FILED
FEB 5 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DENNIS LEO ERNSTING,)

Petitioner-Appellant,) Filed February 5, 1980

vs.)

STATE OF IOWA,) 328
2-63024

Defendant-Appellee.)

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Petitioner appeals denial of postconviction relief alleging trial court erred by failing to set aside his conviction based on an alleged improper guilty plea. - Affirmed.

Penelope B. Tvrdik & Kjas T. Long, Waterloo, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for defendant-appellee.

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

PER CURIAM

Petitioner, Dennis Leo Ernsting, appeals denial of postconviction relief alleging trial court erred by failing to set aside his conviction based on an alleged improper guilty plea. We affirm.

Ernsting sought postconviction relief to overturn his conviction for larceny of a motor vehicle, in violation of section 321.82, The Code 1975. On appeal, he alleges his conviction was based on a guilty plea involuntarily given. Initially, we find petitioner waived the right to challenge the factual basis for his plea in this postconviction action. Petitioner did not attack the factual basis for his plea on direct appeal nor did he establish reason at the postconviction hearing for failing to do so. Accordingly, review of the matter is waived. See Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979); Bledsoe v. State, 257 N.W.2d 32, 34 (Iowa 1977).

Petitioner has not waived his right to contest the voluntariness of the proceedings since that claim depends on evidence not in the record of the plea proceeding. Redding, 274 N.W.2d at 316. In our review of these contentions, we make our own evaluation of the totality of the circumstances under which the postconviction ruling was made because of the constitutional nature of the proceeding. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); State v. Lemburg, 257 N.W.2d 39, 45 (Iowa 1977). We are bound by the ruling below if the fact findings are supported by substantial evidence and the conclusions are justified as a matter of law. Stanford, 279 N.W.2d at 31.

In light of these standards, we believe the trial court conclusion "petitioner has still failed to establish the allegations of his petition by a preponderance of the credible evidence" is correct. Petitioner's evidence consisted of his testimony and testimony and depositions of prisoners incarcerated with him at the Black Hawk county jail during the time of his criminal trial. This evidence is alleged to have proven petitioner's claim he was under the influence of drugs at the time he pleaded guilty and thus unable to enter a voluntary plea of guilty. While we think petitioner's evidence more likely is material to a claim of incompetency to plead guilty rather than inability to enter a voluntary plea, in either case, we believe the trial court properly found petitioner failed to carry his burden of proof.

No testimony was elicited from petitioner's original defense counsel nor was any expert medical evidence presented to support his claim. The trial court found petitioner's testimony "totally incredible and unworthy of belief" and the remaining prisoners' testimony unpersuasive. As trier of fact, the lower court was superiorily situated to assess witness credibility and properly carried out that task. We agree with trial court's conclusion in light of the dearth of competent evidence in the record.

We have considered petitioner's attack on the guilty plea proceeding itself and conclude it was adequate under Sisco-Brainard. State v. Fluhr, No. 62749 (Iowa, filed January 23, 1980) does not control our analysis here since Iowa R. Crim. P. 8(2)(b) was not in effect at the time petitioner pleaded guilty. Rather, since petitioner was charged and tried under provisions of the old criminal code, our review focuses on compliance with Sisco-Brainard. While the colloquy below may not have paralleled the model of Sisco-Brainard, we think it was adequate to protect petitioner's rights. See State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977). The trial court inquired whether petitioner knew of the rights he was waiving and received an affirmative response. The court also asked whether the guilty plea was induced by representations, threats or promises and petitioner replied "No, sir." Those inquiries were directed to the willingness of petitioner to plead guilty and the trial court record sufficiently establishes the adequacy of the proceeding to determine voluntariness. While the colloquy might have been extended by additional questioning on items such as defendant's present mental state, expansion of it fell upon trial counsel's shoulders. Reaves, 254 N.W.2d at 494. Further, our review, with respect to the voluntariness of the guilty plea, is focused on petitioner's awareness, not the trial court's colloquy. Lemburg, 257 N.W.2d at 45. We find the record indicates requisite awareness on the part of petitioner.

Our independent evaluation of the totality of the circumstances leads us to the same conclusion reached below and accordingly we affirm the trial court judgment.

AFFIRMED.