

IN THE COURT OF APPEALS OF IOWA

No. 2-860 / 11-1708
Filed November 29, 2012

ERIC GENE THOMPSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

An applicant for postconviction relief appeals a district court decision denying his request for relief from a conviction. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Eric Thompson appeals a district court judgment denying his application for postconviction relief from his conviction for possession of methamphetamine with intent to deliver. He contends counsel rendered ineffective assistance by allowing him to plead guilty when a factual basis did not exist, and thereafter failing to file a motion in arrest of judgment. Upon our de novo review, we affirm the judgment of the district court.

Thompson was charged with, among other crimes, possession of methamphetamine; two counts of second offense possession of methamphetamine; domestic abuse assault causing bodily injury, third or subsequent offense, a class “D” felony; possession of more than five grams of methamphetamine with intent to deliver, a class “B” felony; and ongoing criminal conduct, a class “B” felony. As part of a plea bargain he entered *Alford*¹ pleas to possession of methamphetamine with intent to deliver, a class “C” felony, and the class “D” felony of domestic abuse assault. The district court entered judgments of conviction and sentenced Thompson, in relevant part, to consecutive indeterminate terms of ten years and five years respectively.

Thompson did not appeal, but filed an action for postconviction relief. Following a hearing the district court found that the record made in the underlying criminal case demonstrated a factual basis for Thompson’s plea of guilty, and denied and dismissed his application for postconviction relief. Thompson appeals.

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

We review claims of ineffective assistance of counsel de novo. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). To establish a claim that counsel in a criminal proceeding rendered ineffective assistance, the defendant in the criminal proceeding must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).

“The district court may not accept a guilty plea without first determining that the plea has a factual basis.” *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). The court “must only 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) (citation omitted). If counsel allows a defendant to plead guilty to a charge for which no factual basis exists, and then does not file a motion in arrest of judgment challenging the plea, counsel fails to perform an essential duty. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Prejudice is presumed under such circumstances. *State v. Ortiz*, 789 N.W.2d 761, 764-65 (Iowa 2010).

As previously noted, Thompson’s pleas were “*Alford*” pleas. An *Alford* plea is a variation of a guilty plea whereby the defendant does not admit participation in the acts constituting the crime but consents to a finding of guilt and imposition of a sentence. *Alford*, 400 U.S. at 32-38. All pleas resulting in a finding of guilt, including *Alford* pleas, must be supported by a factual basis. *Schminkey*, 597 N.W.2d at 788.

Generally, the district court may determine a factual basis for a plea resulting in a finding of guilt by (1) inquiry of the defendant, (2) inquiry of the

prosecutor, (3) examination of the presentence investigation report,² or (4) reference to the minutes of evidence. *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975). However, because in an *Alford* plea the accused is denying guilt, a factual basis must be established independent of the defendant's statements. *Farley v. Glanton*, 280 N.W.2d 411, 416 (Iowa 1979). The factual basis so established is a substitute for a defendant's admission of guilt. *Id.* Whatever the source, the factual basis must be disclosed in the record. *State v. Rodriguez*, 804 N.W.2d 844, 849 (Iowa 2011); *Johnson*, 234 N.W.2d at 879.

Thompson contends the record made in the district court does not disclose a factual basis for his *Alford* plea to possession of methamphetamine with intent to deliver. He requests we reverse his conviction for that crime and remand to the district court for further proceedings.

In a detailed colloquy with Thompson the district court advised him of the rights he was giving up by entering *Alford* pleas, and received Thompson's assurance he understood those rights. The court carefully identified the elements of both crimes, and received Thompson's assurance he understood the nature of the charges. The court received Thompson's assurance that he had had adequate opportunity to talk to his attorney and receive advice from him, and was satisfied with his attorney's legal representation.

Because Thompson's pleas were *Alford* pleas, the district court was careful to avoid asking Thompson what he had done. The court made no inquiry

² A presentence investigation report may be used as a source for a factual basis only if it exists and is available at the time of the plea hearing. *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) (overruled on other grounds by *State v. Kirchoff*, 452 N.W.2d 801, 804-05 (Iowa 1990)).

of the prosecutor concerning a factual basis for the pleas. Nothing indicates a presentence investigation report was available or used at the plea proceeding. The district court expressly relied solely on the minutes of evidence in finding that a factual basis existed for Thompson's pleas. Given this posture of the case, our scrutiny of the record to determine whether a factual basis exists for Thompson's *Alford* plea to possession of methamphetamine with the intent to deliver is limited to a review of the minutes of evidence.

The minutes of evidence include a Waterloo Police Department investigation report, proposed testimony of certain witnesses, and a DCI Criminalistics Laboratory report. These documents set forth the following allegations of fact. In mid-afternoon hours of a January 2009 day a Waterloo police officer on routine patrol observed Thompson, whom the officer knew had his driver's license suspended, driving a vehicle. The officer stopped Thompson, confirmed his license was suspended, and arrested him. The officer searched Thompson and found a camera case around his neck. In response to a question Thompson stated there was "dope" in the case. The officer found a prescription container in the case. In the container were a clear baggie with suspected methamphetamine, about 100 clear baggies, and a "clear glass smoking device with a residue consistent with burnt methamphetamines." In response to questioning Thompson stated he was going to buy a half-ounce of methamphetamine by getting it "fronted," and was going to sell it for money.

The minutes further disclose that at the time of his arrest Thompson was unemployed, and had \$100 cash on his person. The laboratory report shows

that the items seized from Thompson's camera case include two baggies of methamphetamine, one containing 0.42 grams and the other 0.03 grams, and a glass tube containing methamphetamine residue.

The elements of the offense of possession of methamphetamine with intent to deliver are that the defendant (1) knowingly possessed methamphetamine, (2) knew the substance he possessed was methamphetamine, and (3) possessed the methamphetamine with the intent to deliver it. Iowa Code § 124.401(1)(c)(6) (2009); Iowa Crim. Jury Instruction 2300.2. Thompson challenges only the third of these elements, asserting "[t]here was no evidence that Thompson intended to deliver any of the methamphetamine he actually possessed." He asserts that the only intent to deliver disclosed by the record is an intent to deliver methamphetamine he had not yet acquired. We disagree.

At the time of his arrest Thompson possessed almost one-half gram of methamphetamine, divided between two baggies. He possessed almost 100 additional baggies. Despite the fact he was unemployed he had \$100 cash on his person. He stated he intended to acquire additional methamphetamine, to sell. These facts, taken together with the facts that Thompson clearly understood the elements of the offense of possession of methamphetamine with intent to deliver, and stated an unequivocal intent to enter an *Alford* plea to that offense, disclose a factual basis for the third, challenged element of the offense.

We conclude the record is sufficient to establish a factual basis for Thompson's *Alford* plea. We therefore conclude counsel did not render

ineffective assistance by allowing Thompson to enter the *Alford* plea and thereafter not filing a motion in arrest of judgment.

AFFIRMED.