IN THE COURT OF APPEALS OF IOWA

No. 2-805 / 12-0201
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STRAD V. D. DIGHTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler (Plea) and Ian K. Thornhill (Sentencing), Judges.

Strad Dighton appeals from the conviction and sentence following his guilty plea to theft in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason Besler and Jason Burns, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Strad Dighton appeals from the conviction and sentence entered after his guilty plea to theft in the second degree. He claims his counsel was ineffective in allowing him to plead guilty to a crime lacking a factual basis on the record. We affirm, finding a factual basis existed to support his conviction for theft under Iowa Code 714.1(1) (2011).

1. Facts and Background

Strad Dighton was charged with theft in the second degree, driving while barred, and theft in the fifth degree. After his initial plea of not guilty, the parties agreed Dighton would plead guilty to theft in the second degree and pay restitution, and in exchange, the State would drop the remaining charges. During the guilty plea proceedings, Dighton admitted he took possession of the vehicle knowing it was stolen and with the intent to permanently deprive its owner of the car. The court noted it relied upon the minutes of testimony and Dighton verified the veracity of the minutes.

The minutes of testimony stated that a witness would testify to the car being stolen, a witness would testify that Dighton was arrested while driving the car, several witnesses would testify to Dighton representing the car as his own, and Dighton's own statements at the time of his arrest that he had been driving the car for approximately the past month after his step-father gave it to him. During the guilty plea colloquy, Dighton's attorney noted the vehicle was a "hot car and his friend gave it to him knowing—and Mr. Dighton knew it was a hot vehicle." Dighton then verified this statement. The judge accepted his plea and entered an order against him under Iowa Code sections 714.1(1) and 714.2(2).

Dighton was later sentenced to no more than five years in prison, assessed a fine, ordered to pay restitution and attorney fees, and ordered to submit a specimen for DNA profiling. He now appeals.

2. Analysis

We review claims of ineffective assistance of counsel de novo. *State v*. *Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

> To prove ineffective assistance, the defendant must demonstrate by a preponderance of evidence that (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Defense counsel violates an essential duty when counsel permits defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support defendant's guilty plea. Prejudice is presumed under these circumstances.

Id. at 764–65 (internal citations and quotations omitted).

Dighton was found guilty of theft in the second degree, in violation of Iowa Code sections 714.1(1) and 714.2(2). Iowa Code section 714.1(1) reads: "A person commits theft when the person does any of the following: 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." Section 714.2(2) defines the property that, if stolen, will lead to a charge of theft in the second degree.

Dighton now contends sufficient evidence did not exist to establish his theft was one by taking under section 714.1(1), as opposed to one by "exercising control over stolen property, knowing . . . or having reasonable cause to believe that such property has been stolen" under Iowa Code section 714.1(4). Our state supreme court has had occasion to consider the differences between these two provisions, noting:

> The two alternatives used in this case are consistent in that they merely describe different situations that are considered theft. Subparagraph (1) is relevant if the person took the property with the intent to deprive the owner thereof. Subparagraph (4) involves the person who exercises control over the stolen property, that is one who has the property at some point beyond the initial taking. A person cannot commit theft by taking without also exercising control over the property, so the two are not inconsistent. The legislature has determined that both situations are worthy of criminal sanctions. These two alternatives are not inconsistent or repugnant in that they represent different points of time within one crime.

State v. *Conger*, 434 N.W.2d 406, 409–410 (Iowa 1988). However, evidence of the act of physically removing the vehicle from the property of the rightful owner is not necessary under Iowa Code section 714.1(1). *State v*. *Hershberger*, 534 N.W.2d 464, 465 (Iowa Ct. App. 1995) ("We agree with the State's position Defendant's possession and control of the motorcycle are sufficient evidence to support a finding there was a taking."). The minutes of testimony and plea proceedings provide evidence Dighton took possession and control of the vehicle, he did so for an extended period of time knowing the property to be stolen, he provided conflicting and incomplete responses regarding where he acquired the vehicle, and he took the vehicle with the intent to permanently deprive the owner of the car. While this information would also support a conviction under section 714.1(4), we find a factual basis exists to fulfill the requirements of section 714.1(1) here. *See Conger*, 434 N.W.2d at 410. We therefore affirm, finding Dighton's counsel was not ineffective for allowing him to plead guilty.

AFFIRMED.