IN THE COURT OF APPEALS OF IOWA

No. 5-452 / 95-0335

FILED
OCT 31 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee.

vs.

DERRICK F. MASUKU,

Appellant.

Appeal from the Iowa District Court for Marshall County, M. D. Seiser, Senior Judge.

Masuku appeals his conviction, following a guilty plea, for indecent exposure.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and James DeTaeye, County Attorney, for appellee.

Considered by Sackett, P.J. and Habhab and Huitink, JJ.

HUITINK, J.

On February 13, 1995, Masuku filed separate guilty pleas to one count of indecent exposure and one count of possession of marijuana. Both guilty plea forms included express waivers of Masuku's right to be personally addressed by the court with regard to his plea. Masuku also acknowledged that he understood the nature of each offense he was pleading to and that there was a factual basis for his guilty pleas. The guilty plea form relating to the charge of indecent exposure informed Masuku of his obligation to file a motion in arrest of judgment five days before sentencing if he wished to challenge the validity of his guilty plea.

On the same day the guilty pleas were filed, the district court convened a sentencing hearing. The record indicates the court personally addressed Masuku for the limited purposes of determining whether his plea was voluntary and that Masuku was not under the influence of alcohol or drugs. Masuku's pleas were accepted, and the court proceeded to immediate sentencing.

The district court's order entered following sentencing included specific findings that Masuku understood the nature of the charges against him and that there was a factual basis for his plea. The order also stated that Masuku had requested immediate sentencing. Masuku was sentenced to serve a jail term of 364 days.

On appeal Masuku challenges the validity of his guilty plea to indecent exposure. The State contends Masuku waived his right to challenge his guilty plea

because he failed to file a motion in arrest of judgment. Masuku argues his failure to file such a motion was excused by the court's failure to inform him that he would lose his right to file a motion by proceeding to immediate sentencing

Our review is for errors at law Iowa R. App 4 *State v. Ludemann*, 484 N W.2d 611, 612 (Iowa App. 1992).

A defendant's failure to challenge the adequacy of his plea by motion in arrest of judgment precludes the right to assert such a challenge on appeal. Iowa R. Crim. P 23(3)(a) This requirement does not apply when the record shows the defendant was not advised of this obligation. *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980). A voluntary waiver of the time for sentencing pursuant to Iowa Rule of Criminal Procedure 22(1), without more, does not satisfy this requirement.

Here, the defendant was informed of his obligation to file a motion in arrest of judgment and the loss of his right to challenge his plea on appeal if he did not. There is, however, no indication in the plea documents or sentencing record supporting the sentencing judge's finding that Masuku consented to immediate sentencing or that he was aware of the attendant loss of his right to file a motion in arrest of judgment.

We conclude Masuku's challenge to his plea is not precluded by rule 23(3)(a).

Masuku contends he was never informed of the nature of the charge of indecent exposure and the district court failed to ascertain whether there was a factual basis for the plea. Iowa Rule of Criminal Procedure 8(2)(b) specifically requires the court to

determine if a factual basis exists for the plea. This rule also requires the court to personally address the defendant in open court and inform him of the nature of the charges to which his plea is offered. These, along with other requirements of the rule, may be waived with the defendant's consent in serious and aggravated misdemeanor cases. *State v. Mensah*, 424 N W 2d 453, 455 (Iowa 1988).

The record clearly indicates Masuku waived all of the procedures required by 8(2)(b) including the right to a personal colloquy with the court. This waiver is irreconcilable with the scrutiny of the plea procedure Masuku demands on appeal. Any other conclusion would render a defendant's colloquy waiver meaningless. In *Mensah*, the defendant's written plea detailed his understanding and knowing waiver of all the rule 8(2)(b) requirements except the personal colloquy. *Id.* at 455 ("Had Mensah included an express waiver of his right to a colloquy with his written plea, the record would . . . be sufficient to meet the rule 8(2)(b) requirements."). Accordingly, the record is sufficient for purposes of demonstrating Masuku understood the nature of the charge *Id.*

We also find no merit in Masuku's claim regarding the factual basis for his plea The factual basis for a plea may be ascertained by inquiry of the defendant, inquiry of the prosecutor, or by reference to the minutes of testimony attached to the trial information *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975). Masuku

acknowledged the factual basis for this plea, and the minutes of testimony support his acknowledgment.

We accordingly affirm the judgment of the district court.

AFFIRMED.