeal" and may have left Pike with a misimpression of the consequences of not filing a motion in arrest of judgment. We conclude the court did not substantially comply with rule 2.8(2)(d), and therefore, Pike is not precluded from directly challenging his plea on appeal.

2. Merits

> *Challenging pleas of guilty.* The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

The district court may not accept a guilty plea without first determining that the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b). "A factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence." *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). When a defendant challenges the factual basis for a plea, "the entire record before the district court may be examined." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). The record, as a whole, must disclose facts to satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). We only need to "be satisfied that the facts support the crime." *Id.* Establishing the factual basis supporting a guilty plea is less exacting than proving guilt beyond a reasonable doubt at trial. *See State v. Sanders*, 309 N.W.2d 144, 145 (Iowa Ct. App. 1981).

Pike contends the hearing does not show a factual basis for his guilty plea because his actions did not constitute forgery in violation of Iowa Code sections 715A.2(1)(b) or (c) and 715A.2(2)(a)(3). That code section provides:

> 1. 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 does any of the following:
>
> . . . .
>
> b. Makes, completes, executes, authenticates, issues, or transfers a writing so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed.
>
> c. Utters a writing which the person knows to be forged in a manner specified in paragraph "a" or "b".
>
> . . . .
>
> 2. a. Forgery is a class "D" felony if the writing is or purports to be any of the following:

> . . . .
> (3) A check, draft, or other writing which ostensibly evidences an obligation of the person who has purportedly executed it or authorized its execution.

Iowa Code § 715A.2.

Pike argues the record does not show he made or uttered a writing that purported to be the act of another without that person's authorization. To support his position, Pike relies on *State v. Phillips*, 569 N.W.2d 816 (1997). In *Philips*, our supreme court held a defendant who signed his own name as the drawer of a check belonging to his ex-wife upon a bank where he did not have funds deposited did not commit the crime of forgery because the writing did not purport to be the act of another. 569 N.W.2d at 820. "When a check is drawn on an existing bank account and signed by the drawer in his or her own name, the check is exactly what it purports to be—a written request by the drawer to the drawee bank to pay a specified sum of money to a third person." *Id*.

We do not read *Phillips* as helping Pike's argument. Unlike Phillips who signed his own name as the drawer, Pike wrote his name on the check as the payee. *Phillips* explains a person may purport a check to be the act of another, as required for the offense of forgery, by filling in his or her name as the payee without authorization. *Id*. at 819–20 (citing *State v. Ross*, 512 N.W.2d 830, 832 (Iowa Ct. App. 1993)). Under *Ross*, Pike committed forgery by purporting that he had authorization from the chiropractor to endorse the check for himself. Pike told Anderson he needed to cash a paycheck. Pike admitted to Detective Noonan that he signed the back of the stolen check. Noonan also noted the "ID number" on the check matched Pike's State of Iowa identification card and the

signature on the check resembled Pike's signature on the *Miranda* waiver form. Pike told the plea-taking court he "wrote his name on the check" and cashed it, intending to defraud the owners of the check and get cash for his own use. We find a factual basis on this record for the forgery offense.

B. Did Counsel Provide Ineffective Assistance by Allowing Pike to Enter the Plea Agreement Creating a Sentencing Contingency Based on Payment of $685 in Restitution?

The parties filed a memorandum of plea agreement on October 15, 2012. The deal required the State to dismiss the theft count in return for Pike's guilty plea to forgery. The State agreed not to pursue the habitual offender sentencing enhancement at section 902.8 if Pike deposited $685 in restitution into his court-appointed attorney's client trust account by the date set for sentencing. If the $685 was not available at the time of sentencing, Pike agreed to stipulate to his habitual offender status. The parties made the court's concurrence with the agreement as a condition of the plea. The court deferred acceptance of the plea until sentencing.

Pike appeared for sentencing on November 29, 2012. Defense counsel asked to continue the hearing to give his client more time to raise the $685 referenced in the plea agreement. Counsel elaborated:

> Mr. Pike has been trying to get the money together, and he reports to me that on the 31st of October, he had a Social Security disability hearing that he is waiting for the results from which should produce a lump sum settlement. Additionally something monthly. Additionally, he reports his retirement accounts will be starting to be paid on December 21st, which will afford him the possibility of being able to come up with the restitution money.

The court reacted: "What the heck? I don't like this kind of plea agreement. If the guy doesn't come up with the $685, you go through with the habitual?" The court also expressed concern that it "puts the defendant in a pretty big bind."

The prosecutor responded: "On the other side of the coin, the defendant has a horrendous history. We are willing to waive the habitual if he has $685 at this time to do that." Pike spoke up: "I wasn't working, sir." To which the prosecutor replied: "You signed the plea agreement." Defense counsel said Pike "did anticipate being able to make those payments" and "sees an opportunity that the money should be available in the near future." The court granted Pike a thirty-day continuance, concluding: "[I]f he doesn't have the $685, he will face the music." The prosecutor then suggested his office might withdraw the plea agreement, regardless of the continuance.

At the December 28, 2012 hearing, Pike again reported he did not have the restitution amount. Pike admitted being convicted of two prior felony offenses for forgery in Iowa. The State then recommended the fifteen-year sentence under the habitual offender enhancement, noting Pike had "ten prior forgery convictions alone along with various other theft convictions." The court also clarified the amount of restitution owed Anderson was actually $385 and not the $685 included in the plea agreement.

Pike now argues his attorney delivered a subpar performance by condoning a plea agreement where he faced a more severe sentence based on his inability to pay a set amount of restitution. Pike alleges the plea offer violated

the equal protection and due process clauses of the state and federal constitutions because he "ended up with a more severe sentence than a wealthy person would have received under the terms of the plea offer."

We review Pike's complaints against his counsel under the familiar standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* held that legal representation violates the Sixth Amendment if it falls "below an objective standard of reasonableness," as indicated by "prevailing professional norms," and the defendant suffers prejudice as a result of counsel's omissions. 466 U.S. at 687–88. The two-part *Strickland* test applies to guilty plea challenges based on ineffective assistance of counsel. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). Here, the performance prong requires Pike to show counsel breached professional norms when he advised Pike to enter a plea agreement that included the restitution contingency. The prejudice prong requires Pike to show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). When a defendant raises an ineffective-assistance claim on direct appeal, we may decide the record is adequate to decide the claim or we may preserve the claim for postconviction proceedings. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). It is the unusual case when the record will be sufficient to resolve the claim on direct appeal. *Id*.

Pike cannot establish his ineffective-assistance claim without developing an additional record. *See id.* at 138 ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief

hearing."). We appreciate that Pike was indigent and could not take advantage of a restitution payment plan by virtue of the plea agreement. We also note the $685 in restitution designated in the plea agreement differed from the $385 eventually ordered as victim restitution. But we are not prepared to say Pike's attorney was ineffective on this record.

A plea agreement does not violate the state or federal equal protection or due process clauses simply because it requires payment of restitution. *See generally Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Runge*, 588 N.W.2d 116, 118 (Iowa 1999) (noting condition of attorney's probation was that he make restitution payments of not less than $300 per month and finding "Runge was indeed fortunate to have struck a plea bargain with the State absolving him of four felony convictions. Nevertheless, the record is clear that Runge—knowing full well the filing deadlines— . . . failed to pay the amounts stated in the restitution statement on the due dates"); *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (stressing nothing prevents the parties to a plea agreement from making a provision covering the payment of costs and fees); *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993) (finding applicant was "clearly informed of and agreed to restitution provisions of the plea agreement"). We acknowledge that because of his indigency Pike may have a stronger argument regarding differential treatment than would other defendants who enter plea agreements that require the payment of restitution. But the existing record indicates Pike and his attorney were aware of Pike's financial situation and may have accepted the

plea agreement in the belief that its benefit outweighed the risk of a longer sentence.

Pike bears the burden to show his attorney performed below professional norms in negotiating the plea deal in this case and that Pike suffered prejudice as a result. On this record we decline to adjudicate defense counsel's competency. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his day in court."). The development of a full record is necessary to decide Pike's allegation of ineffective assistance.

We affirm Pike's conviction and preserve his ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

C. Did the District Court Err in Imposing and Suspending a Fine on Pike's Habitual Offender Sentence?

Pike argues, and the State agrees, the portion of the sentencing order imposing and suspending the $750 fine must be vacated. If Pike had been convicted of the class "D" felony of forgery without the habitual offender enhancement, he would have been subject to a fine of no less than $750 and no greater than $7500. *See* Iowa Code § 902.9(5). But because Pike stipulated to habitual offender status, his sentence falls under section 902.9(3). Although the habitual offender sentencing provision does not provide for a fine, it does not preclude another statute from imposing such a fine. *State v. Halterman*, 630 N.W.2d 611, 613 (Iowa Ct. App. 2001). The forgery statute does not impose a separate fine. *See* Iowa Code § 715A.2. Accordingly, we vacate the fine and

remand for the district court to enter a modified sentencing order reflecting that change.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED.