IN THE COURT OF APPEALS OF IOWA

No. 9-013 / 07-1688
Filed May 6, 2009

CARROLL CALHOUN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Page County, Jeffrey L. Larson, J.C. Irvin, and James S. Heckerman, Judges.

Carroll Calhoun appeals his conviction based on his guilty pleas to voluntary manslaughter and attempt to commit murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Richard Davidson, County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

In a dispute over twenty bucks, Carroll Calhoun brutally killed his roommate Rickie Lane Kimbro by stabbing him eighteen times. Calhoun was charged with first-degree murder and willful injury. To avoid a potential life sentence, Calhoun entered into a plea agreement wherein he pled guilty to attempted murder and voluntary manslaughter. He was sentenced to thirty-five years of imprisonment.

Calhoun appeals his convictions claiming, among other things, that his trial counsel provided ineffective assistance because they failed to file a motion in arrest of judgment alleging an inadequate factual basis for the pleas, and that his postconviction counsel was ineffective for failing to raise the issue. Upon our review, we affirm Calhoun's convictions.

***I. Background Facts and Proceedings*.**

On May 23, 2002, the State filed a two-count trial information, along with the minutes of testimony, charging Calhoun with first-degree murder and willful injury for the stabbing death of Kimbro. Relevant here, the minutes state:

> [Iowa Division of Criminal Investigation Special Agent Mitch] Mortvedt will testify . . . he [interviewed Mr. Calhoun at the hospital], advised Mr. Calhoun of his rights which Mr. Calhoun waived in writing . . . . Agent Mortvedt will testify Mr. Calhoun admitted living at his current residence . . . . Mr. Calhoun then stated "I done it, I killed the bastard, I stabbed him to death . . . ." Agent Mortvedt will testify Mr. Calhoun had told Mr. Kimbro to get him and his stuff [out]. Mr. Calhoun then got his knife out and "put the shit to a screeching halt." Mr. Kimbro then beat him down to the ground and then let him up. Mr. Kimbro then left the room, then quickly returned and as he was walking through the door into the living room, Mr. Calhoun stated "I stuck him because he bugs me all the . . . time. I told him to quit bugging me and he didn't so I . . . stabbed him. I kept stabbing him like a hundred times to get all of the hate and violence out of me . . . . He was breathing when I left

> so I put a sheet over him. He got to the telephone and I said that's it and I kept stabbing him repeatedly.

The minutes further state:

> Agent Mortvedt will testify Mr. Calhoun repeated that Mr. Kimbro tried to punch him and he wanted twenty bucks. When he agreed, he went into the room, got his knife, and when Mr. Kimbro returned, he "stabbed him right in the belly." Agent Mortvedt will testify Mr. Calhoun then stated "I got down and stabbed him like [thirty] more times. I changed my clothes because there was blood all over me and then I left for a while. When I came back, I thought that he was maybe still alive so I checked him but he was dead."

Calhoun subsequently entered into a plea agreement with the State whereby the trial information was amended to charge him with voluntary manslaughter, in violation of Iowa Code section 707.4 (2001) (Count I), and attempt to commit murder, in violation of section 707.11 (Count II). At the plea hearing,[1] the district court inquired as to the factual basis for the two charges. The State explained:

> It's the State's theory and our facts—what we believe is the factual basis here—is the victim was stabbed numerous times, [sixteen, seventeen] times. And we believe that the facts, as they would come out in trial, would show that the victim was stabbed at least two or three times, and then there was a break. And it was—all the wounds were not inflicted at the same time. There was a telephone call that was placed from the apartment where all this happened. And it's our belief that the facts would demonstrate that the victim made that telephone call. [Mr. Calhoun's] voice is heard on the tape inquiring as to who is on the other line and then simply states, "But we don't need you" and hung up the phone. The telephone call was to 911. We believe that [Mr. Calhoun] had inflicted certain wounds at that time.

[1] The hearing was held February 9, 2004, almost twenty-one months after the crime was committed. On February 6, 2003, Calhoun filed a request for a competency hearing, claiming he suffered from a mental disorder. An Iowa Code section 812.4 order was entered May 22, 2003, finding Calhoun not competent to stand trial and ordering Calhoun to undergo examination and treatment. After an October 31, 2003 hearing, the court entered an order finding Calhoun competent to stand trial. Calhoun entered his guilty plea at a hearing on February 9, 2004.

> We also, for lack of a better term, would state that was kind of a line of demarcation between the two. We believe there were certain other instances after that phone call which we believe would be the—serve as a factual basis for the provocation that lead to the final stabbing and the death of the victim. . . . Count II was actually the first crime, and then Voluntary Manslaughter, Count I, followed at some point after the telephone call.

Calhoun's attorney agreed, stating:

> [T]hat is the factual basis that was discussed with the State's attorneys during plea negotiations. Both [Calhoun's other trial attorney] and I have gone over that with Mr. Calhoun. He has agreed to stipulate, for lack of a better term, for purposes of a factual basis and purposes of this plea agreement that there was an attempt on his part initially in the confrontation with Mr. Kimbro to stab—or he actually did stab Mr. Kimbro with the intent to kill Mr. Kimbro, but there was a break in their activities. After that break, Mr. Kimbro did come after Mr. Calhoun, at which point Mr. Kimbro met his ultimate demise at the hands of Mr. Calhoun.

The court then conducted the following colloquy with Calhoun:

> Q. Mr. Calhoun, you understand what's been said here? A. Yeah. I think I do.
>
> Q. . . . Do you think it's to your advantage to take this plea bargain and avoid standing trial and possible being convicted of Murder in the First Degree that carries the life—mandatory life sentence? A. Yeah.
>
> Q. And you've discussed that with your attorneys? A. Yeah.
>
> Q. Also, I think what's been said here is there was a confrontation between you and Mr. Kimbro or some sort of an attack. What was this, with a knife? A. Yeah.
>
> Q. And that Mr. Kimbro was stabbed on two or three occasions before there was a break in the action, so to speak? A. That's only part. There was no break.
>
> Q. Was there a phone call at one time? A. That was after everything, phone calls, two of them. I put two calls in, because I was going to call them and tell what happened, and I changed my mind. I was trying to think what to do, forgot what to do.
>
> Q. That was after it all happened? A. It's all once with Kimbro. There was no break in between, none of that.
>
> Q. We talked about what we call the minutes of testimony. That's the testimony of the witnesses. You had—you received the copies of that. Do you have any reason to believe that those

> witnesses wouldn't testify as set forth in those papers that were given to you if they were actually called at trial? A. Yeah.
>
> Q. Do you believe they would testify that way? A. Yeah.

Based on the record, the court found a factual basis existed for the pleas. Additionally, the court found Calhoun voluntarily entered his pleas. It then accepted and entered Calhoun's guilty pleas to the amended charges. The court later sentenced Calhoun to consecutive sentencing of thirty-five years and ordered restitution in the amount of $150,000 pursuant to Iowa Code section 910.3B(1).

Calhoun did not file an arrest of judgment motion following entry of his guilty pleas, nor did he file a direct appeal of the judgment after sentencing. Calhoun later filed an application for postconviction relief, which was denied by the district court. Calhoun now appeals, contending there was no factual basis supporting his guilty pleas and therefore his trial counsel were ineffective for failing to file a motion in arrest of judgment to challenge the adequacy of the pleas. He further contends his postconviction counsel was ineffective for failing to assert his trial counsel was ineffective.

II. Scope and Standards of Review.

When a defendant claims trial counsel was ineffective for permitting a guilty plea to a charge not supported by a factual basis, our review is de novo. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

III. Discussion.

A. Lack of Factual Basis.

On appeal, Calhoun argues there was no factual basis for the theory supporting the plea agreement "that Calhoun attempted to murder Kimbro, but

failed to do so, with these events then followed by serious provocation from Kimbro which resulted in his death at the hands of Calhoun" because the record does not support a break or bifurcation in his actions. He argues that his actions were one unbroken chain of events, and thus implies there was no factual basis for two separate crimes. Additionally, in citing to *State v. Hack*, 545 N.W.2d 262 (Iowa 1996), Calhoun implies "that [his trial] counsel may have had strategic reasons for permitting [Calhoun] to plead guilty notwithstanding the lack of a factual basis." *Hack*, 545 N.W.2d at 263. Of course, such strategies erode the integrity of all pleas and the public's confidence in our criminal justice system and therefore cannot be permitted. *See id*.

It is axiomatic that a trial court may not accept a guilty plea without first determining the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(*b*); *see also Keene*, 630 N.W.2d at 581. Where a defendant pleads guilty to two crimes, the record must minimally support a factual basis for two separate crimes. *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000). In order to support Calhoun's two convictions, there must have been two separate and distinct crimes.

Calhoun cites no law suggesting that multiple offenses cannot arise out of a continuity of action—acts closely connected in time and place. Iowa Rule of Criminal Procedure 2.6(1) recognizes that two or more indictable public offenses may arise from the same transaction or occurrence. "[M]ultiple violations of a single statute will support multiple convictions and punishments, even if a defendant commits all the violations in the same course of conduct." *State v. Ross*, 512 N.W.2d 830, 833 (Iowa Ct. App. 1993) (citations omitted). Separate charges can be based on multiple assaults, and a defendant may be convicted

separately for each attack. *See State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982) ("A defendant should not be allowed to repeatedly assault his victim and fall back on the argument his conduct constitutes but one crime."). But, each separate act must be separate and distinct, either in time, place, means, or nature. *Id*.; *see also State v. Holderness*, 301 N.W.2d 733, 739-40 (Iowa 1981); *State v. Flanders*, 546 N.W.2d 221, 224-25 (Iowa Ct. App. 1996).

To support a factual basis for a guilty plea, the record includes the minutes of testimony and statements made by the defendant and prosecutor at the guilty plea proceeding; this record, as a whole, must disclose facts to satisfy elements of the crime. *Keene*, 630 N.W.2d at 581. At the plea hearing, the district court stated it found a factual basis existed for the pleas based on the record. Upon our de novo review, we agree.

The State explained at the plea hearing that, under its theory and facts, there was a break (a telephone call to 911) in Calhoun's stabbing of the victim to support two separate crimes. During his colloquy with the district court, Calhoun denied there was any temporal break in his actions, stating that he made two phone calls "after everything." Although not crystal clear, the minutes do support the State's alleged facts that there was such a break. In any event, we conclude the record supports a factual basis for two separate crimes. *See Walker*, 610 N.W.2d at 526-27. In *Walker*, Walker's willful injury conviction was based upon his initial assault, which consisted of throwing several swift punches which knocked his victim to the ground. *Id*. Instead of stopping the fight there, Walker's rage so consumed him that he proceeded to kick his victim in the head while his victim was down. *Id*. The court found this separate act of uncontrolled

aggression, resulting in the victim's death, furnished the factual basis for the voluntary manslaughter conviction. *Id*. at 527. The record here, at least minimally, establishes two clearly delineated and separate criminal acts. Because a factual basis did exist independently for each of the two crimes to which Calhoun pled guilty, his trial counsel and postconviction relief counsel were not ineffective in failing to raise the inadequate factual basis issue.

***B. Consecutive Sentences*.**

Calhoun next asserts the district court erred in imposing consecutive sentences. On Count I, voluntary manslaughter in violation of Iowa Code section 707.4, Calhoun was sentenced to ten years imprisonment. On Count II, attempt to commit murder in violation of section 707.11, Calhoun was sentenced to twenty-five years imprisonment with a mandatory minimum sentence of seventy percent pursuant to section 902.12. The court ordered the sentences to be served consecutively pursuant to the plea agreement. Section 901.8 provides in part: "If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence."

Calhoun argues, by analogy, that principles of merger should preclude attempt to commit murder and voluntary manslaughter (with the same facts for each) from becoming the foundation for consecutive sentencing. We have already concluded in our analysis of the factual basis claim that there were separate offenses. In *State v. Taylor*, after concluding Taylor committed two separate offenses, the Iowa Supreme Court rejected Taylor's claim that the consecutive sentences imposed by the trial court "were inappropriate inasmuch

as the two charges were so factually intertwined as to essentially constitute one." *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999). *Taylor* cites to *State v. Criswell*, which approved the prevailing view:

> [If an] accused . . . is convicted on several counts of an indictment, and each count is for a *separate and distinct offense*, a separate sentence may be pronounced on each count, and the court may pronounce separate and distinct sentences which are cumulative, and are to run consecutively. This is true, even though the several offenses were committed in the course of a single transaction. . . .

State v. Criswell, 242 N.W.2d 259, 260 (Iowa 1976) (citations omitted). The prevailing view continued with the adoption of Iowa Code section 901.8. *See State v. Jones*, 299 N.W.2d 679, 682-83 (Iowa 1980). An argument similar to Calhoun's was rejected most recently in *Stradt v. State*, 608 N.W.2d 28, 29-30 (Iowa 2000). We therefore find no error in the court's imposition of consecutive sentences.

C. Failure to Pursue Defenses.

Lastly, Calhoun argues his postconviction relief counsel were ineffective for failing to pursue or present an insanity defense, diminished responsibility defense, and/or intoxication defense. He makes no claim that that his plea was not voluntary or knowing, nor does he argue that the plea was not taken in conformance with Iowa Rule of Criminal Procedure 2.8(2)(*b*). It is well established that the entry of a guilty plea in conformance with rule 2.8(2)(*b*) waives all defenses and objections which are not intrinsic to the plea itself. *See Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000) (citations omitted). Failure to raise defenses is not a circumstance that bears on the knowing and voluntary nature of a plea. When these challenges, not bearing on the knowingness and

voluntariness of a plea, are then brought disguised as ineffective assistance of counsel claims, the result is unchanged, and the objection is waived. *See id*.; *see also State v. LaRue*, 619 N.W.2d 395, 398 (Iowa 2000). Accordingly, we hold that Calhoun waived his ineffective assistance claims upon pleading guilty.

***IV. Conclusion*.**

Because we conclude Calhoun's guilty pleas were supported by the facts upon the record, we affirm Calhoun's convictions. The trial court did not err in imposing consecutive sentences. We pass no judgment on the ineffective assistance claim for failure to raise defenses because we hold they were waived by virtue of Calhoun's informed guilty plea. Accordingly, Calhoun's convictions, and sentence thereon, are affirmed.

AFFIRMED.