IN THE COURT OF APPEALS OF IOWA

No. 3-448 / 12-1742
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD J. STORM,
Defendant-Appellant.

Appeal from the Iowa District Court for Keokuk County, Joel D. Yates (first motion to amend trial information) and Myron L. Gookin (guilty plea and sentencing), Judges, and Crystal S. Cronk (second motion to amend trial information), District Associate Judge.

A defendant appeals his conviction for carrying weapons. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and John E. Schroeder, County Attorney, for appellee.

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

VOGEL, P.J.

The defendant, Donald Storm, appeals his conviction for carrying weapons, in violation of Iowa Code section 724.4(1) (2011). He argues his trial counsel was ineffective in allowing him to plead guilty to an offense for which there was no factual basis and in failing to file a motion in arrest of judgment based on the lack of a factual basis. He also argues counsel was ineffective in failing to object to the State's multiple amendments to the trial information, which constituted wholly new and difference offenses, and in failing to move for dismissal for failing to comply with the speedy indictment requirement. Because we find the record is insufficient to determine whether Storm provided a sufficient factual basis, and whether a motion to dismiss based on the amendments to the trial information would be meritless, we preserve those issues for postconviction relief. To the extent Storm makes an independent argument his counsel was ineffective for failing to object to the indictment for the weapons charge as violating the speedy indictment rule, such a motion would be without merit, and his counsel was therefore not ineffective.

I. Background Facts and Proceedings

Storm and Hollis Van De Heuvel have adjoining property. On April 25, 2012, Hollis and his son, Cory, were burning grass near Storm's fence. According to Storm his fence poles were burned. According to the statement of Cory attached to the minutes of testimony, Storm drove "on the fence row on his side and confronted [Hollis]." The Van De Heuvels told the sheriff deputies Storm threatened them and then drove away in his truck. They then heard five to

six gun shots, though they did not see anyone fire a gun due to the smoke from the burning grass.

Storm was arrested that day on a complaint accusing him of intimidation with a dangerous weapon, in violation of Iowa Code section 708.6. On May 7 the State moved to amend the complaint from intimidation with a dangerous weapon to going armed with intent, in violation of Iowa Code section 708.8. The court allowed the amendment. On July 6, the State again moved to amend the trial information to reflect four additional counts: two counts of assault using a dangerous weapon under Iowa Code section 708.1(2) and (3) and two counts of harassment in the first degree under Iowa Code section 708.7(1)(b) and 708.7(2)(a) and (b). These amendments were approved by the court on July 20. The information was amended yet again on August 22 replacing the charge of going armed with intent to the offense of carrying weapons, in violation of Iowa Code section 724.4(1), an aggravated misdemeanor.

That same day Storm filed a written plea of guilty to the offense of carrying weapons. For the factual basis of his guilty plea, typed on the document is, "I knowingly transported a pistol in a vehicle. I also shouted at Cory VandenHeuvel [sic], saying 'Have you killed anyone lately?'" Handwritten additions or substitutions were as follows: the word "loaded" was inserted before the word "pistol"; "Upon a public highway/road" was inserted after the word "vehicle"; the word "anyone" was altered so it read "any OLD MEN." The paragraph shows the handwritten initials "SHS" in the margin. The same day the district court imposed a six-month sentence, suspended the sentence, and placed Storm on probation. He now appeals.

II. Standard of Review and Ineffective-Assistance Principles

Storm claims his trial counsel was ineffective for allowing him to plead guilty when there was not a factual basis established. Ineffective-assistance-of-counsel claims are reviewed de novo. *State v*. *Hischke*, 639 N.W.2d 6, 8 (Iowa 2002). Failure to file a motion in arrest of judgment does not bar a challenge to a guilty plea if the failure to file the motion resulted from ineffective assistance of counsel. *State v*. *Bearse*, 748 N.W.2d 211, 217 (Iowa 2008). Trial counsel is ineffective when counsel's performance falls below the normal range of competency and the inadequate performance prejudices the defendant's case. *Strickland v*. *Washington*, 466 U.S. 668, 687–88 (1984). Prejudice is shown by demonstrating a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v*. *Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). When a defendant raises a claim of ineffective assistance of counsel on direct appeal, we choose whether the record is adequate to decide the claim on direct appeal or to preserve the claim for determination under chapter 822. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Factual Basis for Guilty Plea

Our first inquiry is whether the record shows a factual basis for Storm's guilty plea to the charge of carrying weapons. The State argues this claim cannot be adjudicated on the present record. Iowa Rule of Criminal Procedure 2.8(2)(b) codifies the requirements of a guilty plea: "The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea was made voluntarily and intelligently and has a factual basis." Where a factual basis for a charge does not exist, and trial counsel

allows the defendant to plead guilty, and thereafter fails to file a motion in arrest of judgment challenging the plea, counsel has failed to perform an essential duty. *State v*. *Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Prejudice in such a case is inherent. *See State v*. *Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (holding that where there is no factual basis for a guilty plea, ineffective assistance of counsel is established). In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report. *State v*. *Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). When establishing a factual basis for a guilty plea, "the trial court is not required to extract a confession from the defendant," it must only be satisfied that the facts support the crime. *State v*. *Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

Section 724.4 provides in part:

> 1. Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.
> Subsections 1 through 3 do not apply to any of the following:
> a. A person who goes armed with a dangerous weapon in the person's own dwelling or place of business, or on land owned or possessed by the person.

The defenses, such as being on one's own property, are affirmative defenses. *State v*. *Erickson*, 362 N.W.2d 528, 531 (Iowa 1985).

Storm now claims the handwritten additions to the written guilty plea are inaccurate and he did not voluntarily adopt them as his own. He also argues the

additions contradict the minutes of testimony and counsel was ineffective for allowing him to waive the defense of being on his own property. The handwritten additions were initialed "SHS," which are not Storm's initials, but more likely those of his trial counsel, Stephen Small. It is unclear in the record if Storm was aware of the additions. We therefore must preserve for possible postconviction relief the issue of whether counsel was ineffective for allowing Storm to enter a plea or was ineffective for failing to file a corresponding motion in arrest of judgment.

IV. Trial Information Amendments

Next, Storm argues his trial counsel was ineffective for failing to object to the multiple amendments of the trial information and for failing to move to dismiss the new charges on the theory they were added after the forty-five-day speedy indictment deadline. Iowa Rule of Criminal Procedure 2.4(8)(a) provides:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

"An amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." *State v*. *Maghee*, 573 N.W.2d 1, 6 (Iowa 1997).

The State concedes the different charges here are "wholly new and different" offenses. However, the State argues trial counsel was not ineffective because objecting would have no practical effect. It asserts even if dismissed it could file a new information under a different case number under Iowa Rule of

Criminal Procedure 2.33(1).[1] The record on direct appeal is insufficient for us to determine if Storm would have suffered any prejudice as there is no evidence whether the prosecutor would re-file the charges as the State suggests in its brief. While it is true an attorney has no duty to engage in an obviously useless act, the record before us does not show failing to object to the amendments was obviously useless. *See State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). This issue is accordingly preserved for possible postconviction relief proceedings.

Storm makes a related argument that he was denied effective assistance by his attorney failing to move to dismiss the weapons charge because it was brought after the forty-five-day speedy indictment deadline provided for in Iowa Rule of Criminal Procedure 2.33(2)(a). He argues the State used the amendments to sidestep the speedy indictment requirement. Iowa Rule of Criminal Procedure provides, "When an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within forty-five days, the court must order the prosecution to be dismissed." Iowa R. Crim. P. 2.33(2)(a). The forty-five-day time period of rule 2.33(2)(a) applies only to the public offense for which the defendant was arrested rather than to all offenses arising from the same incident or episode. *State v. Utter*, 803 N.W.2d

[1] Rule 2.33(1) states

> The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

647, 654 (Iowa 2011). Storm was never arrested on the weapons charge, and therefore, there was no violation of rule 2.33(2)(a) and no breach for failing to raise this meritless motion. *See State v*. *Dudley*, 766 N.W.2d 606, 620 (Iowa 2009).

V. Conclusion

Because we find the record is unclear to determine whether a sufficient factual basis supported the plea, and whether a motion to dismiss based on the amendments to the trial information would be meritless, we preserve those issues for possible postconviction relief. To the extent Storm makes an independent argument his counsel was ineffective for failing to object to the indictment for the weapons charge as in violation of the speedy indictment rule, a motion would be without merit, and his counsel was therefore not ineffective.

AFFIRMED.