

IN THE COURT OF APPEALS OF IOWA

No. 3-417 / 12-1790
Filed May 30, 2013

KEITH HENRY DAY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Mills County, Jeffrey L. Larson,
Judge.

Keith Day appeals from the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams and
Theresa R. Wilson, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, and Eric C. Hansen, County Attorney, for appellee State.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DOYLE, P.J.

Keith Day appeals from the district court's denial of his application for postconviction relief (PCR). He claims his trial counsel and PCR counsel were ineffective. We affirm.

In September 2008, the State filed a trial information charging Keith Day with ongoing criminal conduct, in violation of Iowa Code sections 706A.2(4) and 706A.4 (2007), and second-degree theft, in violation of sections 714.1(1) and 714.2(2). The next month, Day pled guilty to charges of assault on a peace officer,¹ in violation of Iowa Code section 708.3A, and ongoing criminal conduct, in violation of Iowa Code section 706A.2(4). Following a colloquy with Day, the district court accepted Day's pleas. Day was sentenced to a term of imprisonment not to exceed twenty-five years.

Day filed an application for PCR asserting his trial counsel was ineffective. At the PCR hearing, he asserted his guilty pleas were not voluntary due to mental health issues, and his trial counsel provided ineffective assistance in advising him to accept a plea offer. The district court denied his application, finding he failed to prove his counsel was ineffective.

On appeal Day switches gears and now contends his PCR counsel rendered ineffective assistance in failing to assert that his trial counsel was ineffective for failing to challenge the adequacy of his ongoing criminal conduct guilty plea in a motion in arrest of judgment. See Iowa R. Crim. P. 2.24(3)(a) ("A motion in arrest of judgment is an application by the defendant that no judgment

¹ In August 2008, the State filed a trial information charging Day with assault on a peace officer, first-degree harassment, and fifth-degree criminal mischief.

be rendered on a finding, plea, or verdict of guilty.”). He claims there was no factual basis to support his guilty plea to that charge. Although Day did not raise this specific issue before the PCR court, we find the record adequate to address his claim. See *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) (holding a claim of ineffective assistance of counsel must be preserved for PCR proceedings if it cannot be addressed on appeal because of an inadequate record, regardless of the court’s view of the potential viability of the claim).

We normally review postconviction proceedings for errors at law. See *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel, we conduct a de novo review. *Id.* 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). 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, or (4) reference to the minutes of evidence. *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). “[T]he record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate the facts that support the offense.” *Id.* 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. *Ortiz*, 789 N.W.2d at 764-65.

Pursuant to Iowa Code chapter 706A, a person is guilty of ongoing criminal conduct when that person commits, for financial gain, “any act, including any preparatory or completed offense, . . . on a continuing basis, that is punishable as an indictable offense” Iowa Code §§ 706A.1(5), .2(4); *State v. Reed*, 618 N.W.2d 327, 331 (Iowa 2000). Day challenges the “financial gain” element of the offense, contending there was no factual basis to support this element, and his trial counsel was therefore ineffective in failing to challenge this element. More specifically, Day contends there was no evidence to show his first theft, that of a vehicle which was driven around and then ultimately destroyed, was done for financial gain because it was “not sold or pieced out for financial gain.” He concedes his second theft of another vehicle was for financial gain.

Although “financial gain” is not defined by the chapter 706A, we read the statute to require only proof that a defendant’s *purpose* was for financial gain, not that he or she actually *received* financial gain. Upon our review of the record, we agree with the State that the minutes of testimony relied upon by the district court support the conclusion that Day’s first theft was committed for financial gain. As the State points out, the minutes of testimony show that the first vehicle stolen by Day contained golf clubs worth \$4000, and iPod worth \$149, a bag of clothes, and a wallet with an ATM card. These items were not recovered. A jury could

easily infer here that valuable items were taken for the purpose of financial gain, particularly given the fact that items were taken from the second vehicle and subsequently sold for financial gain.

Looking at the record as a whole, we conclude there is sufficient evidence in the record that the State could prove beyond a reasonable doubt the “financial gain” element of the crime of ongoing criminal conduct. Because we find there was a proper factual basis for the district court to accept Day’s guilty plea, trial counsel did not breach an essential duty by not filing a motion in arrest of judgment or objecting to the court’s acceptance of that guilty plea. Accordingly, PCR counsel was not ineffective in failing to assert this claim before the PCR court. We therefore affirm the PCR court’s denial of Day’s application for PCR.

AFFIRMED.