FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THE STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 19, 1979
vs.)
JAMES DUANE VOLKER,) 266
Defendant-Appellant.) 61576

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Defendant appeals trial court's judgment and sentence entered on his plea of guilty to the crime of uttering a forged instrument in violation of section 718.2, The Code 1977, alleging trial court erred in accepting his guilty plea without establishing a factual basis to support the plea. He further contends he was denied effective assistance of counsel. AFFIRMED.

Larry J. O'Connor of Waterloo, for defendant-appellant.

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

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, James Duane Volker, appeals trial court's judgment and sentence entered on his plea of guilty to the crime of uttering a forged instrument in violation of section 718.2, The Code 1977. He alleges trial court erred in accepting his guilty plea without establishing a factual basis to support the plea. He further contends he was denied effective assistance of counsel due to counsel's failure to pursue a demurrer to the information despite counsel's knowledge the State's key witness could not be compelled to testify against defendant contrary to the provisions of section 622.7, The Code 1977. We affirm.

On May 19, 1977, defendant executed check no. 126 on the account of his alleged common-law wife, Marty J. Schlampp, by signing Schlampp's name to the check. The check was made payable to defendant in the amount of two hundred dollars and drawn on the Peoples Bank and Trust Company of Waterloo, Iowa. An information was filed in Black Hawk county on August 30, 1977, charging defendant with uttering a forged instrument in violation of section 718.2, The Code 1977. The Minutes of Testimony indicated Marty J. Schlampp would testify check no. 126 was a forgery. At defendant's September 2, 1977, arraignment and hearing on bond reduction, defendant's counsel orally demurred to the information on the ground that Mary J. Schlampp was defendant's common law wife. Following a discussion with trial court, counsel entered a plea of not guilty in lieu of pursuing the demurrer. Defendant filed a motion to dismiss on September 22, 1977, alleging Marty J. Schlampp was defendant's common-law wife and had given defendant consent to use her name on her checks. On October 3, 1977, defendant withdrew his plea of not guilty and entered a plea of guilty to the charge.

I. Challenge to the Guilty Plea. According to Iowa law in effect on the date defendant entered his plea of guilty, a defendant challenging the adequacy of his guilty plea was required to make a motion in arrest of judgment after trial and prior to filing a direct appeal. State v. Spence, 282 N.W.2d 131, 132 (Iowa 1979). In that motion, defendant must claim to have been unaware, as well as not advised, of the claimed omission in the proceeding. State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977).

Contrary to these requirements, defendant failed to make a motion in arrest of judgment. Defendant consequently is precluded from asserting any challenge to the plea proceedings on direct appeal.[1]

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[1] The State's failure to challenge this inadequate procedure, and the State's assertion during oral argument that Reaves applies only when a defendant applies for postconviction relief, is not dispositive.

II. Ineffective Assistance of Counsel. Defendant further claims he was denied effective assistance of counsel because defense counsel at trial did not pursue the defense of marital privilege under section 622.7, The Code 1977, which provides: "neither the husband nor wife shall in any case be a witness against the other . . . ."[2] Due to counsel's failure to utilize this defense, defendant contends his rights were prejudiced.

The present standard for judging the quality of representation of counsel in a criminal action in this jurisdiction is whether counsel's performance was within the "range of normal competency." State v. Killpak, 276 N.W.2d 368, 372 (Iowa 1969). See also State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Defendant must prove counsel did not perform within this range. Veverka, 271 N.W.2d at 750; State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978).

An accused is not deprived of effective assistance of counsel every time an attorney makes a mistake in judgment or error in trial strategy. Long v. Brewer, 253 N.W.2d 549, 558 (Iowa 1977). "Trial tactics may dictate that counsel forego certain avenues of defense in pursuit of the perceived best interests of the accused." Veverka, 271 N.W.2d at 750.

In this case, defendant signed a written plea and waiver which included his statement that he had been informed of the elements the State would have to prove in order to convict him and that he understood the agreement made with the county attorney regarding disposition of this case to be no habitual criminal charge would be filed and bond would be lowered to 10% of the $2500. The statement also included "I represent to counsel and the court that I did the following acts in connection with the charge made against me in this case: 'forge wife's name on closed account' " and " 'possible defenses, if any, . . . 'wife's checking account.' "

By failing to aver anything but counsel's failure to pursue a possible defense, defendant has not met his burden of proof. This allegation alone does not permit us to infer counsel was acting outside defendant's best interests.

Judgment of trial court is affirmed.

AFFIRMED.

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[2] Exceptions provided in section 622.7 are not relevant to this case.