IN THE COURT OF APPEALS OF IOWA

No. 9-556 / 98-0675
Filed March 15, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HEATH WADE JOHNSON,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Wright County, Ronald H. Schechtman (plea), Kurt L. Wilke (sentencing), Judge.

Heath Johnson appeals from his conviction, following a guilty plea, for delivery of methamphetamine in excess of five grams in violation of Iowa Code section 124.401(1)(b)(7) (1997). **AFFIRMED.**

Joseph B. McCarville, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Lee E. Poppen, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Defendant Heath Wade Johnson appeals from judgment and sentence entered upon his plea of guilty to the charge of delivery of a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(b)(7), a class "B" felony. Defendant contends (1) there was no factual basis for his plea; (2) he was charged with a class "B" felony when he should be been charged with a class "C" felony; (3) the district court in sentencing him impermissibly considered portions of the presentence investigation report; (4) his attorney was ineffective in a number of ways. We affirm.

Defendant pled pursuant to a plea agreement that provided the State would dismiss another charge and recommend waiver of the mandatory minimum sentence in Iowa Code section 124.413 if defendant were incarcerated.

At sentencing defendant was asked by the judge if he had delivered more than five grams of methamphetamine. Defense counsel said 5.67 grams were delivered. This amount was confirmed by defendant. Defense counsel told the court he and defendant had received and reviewed the presentence investigation report and had no additions or changes.

The report recommended defendant serve twenty-five years. Defendant was denied probation and was sentenced to serve a term not to exceed twenty-five years as recommended in the presentence investigation report. The court advised defendant of his right to file a motion in arrest of judgment, pursuant to Iowa R. Crim. P. 8(2)(d). No motion was filed.

Defendant first contends there was no factual basis for his plea. He claims the methamphetamine he delivered weighed less than five grams. He

advances there is proof, not a part of this record, which would exonerate him. He asks we remand to the district court to supplement the record. Defendant also claims his attorney was ineffective in allowing him to plead to a crime which he claims was contrary to the evidence.

Johnson did not file a motion in arrest of judgment. Failure to do so bars appeal of his conviction. Iowa R. Crim. P. 23(3)(a). Nevertheless, this failure will not bar a challenge to a guilty plea if the failure resulted from the ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). To prevail on a claim of ineffective assistance of counsel defendant must prove his or her counsel failed in an essential duty and that prejudice resulted. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1997). To establish prejudice defendant must show there is a reasonable probability, that but for counsel's unprofessional errors, the results of the proceedings would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997).

Defendant's attorney would be found ineffective if he allowed the defendant to plead guilty to a charge for which no factual basis existed and thereafter failed to file a motion in arrest of judgment. *See Brooks*, 555 N.W.2d at 448; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). If a factual basis exists for a plea, an attorney generally will not be found ineffective in allowing a defendant to plead guilty. *See Brooks*, 555 N.W.2d at 448. In determining whether a factual basis exists, we examine the entire record before the district court. *Id.* at 449; *Hack*, 445 N.W.2d at 263.

John admitted he delivered over five grams of methamphetamine. The minutes of testimony show seven grams were delivered. The minutes of

testimony state: (1) a confidential informant paid defendant $550 to purchase about seven grams of methamphetamine; (2) after the informant gave the money to the defendant, Josh Hunt, who was with defendant, handed the informant one gram of methamphetamine; (3) Hunt said he would be back later with an additional six grams; (4) defendant returned and gave the informant an additional six grams of methamphetamine.

The district court did not error in finding there was a factual basis for Johnson's guilty plea. Since a factual basis did exist, defense counsel was not ineffective in allowing Johnson to enter a guilty plea and there was no duty for counsel to file a motion in arrest of judgment.

Defendant contends the State erred in charging him with a class "B" felony. He argues for the weight of the methamphetamine to be over five grams it was necessary to aggregate the amount of the substance from more than one delivery. Defendant asserts he should have been charged with a class "C" felony pursuant to Iowa Code section 124.401(b)(6) for delivering less than five grams.

All defenses are waived in entering a plea except the one that the information charges no offense and, of course, the right to challenge the plea itself. *See State v. Kobrock*, 213 N.W.2d 481, 483. Defendant waived his objections to the trial information and minutes of testimony by entering his plea. He is not entitled to have his plea overturned. Defense counsel was not ineffective in failing to object to the charge.

Johnson next claims the sentencing judge considered evidence of other bad acts and unproven crimes in denying him probation. He requests his sentence be vacated and the case be remanded for resentencing.

Our scope of review on this issue is for correction of errors of law. Iowa R. App. P. 4; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence imposed by a district court will not be overturned unless we find an abuse of discretion or a defect in the sentencing procedure, such as a consideration by the district court of impermissible facts. *See State v. Taylor*, 587 N.W.2d 756, 761 (Iowa 1998). When the court considers improper factors, the case must be remanded to the trial court for resentencing without consideration of these factors. *See State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982).

A court may not consider an unproven or unprosecuted offense when sentencing defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998).

The fact that the sentencing judge was merely aware of an uncharged offense is not sufficient to overcome the presumption that his or her discretion was properly exercised. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). In order to overcome this presumption, there must be an affirmative showing that the trial judge relied on unproven charges. *Id.*

In sentencing the defendant the court stated that the defendant had foreclosed any consideration of probation by admitting drug use and by involvement in other criminal acts.

The court specifically said:

> Mr. Johnson, facing the possibility of twenty-five years in prison would go out and in the meantime be involved in other criminal activities dealing with drugs . . . I find that absolutely amazing that anyone would be that foolish. Any chances that you had of

> probation you just threw away when you were involved in that. Even by your admitted drug use.

Defendant denies he made any admissions he continued to use drugs. Defendant was charged on November 8, 1997. The presentence investigation report said, "The defendant admitted to using marijuana, crank, coke and acid. At the time of the presentence interview on February 19, 1998, defendant states that he had used marijuana in January of 1998."

The presentence investigation report also related defendant had since this charge been arrested for possession of methamphetamine and in view of his ongoing criminal behavior shown by his arrest on February 28, 1998 he was not an appropriate candidate for probation supervision.

If a defendant does not object to matters in a presentence investigation, the sentencing court is free to consider those matters. *See Witham*, 593 N.W.2d at 678.

Johnson did not object to the accuracy of the report or suggest any modifications though given the opportunity to do so. The court was free to consider it. Since the presentence investigation report contained an admission by the defendant of drug use, the court's consideration of drug involvement was proper.

We have considered other claims made by defendant and find them to be without merit. We affirm the conviction. We deny defendant's request to have the matter remanded.

AFFIRMED.