

**IN THE COURT OF APPEALS OF IOWA**

No. 3-940 / 12-2248  
Filed December 5, 2013

**RICHARD SIEMER,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Richard Siemer appeals from the denial of his postconviction relief application. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Maggie Popp Reyes, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Miller, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**MILLER, S.J.**

Richard Siemer appeals from the denial of his postconviction relief (PCR) application. He contends his right to effective representation was denied when he pleaded guilty to criminal mischief in the second degree without a factual basis.

After reviewing the record before the district court at the time of the plea hearing, we find that record sets forth facts that support the offense. We therefore affirm.

**I. Background Facts and Proceedings.**

Siemer was facing several charges when he entered a guilty plea in July 2011. The original complaint, filed in May 2011, charged Siemer with criminal mischief in the third degree for his act of throwing an air compressor and air compressor gun at a vehicle, causing damage to its front quarter panel and rear taillight. The charge was later amended to criminal mischief in the second degree. Siemer also faced charges of sexual abuse in the third degree and assault with intent to commit sexual abuse. Because Siemer had already been convicted of a sex offense, both of the latter charges included a sexual predator sentencing enhancement pursuant to Iowa Code section 901A.2(3) (2011). Siemer pled guilty to all three charges in exchange for the State not pursuing the sentencing enhancement.

After entering his guilty pleas, Siemer proceeded to immediate sentencing, thereby waiving his right to file a motion in arrest of judgment. He did not directly appeal any of his convictions.

On April 9, 2013, Siemer filed a PCR application, alleging he received ineffective assistance of counsel because there was no factual basis for his guilty plea to criminal mischief. The district court dismissed the application on December 10, 2012, after a hearing.

## **II. Standard of Review.**

We review the denial of PCR for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But where, as here, an applicant alleges constitutional rights were denied, our review is de novo. *Id.*

## **III. Ineffective Assistance of Counsel.**

Siemer alleges his trial counsel was ineffective in allowing him to plead guilty to second-degree criminal mischief when a factual basis does not exist for the offense.<sup>1</sup> In order to succeed on his claim, Siemer must establish by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. See *State v. Null*, 836 N.W.2d 41, 48 (Iowa 2013).

Defense counsel must ensure a client does not plead guilty to a charge for which there is no objective factual basis; “no advice to plead guilty would be considered competent absent a showing of a factual basis to support the crimes to which the accused has elected to plead guilty.” *State v. Finney*, 834 N.W.2d 46, 54-55 (Iowa 2013). Failure to ensure a factual basis for a guilty plea violates the Sixth Amendment of the United States Constitution. *Id.* at 55.

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<sup>1</sup> In the statement of the issue in his brief, Siemer mischaracterizes the otherwise apparent nature of his claim by stating the district court erred in finding a factual basis for the offense.

In determining whether a factual basis for a guilty plea exists, the record need not show the totality of evidence necessary to support a guilty conviction. *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). The record is sufficient if it shows facts that support the offense. *Id.* In other words, there must be enough in the record for the trial court to be satisfied that the facts support the crime—not necessarily that the defendant is guilty. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The factual basis can be found from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report,<sup>2</sup> and (4) minutes of evidence. *Ortiz*, 789 N.W.2d at 768.

In order to prove second-degree criminal mischief, the State must show the cost of replacing, repairing, or restoring the damaged property exceeds \$1000 but does not exceed \$10,000. See Iowa Code § 716.4. Siemer argues there is insufficient evidence that the cost to repair, replace, or restore the victim's vehicle exceeds \$1000. Specifically, he claims the responding officer estimated the property damage at \$700, and the value of the vehicle at the time it was damaged ranges from \$1571 for a vehicle in excellent condition to \$746 for a vehicle in fair condition.<sup>3</sup> If the vehicle was not worth more than \$1000, the damages could not exceed \$1000. See *State v. Urbanek*, 177 N.W.2d 14, 17-18 (Iowa 1970) (holding that if the cost of repair is the same or greater than the

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<sup>2</sup> The presentence report may only be considered if it was available at the time of the plea hearing. See *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) (citing what is now Iowa Rule of Criminal Procedure 2.8(2)) *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990).

<sup>3</sup> Exhibit "C" to Siemer's application for postconviction relief stated the "Trade-In Value" for the vehicle ranged from \$1571 for a vehicle in excellent condition to \$746 for a vehicle in fair condition.

value of the property before it was damaged, the measure of damages is the value of the property before IT WAS damaged).

When examining the entire record before the district court, we find sufficient evidence to establish a factual basis for second-degree criminal mischief. When asked what the factual basis was for the offense, defense counsel referred the court to the minutes of evidence. The minutes of evidence state that Tom's Auto Body, Inc. provided the victim with a damage estimate of \$2097.65. The fact that if a trial had been held Siemer might have been able to introduce evidence to show the value of the vehicle was less than \$1000 at the time it was damaged does not bear on the existence of a factual basis at the time the guilty plea was entered. As the district court noted in denying the PCR application, if Siemer wanted to challenge the sufficiency of the factual basis established in the minutes of evidence, he needed to have a trial.

Because the minutes of evidence show a factual basis for second-degree criminal mischief, counsel did not breach an essential duty in failing to advise Siemer to file a motion in arrest of judgment. As a result, Siemer's ineffective-assistance-of-counsel claim fails and we affirm the denial of his PCR application.<sup>4</sup>

**AFFIRMED.**

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<sup>4</sup> Siemer also challenges the PCR court's statement that if he was successful in his challenge to the criminal mischief charge, the entire plea agreement would be thrown out, including his pleas to sexual abuse in the third degree and assault with intent to commit sexual abuse. Because we find a factual basis supports the criminal mischief charge, we need not address this claim.