

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK FONVILLE,

Defendant-Appellant.

FOR PUBLICATION

January 25, 2011

No. 294554

Oakland Circuit Court

LC No. 2006-208493-FC

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I fully concur with the majority's determination that defendant's attorney rendered ineffective assistance of counsel by failing to inform defendant that his guilty plea would require him to register as a sex offender. The majority correctly concludes that, like the consequence of deportation at issue in *Padilla v Kentucky*, ___ US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), the requirement to register as a sex offender is a serious consequence of which a defense attorney must inform a client who wishes to plead guilty to certain offenses.

I respectfully dissent, however, from the majority's determination that there was a sufficient factual basis to support defendant's guilty plea in this case. Defendant pleaded guilty to enticing a child in violation of MCL 750.350(1), which provides:

A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.

As noted by the majority, defendant informed the circuit court during the plea hearing that he "pretty much endangered two young kids" by "doing drugs and driving around with [the children] in the car." Defendant admitted that he was supposed to return the children to their mother at 11:00 p.m., but that he "ended up because of getting crack and everything keeping the kids with [him], driving around from 11 p.m. at night through 2 p.m. in the afternoon the next day[.]" The circuit court determined that these statements provided a sufficient factual basis for defendant's guilty plea. I cannot agree.

Before accepting a defendant's plea of guilty, the circuit court must establish a factual basis for the plea. MCR 6.302(D)(1); *People v Carlisle*, 387 Mich 269, 273; 195 NW2d 851 (1972). A factual basis exists for a defendant's guilty plea if "the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding," *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996), or if "an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference," *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975).

I cannot conclude that the colloquy at the plea proceeding provided a sufficient factual basis for defendant's plea of guilty to the charge of child enticement. The offense of child enticement is a specific intent crime. MCL 750.350(1); *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997). The intent to detain or conceal a child from his or her parent is an essential element of the offense. *People v Rollins*, 207 Mich App 465, 469; 525 NW2d 484 (1994). I perceive absolutely no evidence on the record to establish that defendant acted with the requisite specific intent to detain or conceal the children from their mother. Indeed, the children's mother entrusted the children to defendant's care in the first instance. I acknowledge that defendant drove around Oakland County for hours looking for drugs with the children in the backseat of his vehicle. But the children were likely the furthest thing from his mind during this period. It appears that defendant had only one true intention while driving in his vehicle—namely, the intent to locate drugs. No rational trier of fact would believe that defendant's actual intention while he drove throughout Oakland County was to conceal or detain the children from their mother.

It strikes me that defendant's failure to return the children to their mother on time resulted more from his negligence or drug-induced absentmindedness than from any criminal intent to conceal or detain the children. While defendant's act of searching for drugs was not laudable by any means, there is no evidence to suggest that he acted with the specific intent "to detain or conceal the child[ren] from the child[ren]'s parent or legal guardian" MCL 750.350(1). Given the testimony adduced at the plea proceeding and the other evidence presented in this case, no reasonable finder of fact could conclude beyond a reasonable doubt that defendant acted with the specific intent to detain or conceal the children from their mother. *Brownfield*, 216 Mich App at 431.

I do not believe that there was a sufficient factual basis for defendant's guilty plea, see MCR 6.302(D)(1), and I therefore conclude that the circuit court erred by accepting the plea, see MCR 6.302(A). I would remand with instructions to the circuit court to permit defendant to withdraw his plea. In all other respects, I concur with the majority's opinion.

/s/ Kathleen Jansen