

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,
vs.
CHARLES EDWARD ROSS,
Defendant-Appellant.

SUPREME COURT NO. 19-0939

APPEAL FROM DISTRICT COURT FINAL ORDER OF THE
HONORABLE JUDGE KAREN KAUFMAN SALIC

PROOF BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Counsel was ineffective for allowing the district court to accept a guilty plea lacking a factual basis and failing to file a motion in arrest of judgment after the plea was accepted.

State v. Doggett, 687 N.W.2d 97, 100 (Iowa 2004)

State v. Button, 622 N.W.2d 480, 483 (Iowa 2001)

U.S. Constitution, 6th Amendment

Iowa Constitution Article 1, Section 10

State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015)

Strickland v. Washington, 466 U.S. 668, 687-88 (1984)

State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)

State v. Allen, 708 N.W.2d 361, 368 (Iowa 2006)

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004)

Cox v. State, 686 N.W.2d 209, 213 (Iowa 2004)

Richards v. Iowa Dep't of Revenue, 362 N.W.2d 486, 488 (Iowa 1985)

Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 374 (Iowa 1977)

Iowa Code § 4.6(3)

Christenson v. Iowa Dist. Ct., 557 N.W.2d 259, 261 (Iowa 1996)

Iowa Code § 4.6(4)

State v. Young, 686 N.W.2d 182, 184-85 (Iowa 2004)

T & K Roofing Co. v. Iowa Dep't of Educ., 593 N.W.2d 159, 162 (Iowa 1999)

State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999)

Iowa Code § 714.7B(2)

Iowa Code § 714.7B(3)

Iowa Code § 714.7B(4)

H.F. 2391, 78th Gen. Assem., 2000. Sess. (Iowa 2000)

STATEMENT OF THE CASE

Defendant Charles Ross was charged by joint trial information with Possession of Methamphetamine on October 5, 2019. Joint Trial Information filed Oct. 5, 2018, p. 1, APP p. 014. Co-defendant Calvin Lacey was charged with Theft in the Second Degree and “Possess Tool, Instrument or Device to Remove Theft Detection Shielding Device.” Joint Trial Information filed Oct. 5, 2018, p. 1, APP p. 014. After an unsuccessful motion to dismiss filed by Defendant, the prosecutor filed an amended trial

information in which Mr. Ross was also charged with Theft Second Degree with Habitual Offender Enhancement and “Possess Tool, Instrument or Device to Remove Theft Detection Shielding Device,” a violation of Iowa Code Section 714.7B(3). Amended Joint Trial Information filed Feb. 15, 2019, pp. 1-2, APP pp. 019-020; Order filed Jan. 22, 2019, APP p. 018.

The police reports attached to the amended minutes of testimony alleged that Mr. Ross was one of two men who, in the early morning of September 24, 2018, drove a Penske rental truck up to the front of a Mills Fleet Farm store located in Mason City, Iowa, used bolt cutters to cut the padlock from a steel cable that was securing a riding lawn mower in the walkway in front of the store, and loaded the lawn mower into the truck and drove away. Attachment to Notice of Additional Witness filed February 15, 2019, pp. 27-28, APP Vol. II pp. 197-198. The truck was stopped and searched, and methamphetamine was found in the truck. Attachment to Notice of Additional Witness filed February 15, 2019, pp. 27-28, APP Vol. II pp. 197-198. Photos were taken of the area in front of the store. Attachment to Notice of Additional Witness filed February 15, 2019, p. 29, APP Vol. II p. 199.

Mr. Ross filed a Written Plea of Guilty on April 1, 2019 pursuant to a plea agreement in which, among other things, the prosecutor agreed to

dismiss the habitual offender enhancement and Mr. Ross would plead guilty to all three charges with a joint sentencing recommendation. Written Plea of Guilty filed April 1, 2019, p. 2, APP p. 022. At the plea change hearing, the Court indicated it would rely on the written plea of guilty for the misdemeanor charges, including Count 2, the violation of Iowa Code Section 714.7B(3). Transcript of Plea Change Hearing, p. 3, APP p. 027. The Court sentenced Mr. Ross on Count 2, which was described by the Court as “Possession of a Theft Detection Device” to 365 days in jail to run consecutively to the other counts, a \$315 fine with 35% surcharge, and \$125 LEI surcharge. Judgment and Sentence filed May 20, 2019, p. 2, APP p. 061. Mr. Ross filed Notice of Appeal on May 31, 2019. Notice of Appeal filed May 31, 2019, APP p. 064.

ROUTING STATEMENT

This case presents an issue of first impression in deciding the definition of “theft detection device” in Iowa Code § 714.7B(4), and has implications in future cases in which that definition is important to criminal charges brought pursuant to Iowa Code Section 714.7B(2) and (3). This case should not be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(2)(c).

ARGUMENT

I. Counsel was ineffective for allowing the district court to accept a guilty plea lacking a factual basis and failing to file a motion in arrest of judgment after the plea was accepted.

Error was not preserved on the factual basis issue in this matter because no motion in arrest of judgment was filed to challenge the acceptance of the guilty plea by the district court for the plea's lack of a factual basis. An ineffective assistance of counsel claim, alleging that trial counsel failed to file a motion in arrest of judgment is an exception to the general rule that error must be preserved in the district court. *See State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004).

Ineffective assistance of counsel claims are reviewed de novo. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). Effective assistance of counsel is guaranteed by the Sixth Amendment to the U.S. Constitution. *Id.* at 683-85. Effective assistance of counsel is guaranteed under article I, section 10 of the Iowa Constitution. *State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015). For ineffective assistance of counsel, the Court must find that Counsel failed to perform an essential duty and that that failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When the ineffective assistance of counsel claim involves failure of counsel to

challenge a plea for lack of a factual basis, prejudice is assumed, or, results in prejudice per se. *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996), *State v. Allen*, 708 N.W.2d 361, 368 (Iowa 2006).

The goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (citations omitted). Legislative intent is derived not only from the language used but also from "the statute's `subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations.'" *Cox v. State*, 686 N.W.2d 209, 213 (Iowa 2004) (citations omitted).

In addition, the legislative history of a statute is instructive and we may consider it when ascertaining legislative intent. *Richards v. Iowa Dep't of Revenue*, 362 N.W.2d 486, 488 (Iowa 1985); *see also Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 374 (Iowa 1977) (explaining "[t]he striking of a provision before enactment of a statute is an indication the statute should not be construed to include it"); Iowa Code § 4.6(3) (stating the court may consider the legislative history of an ambiguous statute in determining legislative intent). Also, "[t]he interpreter may look to prior enactments of the statute for guidance." *Christenson v. Iowa Dist. Ct.*, 557 N.W.2d 259, 261 (Iowa 1996); *see also* Iowa Code § 4.6(4) (stating the court may consider former statutory provisions in regards to an ambiguous statute in determining legislative intent).

Furthermore, the interpretation of a statute requires an assessment of the statute in its entirety, not just isolated words or phrases. *State v. Young*, 686 N.W.2d 182, 184-85 (Iowa 2004). Indeed, "we avoid interpreting a statute in such a way

that portions of it become redundant or irrelevant." *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999). Finally, it is necessary to remember we construe criminal statutes strictly with doubts resolved in the accused's favor. *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999). *State v. Allen*, 708 N.W.2d 361, 366 (Iowa 2006).

Mr. Ross was convicted of violating Iowa Code Section 714.7B(3). Judgment and Sentence filed May 20, 2019, p. 2, APP p. 061. The crime listed in Iowa Code Section 714.7B(3) is defined as, "A person shall not possess any tool, instrument, or device with the intent to use it in the unlawful removal of a theft detection device. Iowa Code Section 714.7B(3). In Section 714.7B(4), the term "theft detection device" is defined as "any electronic or other device attached to goods, wares, or merchandise on display or for sale for merchant. Iowa Code Section 714.7B(4).

The argument for this claim is short. The court filings show that the basis of the charge is the possession of a bolt cutter used to cut a padlock and remove it and a steel cable from the stolen lawnmower. A padlock and steel cable are not a theft a detection device. So, there is no factual basis for the charge.

It appears there was confusion or mislabeling regarding the charge throughout the case. The charge, as listed in the amended trial information, was called, "Possess Tool, Instrument or Device to Remove Theft Detection

Shielding Device.” Amended Trial Information filed Feb. 15, 2019, p. 2, APP p. 020. In the order of disposition, the charge was called, “Possession of Theft Detection Device.” Judgment and Sentence filed May 20, 2019, p. 2, APP p. 061. The crime listed in Iowa Code Section 714.7B(3) is defined as, “A person shall not possess any tool, instrument, or device with the intent to use it in the unlawful removal of a theft detection device. Iowa Code Section 714.7B(3). In Section 714.7B(4), the term “theft detection device” is defined as “any electronic or other device attached to goods, wares, or merchandise on display or for sale for merchant. Iowa Code Section 714.7B(4).

The written plea of guilty, which was used in lieu of a colloquy, only recites the definition of the crime (which is, “A person shall not possess any tool, instrument, or device with the intent to use it in the unlawful removal of a theft detection device.”) as a factual basis, and allows the court to use the minutes of testimony to the extent necessary to establish a factual basis. Written Plea of Guilty p. 1, APP p. 021; Iowa Code Section 714.7B(3). It seems clear from the guilty plea and the minutes of testimony and notice of additional witness that the factual basis for this charge, using the minutes of testimony and notice of additional witness to the extent necessary to find a factual basis, was that Mr. Ross possessed a bolt cutter which was used to

cut a padlock on the mower that was stolen. Attachment to Notice of Additional Witness filed Feb. 15, 2019, pp. 27-28, APP Vol. II pp. 197-198; Attachment to Minutes of Testimony filed Oct. 5, 2018, APP Vol. II pp. 006-164; Attachment to Notice of Additional Witness filed Feb. 15, 2019, APP Vol. II pp. 171-301; Attachment 2 to Notice of Additional Witness filed Feb. 15, 2019, APP Vol. II pp. 302-307. It is described that the mower was locked up outside the store with a steel cable fastened together with a padlock, and the padlock was cut in order for the defendants to remove the cable and padlock and steal the mower. Attachment to Notice of Additional Witness filed Feb. 15, 2019, pp. 27-28, APP Vol. II pp. 197-198. There is no description in the reports of what the cable was attached to other than the mower, but it appears from the photo on page 41 of the attachment to the minutes of testimony that the cable may have been attached to other mowers parked in front of the store. Attachment to Minutes of Testimony filed Oct. 5, 2018, p. 41 APP p. 046. In any case, the only description in the minutes or written plea of what physical item constituted the theft detection device that was removed from the mower is the “steel cable that was securing a lawn mower from theft” described in the citation on page 122 of the attachment to the minutes of testimony. Attachment to Minutes of Testimony filed Oct. 5, 2018, p. 122 APP p. 127.

Defendant-Appellant submits that the padlock or steel cable do not meet the definition of a “theft detection device” for purposes of the statute. The definition “theft detection device” includes “any device” attached to the merchandise. Iowa Code Section 714.7B(3). Taking this definition literally and without context, it would seem any item, including a price tag, a sticker, a merchandise shelf, or the long and narrow pegs on which merchandise is hung, would be a “theft detection device” for purposes of the statute, but that result would be overbroad and absurd. It would render the words “theft” and “detection” meaningless.

From the context of the statute, the device would have to be a “theft detection” device, which would require that the device provide some sort of “detection” of a theft. Injecting some common sense and common word usage into the term “theft detection device,” it would seem that what the statute refers to are the mostly electronic, but not always electronic, little plastic tags or spider-webbed plastic circles that are ubiquitous in stores’ electronics sections or attached to small items of merchandise that can be easily concealed in pockets or purses (and would therefore need something to alert store staff of a theft occurring because the theft might otherwise be easily concealed), and which set off the store alarm when someone tries to leave the store without the device having been removed, or, perhaps, marks

the items, like the little ink tabs in clothing stores that mark the clothes when not properly removed, leaving clear indication on the item itself that it was stolen. A padlock and cable would not seem to fit in with these types of devices. The padlock and cable do not set off an alarm or trigger a security system when they are removed or when they pass through the entrance or exit of the store. Nor do they somehow mark the item so that it can be more readily identified as a stolen item later. Padlocks and cables predate these types of modern security systems and have been in use as theft *prevention* devices for decades, likely centuries. They do nothing to “detect” theft or alert store staff to a theft the staff might have otherwise missed. They are theft *prevention* devices, not theft detection devices. Under the facts of this case, the padlock and cable did nothing to help the store detect the theft and were not used for the purpose of detecting a theft.

The legislative history of the law does not appear to reveal anything that would change the above analysis. H.F. 2391, 78th Gen. Assem., 2000. Sess. (Iowa 2000), APP. pp. 003-013.

CONCLUSION

The reviewing Court should find that there was insufficient factual basis for the plea in this matter and that trial counsel was ineffective for

allowing Defendant to plead to the charge at issue and for failing to challenge the district court's acceptance of the plea. The conviction should be vacated and the case remanded to the district court.

REQUEST FOR ORAL SUBMISSION

Appellant requests oral submission because this case involves significant issues of statutory interpretation. It would benefit the Court to be able to question the attorneys in this matter regarding the arguments made in their respective briefs.

CERTIFICATION OF COSTS

Appellant has accrued actual costs of \$0 for printing and duplicating necessary copies of this brief in final form.

Respectfully submitted,

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PROOF OF SERVICE
AND CERTIFICATE OF FILING

The undersigned certifies that on the 18th Day of November, 2019, I served this document, Appellant's proof brief, by EDMS to all parties electronically. I served this document on the above date to:

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