

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

MURPHY LEE RUTHERFORD,

Defendant-Appellant.

S. CT. NO. 22-0553

APPEAL FROM THE IOWA DISTRICT COURT
FOR WASHINGTON COUNTY
HONORABLE MARK KRUSE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 8th day of December, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Murphy Rutherford, No. 6800480, Mt. Pleasant Correctional Facility, 1200 East Washington, Mt. Pleasant, IA 52641.

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TRW/lr/10/22

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Jurisdictional Statement Regarding Iowa Code Sections 814.6(1)(A)(3) And 814.7

Authorities

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State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022)

Discretionary Sentencing Issue

Iowa Code section 814.6(1)(a)(3) (2021)

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Lack of a Factual Basis to Support the Plea

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1. Challenge to Inadequate Factual Basis

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State v. Gines, 844 N.W.2d 437, 441-442 (Iowa 2014)

Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974)

State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022)

2. Challenge to voluntary and knowing nature of plea as related to the factual basis

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ARGUMENT

I. The District Court abused its discretion in declining to suspend Rutherford’s prison sentence despite his need for life-saving medical treatment.

Authorities

State v. Gordon, 921 N.W.2d 19, 22 (Iowa 2018)

State v. Calvin, 839 N.W.2d 181, 184 (Iowa 2013)

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II. The District Court erred in accepting Rutherford's plea to Theft in the Second Degree where nothing in the record established he had the necessary intent to permanently deprive another of their property or that he understood the charge required such intent.

Authorities

Iowa Rs. Crim. P. 2.8(2)(d), 2.24(3)(a) (2022)

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Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706
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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a conflict with State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021), a published decision of the Iowa Supreme Court that held a defendant did not have a legally sufficient reason to appeal his guilty plea for a lack of a factual basis. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(b).

In addition, this case presents “substantial questions of enunciating or changing legal principles” in arguing that a district court has an independent duty to ensure a plea is entered knowingly, voluntarily, and with a factual basis so as to permit appellate review despite a defendant’s failure to file a motion in arrest of judgment. Cf. State v. Crawford, 972 N.W.2d 189, 196-198 (Iowa 2022) (holding “a defendant need not file a motion for judgment of acquittal to challenge the sufficiency of the evidence on direct appeal”).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Murphy

Rutherford appeals his conviction, sentence, and judgment for two counts of Felon in Possession of a Firearm, class D felonies in violation of Iowa Code section 724.26(1) (2021), and Theft in the Second Degree, a class D felony in violation of Iowa Code sections 714.1 and 614.2(2) (2021), entered following his guilty plea in Washington County District Court. Rutherford contends the District Court abused its discretion in failing to suspend his sentence in light of his medical conditions, and that the District Court improperly accepted his plea to Theft in the Second Degree without first ensuring it was voluntary and supported by a factual basis.

Course of Proceedings: On July 30, 2021, the State filed a trial information in Washington County District Court charging Rutherford with two counts of Felon in Possession of a Firearm, class D felony in violation of Iowa Code section 724.26(1) (2021) (Counts I & II), and Theft in the Second

Degree, a class D felony in violation of Iowa Code sections 714.1 and 614.2(2) (2021) (Count III). (7/30/21 Trial Information)(App. pp. 4-7). The State also alleged that for each count Rutherford qualified as an Habitual Offender in violation of Iowa Code section 902.8 (2021). (7/30/21 Trial Information)(App. pp. 4-7). Rutherford initially pleaded not guilty and demanded a speedy trial. (8/20/21 Written Arraignment)(App. pp. 8-9).

Rutherford submitted a written waiver of rights and plea of guilty on September 20, 2021. (9/20/21 Written Waiver)(App. pp. 10-15). Under the terms of his agreement with the State, Rutherford would plead guilty as charged and the State would not pursue the habitual offender enhancements. (9/20/21 Written Waiver p. 6)(App. p. 15). The parties would agree that the sentences for the offenses would run consecutively to one another, but Rutherford retained the right to ask for a suspended sentence with probation. (9/20/21 Written Waiver p. 6)(App. p. 15). The

District Court accepted the written plea. (9/21/21 Order Accepting Written Guilty Plea)(App. pp. 16-18).

The District Court held a sentencing hearing on February 25, 2022. (2/25/22 Sent. Tr. p. 1 L.1-25). The court sentenced Rutherford to five years in prison on each count and ran the sentences consecutively with one another.

(2/25/22 Sent. Tr. p. 8 L.4-9 L.6; 2/25/22 Judgment ¶¶ 2, 3)(App. pp. 21-22). The court suspended the \$1025 fine on each count but did not suspend the sentence of incarceration.

(2/25/22 Sent. Tr. p. 8 L.21-9 L.6, Judgment ¶¶ 2, 6, 7)(App. pp. 21-22). The court found Rutherford had no reasonable ability to pay Category B restitution. (2/25/22 Sent. Tr. p. 9 L.24-p. 10 L.4; Judgment ¶ 8)(App. pp. 22-23).

Rutherford filed a timely notice of appeal on March 27, 2022. (3/27/22 Notice)(App. pp. 26-27).

Facts: In his written plea of guilty, Rutherford acknowledged that on July 23, 2021, he was in possession of a firearm having been previously convicted of a felony, and that

he took possession of two guns that were not his and deprived the owner of them. (9/20/21 Written Waiver p. 2)(App. p. 11). He acknowledged that the guns had a value between \$1500 and \$10,000. (9/20/21 Written Waiver p. 2)(App. p. 11). Rutherford acknowledged the District Court could determine a factual basis by reviewing the minutes of testimony and law enforcement reports. (9/20/21 Written Waiver ¶ 1)(App. p. 10).

According to the minutes of testimony, Melissa Beaudette would testify that she was the owner of the firearms in this case and that she did not give permission or authority to Rutherford to take them. (7/30/21 Minutes p. 1)(Conf. App. p. 4). The Audrain County Circuit Clerk in Missouri would testify that Rutherford was convicted of felonies in 2011 and 2018. (7/30/21 Minutes p. 1)(Conf. App. p. 4).

Law enforcement reports attached to the minutes of testimony indicated that on July 23, 2021, Beaudette called police to report that Rutherford had stolen two guns from her

residence and left on foot. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15). When officers found Rutherford, he told them Beaudette had asked him to remove the two guns and an ammunition can from her house. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15). Officers returned the can and the guns to Beaudette, who denied asking Rutherford to remove the items. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15).

JURISDICTIONAL STATEMENT REGARDING IOWA CODE SECTIONS 814.6(1)(A)(3) AND 814.7

Iowa Code section 814.6(1)(a)(3) provides a statutory right of appeal for a defendant in a criminal case except when the case involves a guilty plea. Iowa Code § 814.6(1)(a)(3) (2021). The statute provides two exceptions to the prohibition: Guilty pleas to class A felonies and guilty pleas in which there is “good cause” to appeal. *Id.* The statute itself does not define “good cause,” but the Iowa Supreme Court has chosen to define the phrase broadly as “a legally sufficient reason.” State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022).

“Generally speaking, a defendant asserts a legally sufficient reason and establishes good cause to appeal as a matter of right by asserting a claim on appeal for which an appellate court potentially could provide relief.” Id.

Discretionary Sentencing Issue: The Iowa Supreme Court has found a defendant establishes “good cause” for an appeal under Iowa Code section 814.6(1)(a)(3) “when the defendant challenges his or her sentence rather than the guilty plea.” State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020). This is because no error preservation is required to assert a sentencing claim on appeal. State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022). As such, Rutherford has good cause for this appeal, which challenges the District Court’s decision not to suspend his sentence of incarceration.

Lack of a Factual Basis to Support the Plea:

“An appellate court either has jurisdiction over a criminal appeal or it does not. Once a defendant crosses the good-cause threshold as to one ground for appeal, the court has

jurisdiction over the appeal.” State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022). Because this Court has jurisdiction over this appeal due to Rutherford’s discretionary sentencing challenge, it has jurisdiction to hear his challenge to the factual basis for his plea.

Even if the Court should limit the Wilbourn rule to sentencing issues, however, Rutherford still has good cause to appeal the factual basis for his plea.

1. Challenge to Inadequate Factual Basis

Traditionally, a defendant seeking to challenge the factual basis for his guilty plea on appeal would claim plea counsel ineffective for allowing him to plead guilty without an appropriate factual basis and not filing a motion in arrest of judgment. See, e.g., State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001). By law, appellate courts are now prohibited from ruling upon claims of ineffective assistance of counsel on direct appeal. Iowa Code § 814.7 (2021). The Iowa Supreme Court has held this statutorily-created lack of authority

prevents it from finding “good cause” for appeal in such cases. State v. Treptow, 960 N.W.2d 98, 107 (Iowa 2021).

Yet when the issue is one of an inadequate factual basis, the claim is more than simply whether defense counsel was ineffective. When defense counsel allows a defendant to plead guilty based upon an inadequate factual basis, counsel is deemed ineffective and prejudice is presumed. Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014). Ineffective assistance that prejudices a defendant deprives that defendant of their right to counsel under the Sixth And Fourteenth Amendments to the United States Constitution and Article I Section 10 of the Iowa Constitution. Cf. State v. Treptow, 960 N.W.2d 98, 107 (Iowa 2021)(“The right to the effective assistance of appellate counsel is the right to have counsel in an appeal and to have counsel perform competently in that appeal.”).

Moreover, the denial of the right to counsel – and the failure to provide a factual basis for a guilty plea -- is a denial of due process. Strickland v. Washington, 466 U.S. 668

(1984)(the due process clauses protect the right to a fair trial, and defines a fair trial by reference to the right to counsel); Powell v. Alabama, 287 U.S. 45, 70-72 (1932)(denial of effective counsel is a due process violation); State v. Boone, 298 N.W.2d 335, 337 (Iowa 1980)(person entering guilty plea must make knowing and voluntary waiver of rights); Henderson v. Morgan, 426 U.S. 637, 645 (1976) (“clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.”). Regardless of whether a guilty plea violates due process or the right to counsel based on the lack of a factual basis, the deficiency should be considered “good cause” to appeal said plea.

More importantly, defense counsel is not the only entity obliged to ensure a defendant’s guilty plea is supported by a factual basis. The Iowa Rules of Criminal Procedure provide

the district court “may refuse to accept a plea of guilty, *and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.*” Iowa R. Crim. P. 2.8(2)(b) (2022) (emphasis added).

This requirement was intended to ensure the voluntariness of a defendant’s plea:

Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to “protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”

McCarthy v. United States, 394 U.S. 459, 467 (1969).

When Iowa adopted the colloquy outlined in the ABA Minimum Justice Standards in State v. Sisco in 1969, the Iowa Supreme Court acknowledged the primary role of district courts in ensuring a plea was knowing, voluntary, and supported by a factual basis:

... [A] sentencing court may not abrogate or delegate to anyone, including attorney for accused, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a

guilty plea, whether it is voluntarily entered, or existence of facts supporting it.

State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). In other words, the trial court has an independent duty to ensure there is a factual basis in the record to support the plea before entering judgment. If there is no factual basis in the record, the court should arrest judgment on its own accord.

In this respect, factual basis challenges are similar to sufficiency of the evidence challenges presented in jury trials. See State v. Crawford, 972 N.W.2d 189, 196-98 (Iowa 2022) (holding “a defendant need not file a motion for judgment of acquittal to challenge the sufficiency of the evidence on direct appeal”). The trial court had an independent duty to ensure a factual basis, the record on the factual basis was to be made prior to entry of judgment, and the appellate courts can decide if the record establishes a factual basis. Cf. id. at 195 (appellate courts have constitutional and statutory authority to review and interfere with an unjust verdict). The difference is only in remedy – for a sufficiency challenge from a jury trial,

the remedy is dismissal of the unsupported charge; for a factual basis challenge from a guilty plea, the remedy is to remand for determination of whether a factual basis can be made. State v. Chapman, 944 N.W.2d 864, 875 (Iowa 2020) (when evidence is insufficient to support conviction, double jeopardy requires dismissal of charge without possibility of retrial); State v. Gines, 844 N.W.2d 437, 441-442 (Iowa 2014) (inadequate factual basis for guilty plea requires remand). In both situations, the appellate courts can provide relief albeit in a slightly different form. This is the definition of good cause.

To the extent State v. Treptow held this Court had no authority to provide relief based on an ineffective assistance challenge to the factual basis, it should be distinguished. State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021). In short, Treptow can be distinguished because 1) resorting to ineffective assistance of counsel is unnecessary to resolve this claim, and 2) this Court retains inherent authority to resolve due process challenges.

Finally, it is worth mentioning that a challenge to the adequacy of the factual basis for a plea does not require vacating the plea itself but only requires vacating the sentence. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974). The Court then remands the case to the District Court to allow it to determine if a sufficient factual basis can be established. Id. The District Court will have the option of reaffirming the plea if a factual basis exists, or vacating it if one cannot be found. Id. Accordingly, appeals challenging the factual basis for a guilty plea should fall under the “good cause” exception because 1) they are an attack on the sentence rather than the plea itself, and 2) the appellate courts are able to provide appropriate relief. State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022).

2. Challenge to voluntary and knowing nature of plea as related to the factual basis

In State v. Finney, the Iowa Supreme Court recognized two strands of constitutional analysis relating to challenges to an invalid factual basis. State v. Finney, 834 N.W.2d 46, 54-

55 (Iowa 2015). The first strand – discussed in Subsection 1 above – involves a Sixth Amendment violation where the defendant’s attorney provides incompetent advice in allowing his client to plead guilty where an objective review of the record reveals an inadequate factual basis. Id. at 54-55.

The second strand under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution obligates a district court to find a defendant has made a knowing and voluntary choice to waive their constitutional rights and plead guilty. Id. at 55. “When a Fifth Amendment due process voluntariness claim based on a lack of factual basis is asserted, federal courts look on the record developed at the plea colloquy for evidence of the subjective state of mind of the defendant.” Id.

The factual basis requirement is part and parcel of the broader requirement for a voluntary and knowing plea. The United States Supreme Court has long held that a plea that is neither knowing nor voluntary is entered in violation of due

process and that “because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” McCarthy v. United States, 394 U.S. 459, 466 (1969). The judge must not only question the defendant regarding his knowledge of the nature of the charge but also establish that there is a factual basis for the plea. Id. at 467. “Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to ‘protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.’” Id.

To the extent Rutherford claims his written plea failed to show his understanding of the elements of the offense in relation to the facts he provided, he is alleging his plea is involuntary.

As addressed in Subsection 1 above, the trial court has an independent duty to ensure a plea is knowing and voluntary. Iowa R. Crim. P. 2.8(2)(b) (2022)(the district court “shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.” This duty was not to be delegated to defense counsel. State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). Rather, it was the trial court’s duty to ensure the defendant had and understanding of the law in relation to the facts. McCarthy v. United States, 394 U.S. 459, 467 (1969). If the record fails to disclose such an understanding, the court itself should arrest judgment until the defendant’s understanding can be clarified.

The court’s failure to arrest judgment based upon an unknowing and involuntary plea should be considered “good cause.” As discussed in Section 1 above, such appeals 1) are an attack on the sentence rather than the plea itself, Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974), and 2) are the type of appeals where the appellate courts are

able to provide appropriate relief. State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022).

Petition for Writ of Certiorari: Should this Court determine Rutherford does not have a right to appeal his guilty plea, Rutherford respectfully asks this Court to treat his appeal as a petition for writ of certiorari. See Iowa R. App. P. 6.108 (2022) (Court may proceed with appeal as though proper form of review had been requested). Iowa Rule of Appellate procedure 6.107 provides that “Any party claiming a district court judge, an associate district court judge, an associate juvenile judge, or an associate probate judge exceeded the judge’s jurisdiction or otherwise acted illegally may commence an original certiorari action in the supreme court by filing a petition for writ of certiorari.” Iowa R. App. P. 6.107(1)(a) (2022).

To the extent Rutherford claims the trial court failed to ensure a factual basis for his plea, the court violated its duty under the Rules and the Constitution. See Iowa R. Crim. P.

2.8(2)(b) (2022) (stating the court “shall not accept a plea of guilty without first determining that the plea ... has a factual basis”); McCarthy v. United States, 394 U.S. 459, 467 (1969) (factual basis is necessary to establish a knowing and voluntary plea). Cf. State v. Newman, 970 N.W.2d 866, 872-73 (Iowa 2022)(McDermott, J., dissenting)(holding that certiorari would be available to address district court’s failure to properly notify defendant of his right to appeal as required by the Iowa Rules of Criminal Procedure). The District Court accepted a guilty plea without a valid factual basis and thereby violated its duty under the Rules. Certiorari is an appropriate form of review of the District Court’s illegal action.

ARGUMENT

I. The District Court abused its discretion in declining to suspend Rutherford’s prison sentence despite his need for life-saving medical treatment.

Preservation of Error: A defendant is not required to make a challenge the district court's abuse of discretion at the

sentencing hearing to preserve error for appeal. State v. Gordon, 921 N.W.2d 19, 22 (Iowa 2018).

Standard of Review: “We review ‘the trial court's application of pertinent sentencing statutes for correction of error at law.’” State v. Calvin, 839 N.W.2d 181, 184 (Iowa 2013) (quoting State v. Hawk, 616 N.W.2d 527, 528 (Iowa 2000)). Sentencing decisions are reviewed for an abuse of discretion when the sentence is within the statutory limits. State v. Seats, 865 N.W.2d 545, 552 (Iowa 2015). An abuse of discretion exists when “the district court exercises its discretion on grounds or for reasons that were clearly untenable or unreasonable.” State v. Thompson, 856 N.W.2d 915, 918 (Iowa 2014).

Merits: A sentence is imposed following a conviction in a criminal proceeding in order to give the defendant the maximum opportunity for rehabilitation and to protect the community. Iowa Code § 901.5 (2021); State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977). The court has discretion within

the applicable statutory framework to determine the sentence that will best meet these goals. See State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979).

When a sentence is not mandatory, a district court must exercise its discretion in determining what sentence to impose and additionally demonstrate this exercise of discretion by stating on the record the reasons for the particular sentence imposed. State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996); see also Iowa R. Crim. P. 2.23(3)(d) (2022). Generally, the district court is not required to give the reasons for rejecting particular sentencing options. State v. Thomas, 547 N.W.2d at 225. In applying discretion, the court should weigh and consider all pertinent matters in determining proper sentence:

the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. August, 589 N.W.2d 740, 744 (Iowa 1999) (citations omitted).

The legislature has also specified sentencing factors, which include the following:

- a. The age of the defendant.
- b. The defendant's prior record of convictions and prior record of deferments of judgment if any.
- c. The defendant's employment circumstances.
- d. The defendant's family circumstances.
- e. The defendant's mental health and substance abuse history and treatment options available in the community and the correctional system.
- f. The nature of the offense committed.
- g. Such other factors as are appropriate.

Iowa Code § 907.5(1) (2021). In determining whether the district court considered the relevant factors in imposing a sentence, the Court looks to all parts of the record to find supporting reasons. State v. Lumadue, 622 N.W.2d 302, 304 (Iowa 2001); State v. Boltz, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

In general, when a sentencing court has options to grant probation or impose incarceration, it must exercise its discretion with respect to such options and give reasons for the choices made. State v. Thomas, 547 N.W.2d at 225. A

good sentence is one which can reasonably be explained. State v. Matlock, 304 N.W.2d 226, 228 (Iowa 1981). A sentencing court has a duty to consider all the circumstances of a particular case. State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977). In the end, a court makes each sentencing decision on an individual basis and seeks to fit the particular person affected. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979). Rehabilitation is a fundamental goal of sentencing. State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002).

Rutherford contends the District Court abused its discretion by failing to adequately consider his medical difficulties and need for treatment in fashioning its sentence. Rutherford requests resentencing.

A defendant's need for medical care can be a mitigating factor at sentencing. See Iowa Code § 907.5(1)(g) (2021) (sentencing court may consider other factors as appropriate); State v. Mealancon, 334 So.3d 792, 804-05 (La. Ct. App. 2021)

(court meaningfully considered defendant's medical concerns when it imposed less than the maximum sentence and related the concerns to the jail so defendant could obtain treatment); State v. Arrington, 855 P.2d 133 (N.M. Ct. App. 1993) (upholding trial court's finding that incarceration would constitute a "deliberate indifference to Defendant's serious medical needs" in violation of constitutional proscription against cruel punishments); State v. Lynch, 312 N.W.2d 871, (Wis. Ct. App. 1981) ("A defendant's need for specialized treatment is a factor for the trial court to consider when choosing a disposition for a convicted defendant, and the trial court may impose it as a condition of probation."); People v. Kosanovich, 387 N.E.2d 1061, 1064 (Ill. App. Ct. 1979) (citing defendant's need for health care in vacating prison sentence); But see State v. Lynch, 312 N.W.2d 871 (Wis. Ct. App. 1981) ("The Constitution does not impose upon a trial court an affirmative duty to ascertain, on the record, the availability of a particular program of treatment before it sentences a

defendant to a prison term. It is not an abuse of discretion to sentence a defendant to prison without making such a finding.”).

The plea agreement the parties entered into acknowledged that Rutherford would be sentenced to five years on each count and that the counts would run consecutively to one another. (9/20/21 Written Waiver p. 6) (App. p. 15). The plea agreement also acknowledged that Rutherford retained his right to ask for a suspended sentence with probation. (9/20/21 Written Waiver p. 6)(App. p. 15).

At the sentencing hearing, the State asked that Rutherford be sentenced to prison and that the sentence not be suspended. (Sent. Tr. p. 4 L.13-15). The State based its recommendation on Rutherford’s criminal history, his prior failure on pretrial release and probation, and the nature of the offense. (Sent. Tr. p. 7 L.10-16).

Defense counsel asked that Rutherford’s sentences be suspended with probation for five years. (Sent. Tr. p. 4 L.20-

24). Defense counsel based his recommendation on Rutherford's diagnosis of throat cancer, which required treatment and was getting worse while he was being held in jail without treatment. (Sent. Tr. p. 4 L.24-p. 5 L.3). Counsel mentioned Rutherford also required treatment for Hepatitis C, which was also not being properly treated in jail. (Sent. Tr. p. 5 L.4-11). Defense counsel suggested placement at the halfway house or potentially ankle monitoring would allow Rutherford to get the treatment he needed while under supervision. (Sent. Tr. p. 5 L.17-p. 6 L.5). Rutherford likewise told the court that he needed cancer and liver treatments. (Sent. Tr. p. 6 L.9-14).

The presentence investigation report made a brief mention of Rutherford's self-reported medical issues. It noted Rutherford's report of liver damage, kidney failure, and thyroid cancer. (PSI p. 10 of 12)(Conf. App. p. 25). It also listed Rutherford as saying he was waiting for surgery for his thyroid cancer, and that he should be undergoing dialysis but was

not. (PSI p. 10 of 12)(Conf. App. p. 25). Under the “Problems and Needs” portion of the Recommendations section, the report mentioned Rutherford “appears to have health problems.” (PSI p. 12 of 12)(Conf. App. p. 27). The report indicated he was “currently receiving medical treatment,” though there is no indication in the report he had received any medical treatment outside of substance abuse treatment. (PSI p. 12 of 12)(Conf. App. p. 27). The PSI author recommended a sentence of incarceration, but did not specifically refer to Rutherford’s medical conditions in explaining the recommendation. (PSI p. 12 of 12)(Conf. App. p. 27).

Ultimately, the District Court decided not to suspend the sentence and instead imposed an indeterminate term of imprisonment not to exceed 15 years. (Sent/ Tr. p. 8 L.4-14, 25-p. 9 L.6). The court explained the specific reasons for the sentence imposed:

[THE COURT:] The reasons for sentence, sir:
I've taken into account your prior criminal record.

I've taken into account your job history, which is poor to nonexistent.

It appears you have two kids. You don't have -- it appears you have limited contact with one of them. Now you're telling me here today you have several kids.

You're not able to follow the rules of pretrial release or, it doesn't appear, probation either. You're not going to go to absolutely no stability.

Sir, you just seem to be kind of aimless at this point in your life. *If you do have medical conditions that need to be dealt with, I think the prison system at this time would provide the best opportunity for you to get those taken care of.*

Those are the reasons for the sentence here today. I believe they should also run consecutive due to the -- what I consider the serious nature of the offenses, harm to the community. Given the fact that you have been in trouble several times before, I think all those factors would indicate that consecutive is appropriate in this case.

(Sent. Tr. p. 10 L.5-24) (emphasis added).

The District Court abused its discretion in failing to properly consider Rutherford's medical conditions as mitigating factors. First, it appears the court questioned the validity of Rutherford's claimed medical conditions, suggesting that "if" he had medical conditions, the prison system could deal with them. (Sent. Tr. p. 10 L.15-18). Nothing in the

record disputes or contradicts Rutherford's claims regarding his health.

Second, the District Court made a blanket assumption that Rutherford could receive adequate treatment through the prison system without any record evidence supporting such an assumption. The presentence investigation report briefly referred to Rutherford's claimed medical issues, but then provided no information regarding treatment services available in the prison for those conditions. (PSI Report p. 10 of 12) (Conf. App. p. 25). The record does not support the District Court's assertion that Rutherford would receive adequate medical treatment in prison.

The District Court cited its reasons for failing to suspend Rutherford's sentence but did not adequately consider his need for medical treatment and appeared to question the validity of his claims. This is hardly the sort of "meaningful consideration" expected when determining the appropriate sentence. State v. Mealancon, 334 So.3d 792, 804-05 (La. Ct.

App. 2021). Sentencing courts are expected to make sentencing decisions on an individual basis to fit the particular person affected. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979). The sentencing court failed to do so when it gave little consideration to Rutherford's medical ailments and need for treatment. Rutherford's sentence should be vacated and his case remanded for resentencing with proper consideration of his medical needs.

II. The District Court erred in accepting Rutherford's plea to Theft in the Second Degree where nothing in the record established he had the necessary intent to permanently deprive another of their property or that he understood the charge required such intent.

Preservation of Error: As a general rule, a defendant must first file a motion in arrest of judgment to preserve error from a guilty plea on direct appeal. Iowa Rs. Crim. P. 2.8(2)(d), 2.24(3)(a) (2022). Alternatively, a defendant seeking to challenge the factual basis for his guilty plea on appeal would preserve error by claiming plea counsel ineffective for allowing entry of the plea and not filing a motion in arrest of

judgment. See, e.g., State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001).

As discussed in the jurisdictional statement above, Rutherford contends the District Court had an independent duty to arrest judgment if it failed to ensure a defendant's guilty plea was knowing, voluntary, and supported by a factual basis. See Iowa R. Crim. P. 2.8(2) (2022) (court's duty to ensure valid plea); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969)(court may not delegate its responsibilities for ensuring valid plea to anyone else). Assuming this Court agrees with these propositions, error has been preserved by the filing of the notice of appeal with good cause.

Standard of Review: Claims involving the interpretation of a rule are usually reviewed for correction of errors at law. State v. Smith, 924 N.W.2d 846, 850 (Iowa 2019). To the extent the factual basis claim implicates constitutional standards, review is de novo. State v. Ortiz, 789 N.W.2d 761, 764 (Iowa 2010).

Merits: In State v. Finney, the Iowa Supreme Court recognized two strands of constitutional analysis relating to challenges to an invalid factual basis. State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2015). The first strand involves a Sixth Amendment violation where the defendant’s attorney provides incompetent advice in allowing his client to plead guilty where an objective review of the record reveals an inadequate factual basis. Id. at 54-55.

The second strand under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution obligates a district court to find a defendant has made a knowing and voluntary choice to waive their constitutional rights and plead guilty. Id. at 55. “When a Fifth Amendment due process voluntariness claim based on a lack of factual basis is asserted, federal courts look on the record developed at the plea colloquy for evidence of the subjective state of mind of the defendant.” Id.

In this case, neither an objective review of the record nor the record of Rutherford's subjective state of mind permits conviction for Theft in the Second Degree.

For a guilty plea to be truly voluntary, a defendant must have an understanding of the law in relation to the facts.

McCarthy v. United States, 394 U.S. 459, 466 (1969). The judge must not only question the defendant regarding his knowledge of the nature of the charge but also establish that there is a factual basis for the plea. Id. at 467.

Rutherford entered a written plea to the offenses charged in his case. The written plea did not provide the elements for the crime of Theft in the Second Degree. (9/20/21 Written Waiver)(App. pp. 10-15). While the offense of Felon in Possession of a Firearm might be self-explanatory from the name, Theft in the Second Degree is not. See Brainard v. State, 222 N.W.2d 711, 714 (Iowa 1974)(name of offense can be sufficiently descriptive). Theft can be committed in numerous ways, and theft in the traditional sense requires an

intent to permanently deprive, not simply a deprivation. See Iowa Code § 714.1 (2021)(defining alternatives of theft); State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999) (theft under Iowa Code section 714.1(1) requires an intent to permanently deprive someone of their property).

To establish Rutherford's guilt for Theft in the Second Degree, the State would have to establish that "on or about July 23, 2021 at or near in the County of Washington, State of Iowa, did take possession or control of the property of another, the property having a value in excess of \$1,500 but not exceeding \$10,000, with the intent to deprive the other thereof." (7/30/21 Trial Information Ct. III)(App. pp. 5-6). The trial information was the only document that even remotely laid out the elements for Theft in the Second Degree, and Rutherford's written waiver indicated he had reviewed the trial information. See State v. Yarborough, 536 N.W.2d 493, 497 (Iowa Ct. App. 1995)(finding defendant was aware of elements of offense based on description in trial information).

Notably, Rutherford's written plea did not specifically acknowledge he understood the nature of the offense. In fact, his written statement of what he did to constitute Theft in the Second Degree reveals he did not have an understanding of the nature of the charge in relation to the facts:

I admit that I did, on or about the 23rd day of July, 2021... I took control of property, two guns, that were not mine and deprived the owner of them. The guns had a value of between \$1500 and \$10,000.

(9/20/21 Written Waiver p. 2)(App. p. 11). It is not sufficient for Theft to admit that you *deprived* someone of their property – you have to admit you had the *intent to permanently* deprive them of their property. State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999).

Nor do the minutes of testimony provide a factual basis for the Theft charge. According to the minutes of testimony and attachments, Melissa Beaudette would testify that she was the owner of the firearms and that she did not give permission or authority to Rutherford to take them.

(7/30/21 Minutes p. 1)(Conf. App. p. 4). Rutherford told officers that Beaudette had asked him to remove the two guns and an ammunition can from her house. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15). When officers returned the can and the guns to Beaudette, she denied asking Rutherford to remove the items. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15). Rutherford's statement to officers is consistent with his written plea statement that he simply deprived her of the property and inconsistent with an intent to permanently deprive her of the items.

Rutherford's plea was faulty in two respects. First, it failed to establish a factual basis for Theft in the Second Degree. Second, it failed to establish that he understood the nature of the charge in relation to the facts. The District Court should not have accepted Rutherford's plea when the written plea did not show it was knowing, voluntary, and supported by a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969);

State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). The remedy is to vacate the plea and remand the case to the District Court to fulfill its obligations in ensuring a valid plea. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974).

Finally, Rutherford recognizes Iowa Code section 814.29 now provides:

If a defendant challenges a guilty plea based on an alleged defect in the plea proceedings, the plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred. The burden applies whether the challenge is made through a motion in arrest of judgment or on appeal. Any provision in the Iowa rules of criminal procedure that are inconsistent with this section shall have no legal effect.

Iowa Code § 814.29 (2021).

Rutherford respectfully submits this provision has no practical impact upon the remedy in this case. A district court may not accept a guilty plea that is involuntary or lacking in a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). A defense attorney

may not allow their client plead guilty to an offense that has no factual basis. State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2013). See also Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005) (prosecutor commits ethical violation by amending charge to cowl lamp violation without probable cause). Under the circumstances, the “more likely than not” standard has no application to a situation where a defendant would not be allowed to plead guilty without a factual basis.

CONCLUSION

The District Court abused its discretion when it failed to properly consider Rutherford’s need for medical treatment when it chose to impose a term of incarceration. The court also erred in accepting Rutherford’s guilty plea to Theft in the Second Degree when it lacks a factual basis and a showing that Rutherford understood the nature of the offense in relation to the facts.

For all the reasons discussed above, Defendant-Appellant Murphy Rutherford respectfully requests this Court vacate his judgment and sentence and remand his case to the District Court to make further record on his understanding of and the factual basis for his plea, and for resentencing.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$6.32, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
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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) because:

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/s/ Theresa R. Wilson

Dated: 12/8/22

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