IN THE COURT OF APPEALS OF IOWA

No. 3-438 / 12-1103
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW ALAN BAKALAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Martha L. Mertz, Judge.

A defendant challenges the adequacy of his written guilty plea. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael K. Jacobsen, County Attorney, and Scott Nicholson, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Matthew Bakalar entered a written plea of guilty to child endangerment, an aggravated misdemeanor. *See* Iowa Code § 726.6(1)(a), (7) (2011). The district court "accepted" the plea in a handwritten calendar entry and, later, imposed sentence.

On appeal, Bakalar makes the following argument:

> The district court must determine whether a written guilty plea is knowing and voluntary by assuring that defendant is informed of his rights under Rule 2.8(2)(b) and the court is informed of the plea agreement, and there must be a factual basis. The in-court colloquy was waived and the written plea failed to inform defendant of the nature of the offense, failed to inform the court of the plea agreement, and failed to state a factual basis. Therefore, the district court erred in accepting the written guilty plea to aggravated misdemeanor child endangerment.

Bakalar essentially challenges three aspects of his written plea under one argument heading: (1) failure to disclose the nature of the offense, (2) failure to disclose the plea agreement, and (3) failure to disclose a factual basis. The State responds that Bakalar failed to preserve error on the first two sub-arguments because he did not first challenge the adequacy of the plea by filing a motion in arrest of judgment and he does not alternately raise those two arguments under an ineffective-assistance-of-counsel rubric, which is an exception to our error preservation rules. *See State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005).[1] We are persuaded that Bakalar did indeed raise all three sub-arguments as ineffective-assistance-of-counsel claims.

[1]The State concedes Bakalar challenges the factual basis for the plea under an ineffective-assistance-of-counsel rubric.

To prove ineffective assistance of counsel, Bakalar must establish the breach of an essential duty and prejudice. *Strickland v*. *Washington*, 466 U.S. 668, 693 (1984). "If it is necessary to more fully develop a factual record, we preserve the ineffective-assistance claim for a possible postconviction relief action." *State v*. *Taylor*, 689 N.W.2d 116, 134 (Iowa 2004).

Iowa Rule of Criminal Procedure 2.8(2)(b) requires a guilty plea to be "made voluntarily and intelligently" and have "a factual basis." "If a plea is not intelligently and voluntarily made, the failure by counsel to file a motion in arrest of judgment to challenge the plea constitutes a breach of an essential duty." *Philo*, 697 N.W.2d at 488. Similarly, "[i]f an attorney allows a defendant to plead guilty to an offense for which there is no factual basis and to waive the right to file a motion in arrest of judgment, the attorney breaches an essential duty." *Id.* at 485. Bakalar's first two arguments go to whether the plea was made voluntarily and intelligently. His third argument is a challenge to the factual basis. We will begin with the second argument because it is dispositive.

Rule 2.8(2)(c) requires the plea agreement to be disclosed on the record. The rule also requires the court to "inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the attorney for the state and the defendant or the defendant's attorney."

The State concedes the plea agreement was not adequately disclosed on the record. Specifically, the written plea did not set forth the agreement, and the record contains no verbatim transcription of an oral guilty plea colloquy. *See State v*. *Meron*, 675 N.W.2d 537, 543 (Iowa 2004) (permitting the use of written forms in aggravated misdemeanor cases, but emphasizing "the importance and

necessity of the court's role to ensure each plea is voluntary, intelligent, and supported by facts"). Accordingly, the record is inadequate to decide the second issue. We preserve this issue for postconviction relief to "allow a record to be developed concerning the actual terms of the plea agreement and [Bakalar's] understanding of the terms of the plea agreement." *See Philo*, 697 N.W.2d at 489. Because the two remaining arguments raised by Bakalar are tied to the plea agreement, we also preserve those issues for postconviction relief proceedings.

AFFIRMED.