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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed November 22, 1978
vs.	)	
JOHN CLAIR FICHTNER,	)	669 / 61774
Appellant.	)	

Appeal from Black Hawk District Court - Roger F. Peterson and Karl Kenline, Judges.

Defendant appeals plea of guilty alleging he was not aware of the intent to defraud element in the charge of false drawing and uttering a check and that he was denied the effective assistance of counsel. - Affirmed.

Paul T. Shinkle, of Ackerman & Shinkle, Cedar Falls, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond Sullins, Assistant Attorney General and David Correll, Black Hawk County Attorney, for Appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant appeals his plea of guilty to the crime of false drawing or uttering of checks in violation of § 713.3, The Code (1977). On appeal, defendant alleges he did not have a full understanding of the nature of the charge in that he was not fully aware of the element of intent to defraud at the time of the entering of his plea. He also alleges he was denied the effective assistance of counsel prior to entering his plea of guilty.

Defendant's claim that he did not fully understand the nature of the charge goes to the heart of what is commonly called the first Sisco requirement. Brainard v. State, 222 N.W.2d 711, 714 (Iowa 1974); State v. Sisco, 169 N.W.2d 542 (Iowa 1969). See also Hoskins v. State, 246 N.W.2d 266, 267 (Iowa 1976). Defendant admits writing the check, but denies that he did so with an intent to defraud. He alleges that the meaning of the term 'intent to defraud' was explained to him only after new counsel was appointed to represent him and after his plea was entered. Defendant alleges that although he wrote the check knowing there were insufficient funds in the bank to cover the same, he intended to sell a boat he owned to get the money to pay off the check before it was presented for payment. Thus, he argues, there was no intent to defraud.

Intent to defraud is an essential element under § 713.3, The Code. State v. Mullin, 225 N.W.2d 305, 307 (Iowa 1975). However, it is not necessary that the trial court specifically explain each element of the offense, if under all the circumstances it is apparent the accused understood the nature of the charge. State v. Reaves, 254 N.W.2d 488, 491 (Iowa 1977); Hoskins, supra at 268; State v. Townsend, 238 N.W.2d 351, 355 (Iowa 1976); State v. Hansen, 221 N.W.2d 274, 276 (Iowa 1974).

The question of whether the defendant understood the nature of the charge may turn on whether defendant read the indictment or information, whether the criminal statute was read to him, or whether he otherwise indicated a familiarity and knowledge of the meaning of the words such as "intent." Hoskins, supra. It may also turn on assurances of defense counsel. Reaves, supra at 494. Other relevant factors include the complexity of the charge and the experience and education of the defendant. Hoskins, supra. Finally, it is permissible to consider subsequent testimony, such as that in a hearing on motion for arrest of judgment or post-conviction relief, in determining whether the defendant understood the nature of the charge at the time he entered his plea. Adams v. State, 269 N.W.2d 442 (Iowa 1978).

In the instant case, at the beginning of the colloquy between the trial court and the defendant, the court stated:

> You understand the kind of a charge this is, that on September 7, 1977 in Black Hawk County, Iowa, with intent to defraud you did make a check in the amount of two hundred six dollars drawn on the People's Bank & Trust Company, Waterloo, Iowa, and negotiated the same at Smitty's Tire & Appliance without having funds or arrangements with said bank to pay said check, contrary to and in violation of Section 713.3 of the Code of Iowa.

to which defendant replied, "Yes, sir." The trial court also asked defendant's attorney if there was any reason why the defendant should not plead guilty, to which he responded "I know of none".

At the time he plead guilty, defendant also filed a written plea. Although the plea was prepared by defendant's lawyer, it was signed by him. The written plea stated in part that "My lawyer has informed me of the elements of the crime I have been charged with, that the State would have to prove against me. . . [and] the elements that the State would have to prove. . . are . . . 2. done with intent to defraud." Defendant also stated in response to possible defenses, if any: "None".

However, at the hearing on his motion in arrest of judgment, defendant changed his story. He stated at the time he signed the written plea, he didn't understand what "done with intent to defraud" meant. He testified it was explained later, in preparation for the motion under consideration and that he intended to cover the check with funds which he received from the sale of his boat, of which sale his attorney was aware. On cross-examination defendant admitted a prior plea to violating the Arkansas Hot Check Law, which he stated was comparable to False Drawing and Uttering. He also stated that offense involved the intent to defraud. Defendant then stated that he didn't know whether the element was necessary, "but there was, [had] been intent to defraud, there". Finally, he stated that this was not an important consideration to him on the Arkansas pleas because he did not intend to make the checks good at the time he wrote them.

Our review of the testimony convinces us that defendant understood the nature of the charge. The trial court read the substance of the information, which is set out above, to defendant. All the necessary elements of the crime are contained therein. Cf. State v. Wall, 239 N.W.2d 548 (Iowa 1976). Defendant admitted he understood the charge. His attorney stated he knew no reason why defendant should not plead guilty. In the written plea which he signed, defendant admitted he had no defense although he now argues to the contrary. The trial court found defendant had one and one half years of college education. Defendant had previously pled guilty to violation of the Arkansas Hot Check Law, a prior felony conviction of a similar or almost identical nature. Cf. State v. Brown, 262 N.W.2d 557, 562 (Iowa 1978); Hoskins v. State, supra. We find defendant had the requisite understanding at the time he entered his plea. See State v. Speer, 245 N.W.2d 331, 332 (Iowa 1976).

Defendant's other contention on appeal is that he was denied effective assistance of counsel where his attorney spent only ten minutes explaining the effects of a plea of guilty prior to entering the plea and because his attorney did not indicate to him the use of a defense to the crime charged based on a lack of intent to defraud where the attorney was allegedly aware of the facts indicating that intent was lacking. A claim of ineffective assistance of counsel is an alleged violation of a basic constitutional safeguard, accordingly, review of the record is de novo. Long v. Brewer, 253 N.W.2d 549, 552 (Iowa 1977).

The right to counsel means effective assistance of an attorney. Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976). That right is fully applicable to guilty pleas. Ogden v. State, 215 N.W.2d 335, 337-38 (Iowa 1974). The test is whether under all the circumstances counsel's performance was within the range of normal competency. Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977); Zacek v. Brewer, supra. To warrant finding a deprivation of due process, such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. Cleesen, supra; Long v. Brewer, 253 N.W.2d at 553; State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). The burden is upon the defendant to show the ineffectiveness of his counsel and that the plea related proceedings did not measure up to the requisite fairness. Long, supra; State v. Kendall, 167 N.W.2d 909, 910-11 (Iowa 1969).

A review of the record discloses defendant has failed to provide an affirmative factual basis from which this court can determine that trial counsel in the instant case was ineffective. We are asked to speculate on the issue and we decline to do so. State v. McCray, 231 N.W.2d 579, 581 (Iowa 1975). There is no evidence in the record outside of defendant's own testimony that his attorney had any knowledge of the arrangement to sell the boat except for his own self-serving statements. Counsel's lack of knowledge could be true even though defendant testified that his former attorney was currently representing him over the marina's repossession of his boat. Although defendant attempts to bolster his argument by claiming that counsel led him to believe probation would be granted, we are nevertheless not persuaded. The trial court, before accepting the plea, asked defendant if anybody had promised him anything, to which he replied, no. There were no unfulfilled promises with regard to the guilty plea. See e.g. State v. Whitehead, 163 N.W.2d 899, 902-03 (Iowa 1969).

As we find no basis on which to hold defendant's counsel ineffective, this appeal must be affirmed. This holding is without prejudice to defendant's right to raise this issue by application for post-conviction relief, where a full evidentiary hearing may be had and where counsel will have an opportunity to respond to defendant's charges. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

AFFIRMED.