

IN THE COURT OF APPEALS OF IOWA

No. 3-984 / 13-0659
Filed November 20, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SPENCER RAY FITZPATRICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price,
District Associate Judge.

The defendant has appealed from a judgment and sentence entered pursuant to his plea of guilty to the offense of carrying a concealed weapon in violation of Iowa Code section 724.4(3)(b) (2013). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Thomas Desio and Kevin Hathaway, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., Mullins, J., and Goodhue, S.J.*

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

GOODHUE, S.J.

The defendant has appealed from a judgment and sentence entered pursuant to his plea of guilty to the offense of carrying a concealed weapon, in violation of Iowa Code section 724.4(3)(b) (2013).

I. Background Facts and Proceedings.

The defendant entered a written plea of guilty to the offense of carrying a concealed weapon on March 22, 2013. The defendant waived his right to a verbatim record of the proceedings, including the sentencing hearing, and requested immediate sentencing. The trial information had charged him with the aggravated misdemeanor of carrying a knife, in violation of section 724.4 of the Iowa Code.

Pursuant to the plea agreement, he was sentenced to the serious misdemeanor charge of violating section 724.4(3)(b) of the Iowa Code. The aggravated misdemeanor, section 724.4(3)(a), specifies that the knife blade must exceed eight inches, while the serious misdemeanor, section 724.4(3)(b), specifies that the “knife has a blade exceeding five inches but not exceeding eight inches in length.” The defendant’s written plea of guilty set out the following factual basis for the charge, “I admit I did the following: On or about 2/14/13 in Polk Co., IA I had a knife concealed on/near me w/in my control greater than 5” (knife).”

The defendant failed to file a motion in arrest of judgment but has appealed claiming ineffective assistance of counsel for not ensuring there was a factual basis for the plea. Specifically, the defendant contends that the factual

basis set out in the plea of guilty did not state or reflect that the blade did not exceed eight inches in length as required by Iowa Code section 724.4(3)(b).

II. Scope and Standard of Review.

A claim that counsel was ineffective for permitting a defendant to plead guilty to an offense where there is no factual basis and then failing to file a motion in arrest of judgment is an exception to the error preservation requirement. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). Ineffective-assistance-of-counsel claims involve a constitutional challenge and are therefore reviewed de novo. *State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013).

III. Discussion.

To support an ineffective-assistance-of-counsel claim a proponent must prove beyond a preponderance of the evidence (1) counsel failed to perform an essential duty, and (2) the failure resulted in prejudice. *State v. Clark*, 814 N.W.2d 551, 567 (Iowa 2012). The only issue raised by the defendant is the lack of a factual basis to the charge for which judgment was entered and for which the defendant was, in fact, sentenced. Where a factual basis does not exist to support the charge to which the plea has been entered, ineffective assistance of counsel is established and prejudice is inherent. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

The only record before the court to establish the lack of a factual basis is the defendant's written plea of guilty. It is the defendant's duty and obligation to provide the reviewing court with a record disclosing the deficiency of the record on which he is relying. *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). The

defendant waived all other record of the plea and sentencing procedure. The factual basis, which the defendant asserts is deficient, is in the written plea itself.

The trial record alone will rarely be adequate to resolve a claim of ineffective assistance of counsel. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). In this case, where the defendant is totally relying on the written plea before us, we find the record is adequate as to the claim made.

The factual basis set out in the plea constitutes a factual basis for determining that the defendant was carrying a knife in violation of section 724.4(3)(b). He was sentenced pursuant to the plea agreement to the lesser charge included in section 724.4(3)(b). There is no reason in law or logic once the factual basis for the underlying charge has been established that a factual basis for a greater charge or crime needs to be eliminated when the judgment and sentence are entered pursuant to the lesser charge. Counsel is not ineffective for failing to pursue a meritless claim. *State v. Brothorn*, 832 N.W.2d 187, 192 (Iowa 2013).

AFFIRMED.