IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0939

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES EDWARD ROSS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE KAREN KAUFMAN SALIC, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
Katie.Krickbaum@ag.iowa.gov

CARLYLE DALEN
Cerro Gordo County Attorney

JAMES O'HOLLEARN
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Ross's trial counsel did not breach an essential duty by allowing his client to plead guilty to possession of a tool, instrument, or device with the intent to use it to unlawfully remove a theft detection device. The term "theft detection device" is defined broadly, and includes the padlock and wire cable used to secure the stolen item here.

Authorities

Jack v. P & A Farms, Ltd., 822 N.W.2d 511 (Iowa 2012)
Rhoades v. State, 848 N.W.2d 22 (Iowa 2014)
State v. Armstrong, 80 P.3d 378 (Kan. 2003)
State v. Chang, 587 N.W.2d 459 (Iowa 1998)
State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
State v. Davis, 922 N.W.2d 326 (Iowa 2019)
State v. Finders, 743 N.W.2d 546 (Iowa 2008)
State v. Finney, 834 N.W.2d 46 (Iowa 2013)
State v. Hearn, 797 N.W.2d 577 (Iowa 2011)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Schminkey, 597 N.W.2d 785 (Iowa 1999)
State v. Straw, 709 N.W.2d 128 (Iowa 2006)
Iowa Code § 714.7B
Iowa Code § 714.7B(3)
Iowa Code § 814.7(2)
Iowa Code § 814.7(3)
Iowa Code § 714.7B(4)
Iowa R. Crim. P. 2.24(3)(a)
Iowa R. Crim. P. 2.8(2)(b)
Merriam-Webster, https://www.merriam-webster.com/dictionary/device (last visited Nov. 1, 2019)

ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

Although the Iowa Supreme Court has not yet addressed the meaning of "theft detection device" in Iowa Code section 714.7B, that question is not a "substantial issue[] of first impression" warranting retention. *See* Iowa R. App. P. 6.1101(2)(c). Moreover, the Court of Appeals can resolve the question presented in this appeal by studying the language of the statute—including the definition of the phrase at issue—and by using well-established rules of statutory interpretation. Accordingly, transfer to the Court of Appeals would be appropriate here.

STATEMENT OF THE CASE

Nature of the Case

Defendant Charles Edward Ross appeals his conviction after pleading guilty to theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2(2), a class D felony; possession of a tool, instrument, or device with the intent to use it to unlawfully remove a theft detection device, in violation of Iowa Code section 714.7B(3) of the Iowa Code, a serious misdemeanor; and possession of

methamphetamine, first offense, in violation of Iowa Code section 124.401(5), a serious misdemeanor. The Honorable Karen Kaufman Salic accepted Ross's guilty plea and imposed sentence.

Facts and Course of Proceedings

At about 4:00 a.m. on September 24, 2018, Ross went with his co-defendant to a Mills Fleet Farm in Mason City, Iowa. Plea Hr'g Tr. 12:12-13:10; Minutes of Testimony; Conf. App. 24. Using bolt cutters, Ross cut the padlock securing a wire cable that was wrapped around a riding lawn mower on display outside in front of the store. Plea Hr'g Tr. 12:19-15:12; Minutes of Testimony; Conf. App. 24. Ross then helped his co-defendant load the mower onto a rented Penske truck. Plea Hr'g Tr. 12:19-15:12; Minutes of Testimony; Conf. App. 24. Neither Ross nor his co-defendant had permission to take the lawn mower, and they did not intend to return the mower to its rightful owner. Plea Hr'g Tr. 14:10-15:4.

On October 5, 2018, the State charged Ross by trial information with theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2(2), a class D felony; possession of a "tool, instrument or device to remove theft detection shielding device," in violation of Iowa Code section 714.7B(3) of the Iowa Code, a serious

misdemeanor;[1] and possession of methamphetamine, first offense, in violation of Iowa Code section 124.401(5), a serious misdemeanor. Trial Information; App. 14. Ross moved to dismiss the methamphetamine charge only, a motion the district court denied after a hearing. Motion to Dismiss; App. 17; Order Denying Motion to Dismiss; App. 18.

On February 15, 2019, the State filed an amended trial information, in which it added an habitual offender enhancement to the theft charge. Amended Trial Information; App. 19. The State also indicated its original intention that both Ross and his co-defendant be charged with possession of "a tool, instrument or device with intent"

[1] The language of the statute to which Ross pleaded guilty states: "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 § 714.7B(3). Despite this, both parties and the district court described the crime in different ways throughout the proceedings below. *See* Amended Trial Information; App. 19 (citing the correct statutory provision, but charging Ross with unlawfully possessing a tool, instrument, or device with the intent to remove "a theft detection shielding device"); Written Plea of Guilty; App. 21 (describing the charged crime as the "possession of theft detection removal device"); Order of Disposition at 2; App. 61 (again, citing the correct statutory provision, but describing the conviction as one for "possession of a theft detection device"). The parties seem to agree, however, that Ross pleaded guilty to the terms of Iowa Code section 714.7B(3), and that the issue on appeal is the meaning of "theft detection device" in that statute.

to use it to unlawfully remove a theft detection device, in violation of section 714.7B(3) of the Iowa Code, a serious misdemeanor. Amended Trial Information; App. 19.

On April 1, 2019, after the State agreed to drop the habitual offender statue and jointly recommend a seven-year term of incarceration, Ross pleaded guilty to theft in the second degree; possession of a tool, instrument, or device with the intent to use it to unlawfully remove a theft detection device; and possession of methamphetamine. Order to Accept Plea; App. 44; *See* Plea Hearing Transcript, April 1, 2019 ("Plea Hr'g Tr.") 15:17-16:12; App. 25; Sentencing Hearing Transcript, May 20, 2019 ("Sent. Hr'g Tr.") 4:10-18; App. 46.

The district court relied on Ross's written plea of guilty to accept his plea to the two misdemeanor charges, including the one at issue here. *See* Plea Hr'g Tr. 3:20-24. In that document, Ross admitted, in relevant part, that on September 24, 2018, he "possessed a tool, instrument, or device, with the intent to use it in the unlawful removal of a theft detection device" and that "[t]he value of the item good exceeded $200.00." Written Plea of Guilty; App. 21. Ross also agreed that the district court could "rely on the Minutes of Testimony

to the extent necessary to establish a factual basis" for the charges. Written Plea of Guilty; App. 22.

The district court sentenced Ross to an indeterminant five-year term in prison for the theft conviction, and two 365-day terms in jail for the possession of a tool to remove a theft detection device and possession of methamphetamine convictions. Order of Disposition; App. 60. The court ordered that Ross serve the three sentences consecutively, for a total of seven years. Order of Disposition; App. 60.

Ross now appeals, arguing that his trial counsel was ineffective for allowing Ross to plead guilty to a charge—possession of a tool, instrument, or device with the intent to use it to unlawfully remove a theft detection device—for which there was no factual basis. Specifically, Ross contends that the padlock and wire cable securing the stolen lawn mower do not meet the definition of "theft detection device." For the reasons set forth below, Ross's claim has no merit.

ARGUMENT

I. Ross's trial counsel did not breach an essential duty because there was a factual basis for Ross's guilty plea. A padlock and wire cable are "theft detection devices" as defined in the statute.

Preservation of Error

As Ross acknowledges, he may not directly challenge his guilty plea on appeal because he did not file a motion in arrest of judgment contesting the legality of the plea. *See* Iowa R. Crim. P. 2.24(3)(a); Appellant's Brief at 8. The failure to file such a motion, however, "does not bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Ross's ineffective assistance of counsel claim is not bound by traditional error-preservation rules. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Standard and Scope of Review

This Court reviews ineffective-assistance-of-counsel claims de novo. *Straw*, 709 N.W.2d at 133. A defendant may raise a claim of ineffective assistance of counsel on direct appeal if he believes the record is adequate to address the claim at that stage. *Id.* (citing Iowa Code § 814.7(2) (2013)). The Court may decide that the record is

sufficient to rule on the merits, or it may choose to preserve the claim for post-conviction proceedings. *Id.* (citing Iowa Code § 814.7(3) (2013)).

The record before this Court is adequate to resolve Ross's claim on direct appeal.

Merits

Ross makes one argument on appeal: That his trial counsel was ineffective for allowing him to plead guilty to a crime for which there was no factual basis. Specifically, Ross contends that neither the padlock nor the wire cable securing the riding lawn mower is a "theft detection device" as defined in Iowa Code section 714.7B.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel failed to perform an essential duty, and (2) counsel's failure resulted in prejudice. *See Straw*, 709 N.W.2d at 133. Before it can accept a plea of guilty, the district court must first determine that the plea has a factual basis. *Id.* at 788; Iowa R. Crim. P. 2.8(2)(b). "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *see also* Iowa R. Crim.

P. 2.8(2)(b). In such a case, prejudice is presumed. *See Schminkey*, 597 N.W.2d at 788.

At the time of the defendant's guilty plea, "the record must disclose facts to satisfy all elements of the offense." *Rhoades*, 848 N.W.2d at 29. To determine whether a factual basis exists, the Court may review, among other things, the defendant's statements and the minutes of testimony. *See id.*; *see State v. Finney*, 834 N.W.2d 46, 61-62 (Iowa 2013). The record need not "show the totality of the evidence necessary to support a guilty conviction"; all that is required is that "the record demonstrates the facts to support the elements of the offense." *Rhoades*, 848 N.W.2d at 29.

Here, the record supports the fact that Ross possessed and then used bolt cutters to unlawfully cut a padlock securing a wire cable that was wrapped around a lawn mower. *See* Plea Hr'g Tr. 12:19-15:12; Minutes of Testimony; Conf. App. 24, 26-27, 34, 39-40. Ross argues that neither the padlock nor the wire cable is considered a "theft detection device" within the meaning of Iowa Code section 714.7B(3). If they are not, Ross contends, then his trial counsel allowed him to plead guilty to a charge for which there was no factual basis.

When interpreting a statute, the Court's "primary goal is to give effect to the legislature's intent as expressed in the statute's words." *State v. Davis*, 922 N.W.2d 326, 330 (Iowa 2019). The Court "consider[s] the object sought to be accomplished and the evil sought to be remedied, and seek[s] a reasonable interpretation that will best affect the legislative purpose and avoid absurd results." *State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008) (quotation omitted).

"'When a statute is plain and its meaning clear,'" the Court does not "'search for meaning beyond its express terms.'" *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011) (quoting *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998)). If there is no legislative definition, the Court gives the words of the statute their ordinary meaning. *Hearn*, 797 N.W.2d at 583. Although the Court "adhere[s] to the rule of lenity in criminal cases, criminal statutes still must be construed reasonably and in such a way as to not defeat their plain purpose." *State v. Coleman*, 907 N.W.2d 124, 136 (Iowa 2018) (quotation omitted).

Iowa Code section 714.7B(3) penalizes 1) possessing, 2) any tool, instrument, or device, 3) with the intent to use it, 4) in the unlawful removal of, 5) a theft detection device. Ross does not challenge the fact that he possessed the bolt cutter, or that he

intended to use it (and did use it) to unlawfully cut the padlock and remove the wire cable. Nor does Ross contend that a bolt cutter is not a "tool, instrument, or device" under the statute. Ross only argues that the padlock and wire cable combination here is not a "theft detection device." *See* Appellant's Brief at 10 & 13.

Ross concedes that on its face the definition of the term "theft detection device," found in section 714.7B(4), does include a padlock and wire cable securing an item, and he's right. *See* Appellant's Brief at 13. The statute defines "theft detection device," as "any electronic *or other device* attached to goods, wares, or merchandise on display or for sale by a merchant." Iowa Code § 714.7B(4). Although not defined in the statute, the word "device" means "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function." *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/device (last visited Nov. 1, 2019); *Jack v. P & A Farms, Ltd.*, 822 N.W.2d 511, 516 (Iowa 2012) (citation and internal quotation marks omitted) ("If the legislature has not defined words of a statute, we may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage."). A padlock and wire cable plainly meet that statutory definition.

Ross argues that despite the definition of the term in the statute, the legislature actually intended to limit the term to "the mostly electronic, but not always electronic, plastic tags" that "set off the store alarm" if someone tries to leave the store without removing the device, or that "marks the items . . . when not properly removed[.]" Appellant's Brief at 13-14. He contends both that "common sense" demands such an interpretation, and that taking the statutory definition "literally and without context" renders the words "theft" and "detection" meaningless. Appellant's Brief at 13.

But Ross cannot read into an unambiguous statute limitations that are not there. The legislature here—unlike in some states—decided to define the term "theft detection device," and the definition it provided is intentionally broad. *See State v. Armstrong*, 80 P.3d 378, 381 (Kan. 2003) (discussing differences among state statutes and stating that the statutes that "define the phrase only in the broadest or most repetitive terms" are "appropriately flexible"). By its terms, the statute includes "high-tech," new, and electronic devices, but it also includes "lower-tech" options like padlocks and wire cables.

Nor does the statute limit the device to something that will immediately alert the owner to the theft of his or her property. All that is required is that the device be "attached" to the item on display or for sale. Iowa Code § 714.7B(4). Even if the context does require that the device have some type of "detection" property, however, the padlock and wire cable here fit that definition. A cut padlock and loose wire cable would alert the owner of the item on display or for sale that the item was taken without permission just as well as the devices that Ross identifies in his brief.

For all of those reasons, this Court should conclude that the term "theft detection device" includes the padlock and wire cable securing the lawn mower in this case. Ross admitted to possessing and using bolt cutters to cut the padlock and remove the wire cable wrapped around the mower. This meets the elements of Iowa Code section 714.7B(3). Because there was a factual basis for Ross's conviction on this count, his trial counsel did not breach an essential duty and thus provided effective assistance of counsel. This Court should affirm Ross's conviction.

CONCLUSION

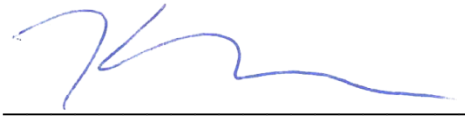
For all the reasons set forth above, the State respectfully asks this Court to affirm Ross's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,522** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 20, 2019

KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov