IN THE COURT OF APPEALS OF IOWA

No. 2-538 / 11-1071
Filed August 8, 2012

DONALD BRUCE ALLEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Donald Bruce Allen appeals the denial of his application for postconviction relief. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

One summer evening, Donald Bruce Allen pulled his long-time girlfriend and mother of his three-year-old daughter out of a car, dragged her into the house they shared, fitted her with an electric dog collar, and repeatedly shocked her while his daughter sat in the unventilated car.

Allen entered an *Alford* plea[1] to third-degree kidnapping and neglect of a dependent person and was sentenced to two ten-year prison terms, to be served consecutively. He later filed an application for postconviction relief alleging his attorney was ineffective in several respects. The district court denied the application after holding an evidentiary hearing.

On appeal, Allen contends his attorney was ineffective in failing to (1) ensure that his plea to neglect of a dependent person was supported by a factual basis and (2) investigate a diminished-responsibility defense. Our review of these constitutional claims is de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

I. Factual Basis for Plea to Neglect of a Dependent Person

A conviction on a plea of guilty, including an *Alford* plea, cannot stand if a factual basis for the charge does not exist. *State v. Rodriguez*, 804 N.W.2d 844, 849 (Iowa 2011); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *see also* Iowa R. Crim. P. 2.8(2)(b). If a factual basis is lacking and defense counsel allows the plea to be made and does not file a motion in arrest of judgment to

[1] An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001).

challenge the plea, counsel will be deemed ineffective. *Rodriguez*, 804 N.W.2d at 849.

The crime of neglect of a dependent person required a showing that Allen knowingly or recklessly exposed his three-year-old daughter to a hazard or danger against which she could not reasonably be expected to protect herself. Iowa Code § 726.3 (2009); *see also State v. Leckington*, 713 N.W.2d 208, 215 (Iowa 2006) (setting forth the elements for neglect of a dependent person). Allen asserts the minutes of testimony fell "woefully short" of establishing these elements. *See Schminkey*, 597 N.W.2d at 788 (noting minutes of testimony are part of record to be reviewed in determining existence of factual basis). We disagree.

The minutes stated,

> [Allen's girlfriend] attempted repeatedly to persuade the defendant to get the child out of the car, because she was concerned about the child's safety. It was summer and warm outside. Moreover, the child was sometimes able to open a car door (making it possible for her to wander off) and there was a possibility that she might start the car. Defendant initially resisted her requests to check on the child, telling the witness that if the child died, it would be her fault. Eventually, the defendant did check on the child. . . . The child was sleeping. Defendant refused to open the windows or bring the child in the house.
>
> . . . .
>
> By the time she was allowed to check on their daughter, the child was sweating and warm to the touch.

According to these paragraphs, Allen declined to heed the pleas of the child's mother to release the child from the car, acknowledged the child could die, and, when he ultimately did check on the child, refused to open the car windows or bring the child indoors, notwithstanding the heat. "No imagination is required to anticipate the harm which might have befallen the child." *State v. Wilson*, 287

N.W.2d 587, 588 (Iowa 1980); *see also State v. Petithory*, 702 N.W.2d 854, 859 (Iowa 2005) (interpreting section 726.3 in a common-sense manner and rejecting defendant's argument "that his conviction was based on mere *speculation* and *conjecture*, insofar as generalized risks are attributed to him without an affirmative showing such factors occurred"). As the court in *Petithory* recognized, "Dangers and hazards need not be realized; dangers and hazards are by their very nature risks, not certainties. Russian roulette is dangerous each time it is played, not just when someone has his head blown off." 702 N.W.2d at 859 (citation omitted). Because the minutes of testimony provided a factual basis for finding Allen neglected his child, Allen's attorney was not ineffective in failing to challenge his *Alford* plea to this charge.

II. Failure to Investigate Diminished-Responsibility Defense

Allen next argues his attorney was ineffective in failing to investigate a diminished-responsibility defense before he entered the *Alford* pleas. *See Anfinson v. State*, 758 N.W.2d 496, 502 (Iowa 2008) ("The diminished responsibility defense allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect she did not have the capacity to form that specific intent.").

At the postconviction relief hearing, Allen testified he had anxiety, depression, and post-traumatic stress disorder around the time of the crimes. He also testified he was not taking any medications to alleviate the symptoms because of the medications' side effects. His attorney testified he was aware of these mental health diagnoses and was aware Allen was not on medications. He stated he made a decision not to raise the diminished-responsibility defense after

obtaining all of Allen's medical records. He explained the defense was a "tough" one that was "very rarely successful."

It is clear from this testimony that Allen's attorney investigated the diminished-responsibility defense and made a strategic decision not to pursue it. *See, e.g.*, *Pettes v. State*, 418 N.W.2d 53, 55, 56–57 (Iowa 1988) (rejecting ineffective-assistance claim where trial counsel chose not to assert a diminished-responsibility defense based on defendant's diagnosis of "adult situational stress with moderately severe depression" and citing counsel's prior lack of success in asserting diminished-responsibility defense in finding counsel performed within range of normal competency). Notably, the defense was inconsistent with the trial defense Allen told his attorney to pursue: to establish his girlfriend deserved the dog collar shock treatment as punishment for financial improprieties. *See State v. Stewart*, 445 N.W.2d 418, 421 (Iowa Ct. App. 1989) ("In assessing the reasonableness of an attorney's action we consider the attorney's actions may be determined or substantially influenced by defendant's own statements or actions."). We conclude Allen's attorney did not breach an essential duty in failing to raise a diminished-responsibility defense.

We affirm the denial of Allen's application for postconviction relief.

AFFIRMED.