IN THE COURT OF APPEALS OF IOWA

No. 2-268 / 11-1335
Filed May 9, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON LAYNE ROSE,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas Horan Judge.

Jason Rose appeals the judgment and sentence entered following his guilty plea to the possession of precursors. **AFFIRMED.**

Caitlin L. Slessor of Nazette, Marner, Nathanson & Shea, L.L.P., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas Scott, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Jason Rose appeals from his guilty plea for the possession of precursors. He contends his counsel was ineffective because no factual basis exists for his plea of guilty. We affirm.

***I. Background Facts and Proceedings*.**

According to the minutes of testimony, on November 14, 2010, Cedar Rapids police officers stopped a car because a brake light was out. Rose was the driver. After learning Rose's driver's license was suspended, the officers impounded Rose's car. During an inventory search, officers observed a meth lab and items commonly associated with manufacturing methamphetamine in the trunk of the car. Photos of the lab were taken.

Thereafter, the State filed a trial information charging Rose with manufacturing methamphetamine, possession of precursors, and driving while his license was suspended. On May 26, 2011, Rose appeared before the district court and entered a plea of guilty to the possession-of-precursors charge pursuant to a plea agreement with the State, which dismissed the other charges. The court conducted a colloquy with Rose:

> Q. [H]ow do you plead to [the] class D felony offense of possession of precursors in violation of [Iowa Code section 124.401(4) (2009)], guilty or not guilty? A. Guilty, Your Honor.
>
> Q. Have you read the minutes of testimony attached to the trial information? A. Yes, Your Honor.
>
> Q. Are those minutes of testimony accurate? A. Yes, Your Honor.
>
> Q. Is that what happened in this case? A. Yes, Your Honor.
>
> Q. You did on or about the [fourteenth] day of November, 2010, in Linn County . . . possess precursors with the intent to be used in the manufacturing of methamphetamine, including

> pseudoephedrine, anhydrous ammonia, while . . . in Cedar Rapids . . . ; is that true? A. Yes, Your Honor.
>
> [THE COURT]: I find your plea of guilty is voluntary . . . . From your statements [and] examination of the minutes of testimony, . . . I find there is a factual basis for the charge filed and your plea of guilty is, therefore, accepted.

Rose was later sentenced to serve a term of incarceration not to exceed five years. The sentence was suspended, and Rose was placed on supervised probation for a period of four years. As a condition of probation, Rose was ordered to reside at the Gerald R. Hinzman Center until maximum benefits had been received.

Rose appeals.

II. Error Preservation and Scope and Standards of Review.

In his brief, Rose states error was preserved "by timely filing a notice of appeal following his sentencing." "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayes & Anuradha Vaitherswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (Fall 2006) (footnote omitted). Nevertheless, error was properly preserved in this case. Normally, failure to file a motion in arrest of judgment prevents challenges to a guilty plea on appeal. Iowa Rs. Crim. P. 2.24(3)(a), 2.8(2)(d); *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). However, the failure to file a motion in arrest of judgment will not preclude the claim if the failure was the result of ineffective assistance of counsel. *Rodriguez*, 804 N.W.2d at 848.

Our review of ineffective-assistance-of-counsel claims is de novo. *Id*. We typically preserve these claims for postconviction relief, although we will resolve

them on direct appeal if the record is adequate. *Id*. We conclude the record in this case is adequate to decide this issue.

***III. Discussion*.**

On appeal, Rose claims his trial counsel was ineffective for failing to challenge the validity of his plea of guilty on the ground that the record failed to establish the requisite factual basis for the plea. He asserts "[w]here a defendant agrees to have possessed precursors that were located in the trunk of a car, and which car contained another passenger, without more, the factual basis for the plea does not exist as those facts alone do not create . . . possession." We disagree.

"To succeed on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. We can affirm on appeal if either element is absent." *Id*. (internal citations and quotation marks omitted). "Under the first prong of this test, counsel's performance is measured against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner." *State Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (internal quotation marks omitted).

Pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b), a court cannot accept a guilty plea without first determining the plea has a factual basis. *See also State v. Ortiz*, 789 N.W.2d 761, 767 (Iowa 2010).

> The factual basis must be contained in the record, and the record, as a whole, must disclose facts to satisfy all elements of the offense. 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. Moreover, . . . the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense.

Id. at 768 (internal citations omitted). Where counsel allows a defendant to plead guilty to a charge that is not supported by a factual basis in the record, counsel has failed to perform an essential duty and prejudice is established. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). Therefore, the only question in this case is whether the record shows a factual basis for Rose's guilty plea to the charge of possessing precursors. *Id*.

> In order to prove unlawful possession of a precursor product with the intent to manufacture methamphetamine, the State must prove beyond a reasonable doubt: (1) the person exercised dominion and control over the precursor product, (2) the person had knowledge of the precursor product's presence and nature, and (3) the person possessed the precursor product with the intent that the product be used to manufacture methamphetamine.

State v. Vance, 790 N.W.2d 775, 784 (Iowa 2010). Unlawful possession can be either actual or constructive. *Id*. Actual possession may be shown by direct evidence, such as when the precursor product is found on the person. *Id*. Additionally, it can be shown by circumstantial evidence showing that a person at one time had actual possession of the contraband. *Id*. The State asserts that the record shows Rose had actual possession at the time he allegedly placed the precursor products in his car's trunk. Rose's response to the court's colloquy, that he possessed the precursors, when combined with his control of the vehicle, is sufficient to show actual possession.

Rose, however, contends we must explore a factual basis for constructive possession, assuming that there is insufficient record to show actual possession,

and defense counsel must have failed to advise Rose concerning the elements of constructive possession. We disagree.

Possession is constructive where the defendant has knowledge of the presence of the precursor products and has the authority or right to maintain control of them. *State v. Maxwell*, 743 N.W.2d 185, 194 (Iowa 2008). "[P]ossession may be imputed when the [contraband] is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control . . . ." *State v. Carter*, 696 N.W.2d 31, 39 (Iowa 2005). However, "[p]roof of opportunity of access to a place [where precursor products are] found will not, without more, support a finding of unlawful possession. *Id*. at 38.

In determining whether a defendant had constructive possession, we consider a number of factors, including incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of precursor products among or near the defendant's personal belongings, the defendant's fingerprints on precursor product, and any other circumstances linking the defendant to the precursor product. *Maxwell*, 743 N.W.2d at 194. When precursor products are found in a motor vehicle, additional factors include whether the contraband was in plain view, whether it was with the defendant's personal effects, whether it was found on the same side of the car as the defendant or immediately next to the defendant, whether the defendant was the owner of the vehicle, and whether there was suspicious activity by the defendant. *Id*. Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances, including those not listed above, allow

a reasonable inference that the defendant knew of the precursor products' presence and had control and dominion over the contraband. *Id*. "The existence of constructive possession turns on the peculiar facts of each case." *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002).

The minutes of testimony do not reflect that Rose made any incriminating statements at the scene of the traffic stop, or that he made any incriminating actions upon the officers' discovery of the contraband. The record does contain Rose's admission at the time of the guilty plea that he possessed the precursors.

The precursor products were not in plain view. Rather, they were discovered in Rose's car's trunk, and there is no evidence Rose's fingerprints were on any of the materials. There is no evidence that precursor products were found with Rose's personal effects, other than their presence in his car which he was driving. There is no suggestion of suspicious activity by Rose at the time of the traffic stop.

Nevertheless, Rose was the driver of the car and had exclusive dominion and control over the car and the trunk. *See Carter*, 696 N.W.2d at 39; *see also United States v. Walker*, 393 F.3d 842, 847 (8th Cir. 2005) (finding defendant had dominion and control over contraband because he had control of the keys to the trunk of the car). Further, Rose agreed the minutes of testimony were accurate. There was absolutely no mention of a passenger in the minutes, nor was there any evidence that someone other than Rose had access to his car's trunk or keys. Rose's later account of the offense in the presentence investigation report, which he provided after acceptance of his plea, did not make any assertion that the precursors found in his trunk belonged to his passenger or

that the passenger had access to his car's trunk or keys. Finally, Rose admitted in the colloquy that he had intended to manufacture methamphetamine. We agree with the State that even if the passenger had placed the precursors in Rose's car's trunk, the passenger could not have placed all those materials in the car's trunk without Rose's knowledge or approval.

All in all, we believe this evidence was sufficient for the district court to reasonably infer Rose knew of the precursor products' presence and exercised control and dominion over them. Because Rose does not contend there was not a factual basis on the intent to manufacture methamphetamine element, that issue is conceded. In short, there is a sufficient factual basis in the record for Rose's guilty plea to possession of precursors. Consequently, we conclude he has not shown he received ineffective assistance of counsel, and we affirm the judgment and sentence.

AFFIRMED.