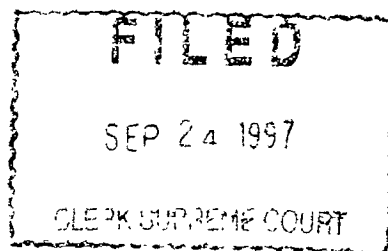


IN THE COURT OF APPEALS OF IOWA

No. 7-425 / 96-2009
Filed September 24, 1997

000369



STATE OF IOWA,
Appellee,

vs.

LANETTE ANDERSON
a/k/a LYNETTE FAYE REID,
Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
District Associate Judge.

Defendant appeals from judgment and sentences entered upon her convictions
for two counts of third-degree theft and one count of escape. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
William Davis, County Attorney, and Marc Gellerman, Assistant County Attorney,
for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Lynette Anderson, defendant, challenges her guilty pleas claiming they were not voluntary or knowing and the district court did not engage in a personal colloquy to determine if they were. She further claims the court erred in denying her motions for arrest of judgment and to withdraw her guilty pleas which were made in the middle of her sentencing proceedings. Because she did not preserve these issues, she is not entitled to appellate review. Even if she were, her challenges to her guilty pleas are without merit. The trial court is affirmed.

I. Background Facts and Proceedings.

Anderson was taken into custody by Phar Mor security when she was caught stealing bottles of liquor which she had placed in her purse. By the time police officers arrived she appeared to be having a seizure. She was taken to the hospital, but escaped from her hospital room while the officer went to get a cup of coffee. Less than a month later, she was stopped for shoplifting at J.C. Penney's. While waiting for police to arrive and take her into custody, she claimed she was having a miscarriage, but refused medical treatment. She was charged with two counts of third-degree theft and one count of escape, in violation of Iowa Code sections 714.2(3) and 719.4(2).

Anderson signed written guilty pleas to all three charges. Anderson and her attorney filed the pleas. Each of the guilty pleas contained the following paragraph:

10. If I claim there are any irregularities or errors in this guilty plea, I must file a Motion in Arrest of Judgment not later than 45 days after this plea of guilty or in any case, not later than five days before the day of sentencing. Failure to do so will preclude my right to assert any defects in this plea in any appeal to the Iowa Supreme Court.

Anderson did not make a motion for arrest of judgment before sentencing. She did not file a motion to withdraw her pleas before sentencing. During the sentencing proceedings, Anderson motioned for arrest of judgment and to withdraw her guilty pleas. The court denied her motions and sentenced her to two years in prison and a fine of \$500 for her first theft charge; two years in prison and a fine of \$500 for her second theft charge; and one year in prison and a fine of \$250 for her escape charge. Anderson appeals.

II. Scope of Review.

This court reviews plea proceedings for correction of errors at law. Iowa R. App. P. 4. In considering a challenge to a guilty plea proceeding involving constitutional safeguards, we make an independent evaluation of the circumstances as shown by the entire record, which we review de novo. *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

III. Preservation of Error for Appellate Review.

Before sentencing, Anderson told her attorney she did not want to file a motion in arrest of judgment, but would like to proceed with sentencing. At the beginning of the sentencing proceedings the district court directly asked Anderson

if she wished to proceed with sentencing, and she replied: “yes.” During proceedings, after conferencing with her attorney, Anderson decided to file a motion in arrest of judgment. The court denied the motion.

Iowa Rule of Criminal Procedure 23(3)(a) requires a defendant challenge any defect in a guilty plea proceeding by a motion in arrest of judgment. If the motion is not filed, the defendant is barred from challenging the plea on appeal. The latest date a motion for arrest of judgment can be made is “five days before the date set for pronouncing judgment.” Iowa R. Crim. P. 23(3)(b). Anderson did not file a motion in arrest of judgment before sentencing. Her motion in arrest of judgment filed during the sentencing proceedings was untimely. The court correctly denied it. Anderson was adequately informed of the necessity of filing a motion in arrest of judgment by paragraph ten of her guilty plea.¹ Because she was informed of the motion requirement and did not file a timely motion she is precluded from challenging the plea on appeal.

In the alternative, Anderson motioned to withdraw her pleas during the sentencing proceedings. A defendant may only move to withdraw a guilty plea before judgment and sentencing. Iowa R. Crim. P. 8(2)(a)(1997). It is discretionary with the trial court whether to grant or deny a withdrawal of a plea of guilty. *State*

¹ At the sentencing proceedings, her attorney testified it was his understanding that Ms. Messer, Anderson’s attorney, who filed her guilty pleas, went through the individual paragraphs of the plea of guilty with Anderson. This was confirmed by Mr. Montgomery, the bondsman present at the plea signing.

v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987). The trial court was correct in denying the untimely motion. Further, the motion to withdraw the pleas is not preserved for appellate review.

IV. Waiver of Rule 8(2)(b) Procedures.

Even if Anderson had preserved the challenge of her guilty plea for appeal, the trial court would be affirmed because her challenge is without merit. Anderson challenges the acceptance of her guilty plea, asserting her plea was not voluntarily and intelligently made. She asserts that before she signed the guilty pleas she did not understand the plea agreement, the penalties for escape, or that there was a possibility her sentences would run consecutively.

The adequacy of a plea proceeding is determined under Iowa Rule of Criminal Procedure 8(2)(b). In the case of serious and aggravated misdemeanors, the legislature expressly authorizes judges to dispense with rule 8(2)(b) procedures with defendant's approval. Anderson was charged with two counts of third-degree theft, aggravated misdemeanors, *see* Iowa Code § 714.2(3), and one count of escape, a serious misdemeanor, *see* Iowa Code § 719.4(2). Her written guilty plea evidenced her understanding and knowing waiver of the rule 8(2)(b) requirements. Even when a written plea does not include a specific request to waive rule 8 requirements, simply executing a written plea constitutes approval of a district court waiver of the plea-taking requirements. *See Patten v. State*, 553 N.W.2d 336, 337 (Iowa App. 1996).

The personal colloquy requirement, like the other components of Iowa Rule of Criminal Procedure 8(2)(b), codifies the due process mandate that a waiver of constitutional rights, implicit in all guilty pleas, must be made voluntarily. *State v. Mensah*, 424 N.W.2d 453, 455 (Iowa 1988). The court did not engage in a colloquy with Anderson before the sentencing proceedings began, however, it did throughout the proceedings make substantial efforts to ensure her pleas were voluntary, including questioning Anderson and her attorney.² A court need only substantially comply with the requirements of rule 8(2)(b). *Odham*, 515 N.W.2d at 46. The court substantially complied with the rule.

Anderson also argues the court erred in not inquiring as to whether a plea agreement existed and the court erred in not waiting fifteen days after judgment before sentencing her as required by Criminal Rule 22(1). Anderson's assertion a plea agreement existed is not credible. However, if a plea agreement would have existed, defendant should have filed a motion in arrest of judgment before the middle of her sentencing proceedings. Further, she waived the Rule 22(1) fifteen-day waiting period when she agreed the judge should proceed with sentencing. The trial court's acceptance of the guilty pleas and the court's sentences are affirmed.

AFFIRMED.

² The court began the proceedings by asking Anderson if she would like to proceed with sentencing. She said "yes." During the proceedings the court questioned Anderson about her understanding of the guilty pleas and the sentences for each. The court allowed Anderson to recess during the sentencing and talk to her attorney about her pleas. The court questioned her attorney about if Anderson had the plea and its terms explained to her.