IN THE COURT OF APPEALS OF IOWA

No. 1999-603 (9-864) / 99-0918
Filed January 26, 2000

FILED
JAN 26 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN PAUL SHAW,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Justin Shaw appeals from his conviction and the sentence imposed following his guilty plea to second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). He contends (1) he did not enter a voluntary and intelligent plea; and (2) he was denied effective assistance of counsel. **AFFIRMED.**

Maggi Moss and Jennifer Larson of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Defendant-Appellant Justin Paul Shaw pled guilty to second-degree robbery, in violation of Iowa Code sections 711.1 and 711.3 (1997). He now appeals contending (1) that he did not enter a voluntary and intelligent plea; and (2) his attorney was not effective. We affirm.

Defendant was charged by trial information on November 10, 1998, with first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1997). According to the minutes of testimony defendant hit Paul Boosalis on the head with a rock in a Des Moines park. Boosalis had called a date line and agreed to meet Alicia, a friend of defendant's, at the park. It was agreed that Boosalis would bring approximately $325 in cash to exchange with Alicia for a check of her father's. Alicia, defendant's father, defendant and a third man planned to hide in the park. Alicia would bring Boosalis to near where they were hiding and the men would tie him up and take the cash. Boosalis met Alicia at the park and she led him to the area where the men waited. Defendant hit Boosalis on the head with a rock. Boosalis, who was injured, escaped and later identified defendant as the person who hit him.

Defendant, who was initially represented by the public defender, pled not guilty to the first-degree robbery charge. Later a private attorney appeared for defendant. The case was set for trial on February 17, 1999. It was subsequently continued to March 15, 1999. On March 12, 1999, the trial information was amended to reduce the charge to second-degree robbery. The minutes of testimony on the amended charge were the same minutes as those filed with the

first-degree robbery charge. On March 12, 1999, the same day the trial information was amended, defendant and his attorney appeared and defendant pled guilty to the reduced charge. Defendant was subsequently sentenced to a mandatory ten-year indeterminate prison term.

Defendant contends that his plea was not voluntary and intelligent. The state contends defendant's failure to challenge the adequacy of the guilty plea by filing a motion in arrest of judgment precludes his right to assert this challenge on appeal. Defendant contends his attorney was ineffective in not filing the motion. We consider defendant's challenges without deciding the preservation of error question.

Defendant first contends the district court failed to inquire as to his understanding of the nature of the charges against him. The extent of the court's explanation necessary to assure a defendant's understanding depends on the circumstances of each case. *Brainard v. State*, 222 N.W.2d 711, 714 (Iowa 1974). This includes among other things the complexity of the charge and the accused's education and experience. *State v. Victor*, 310 N.W.2d 201, 204 (Iowa 1981). In addition, the name given the offense may be sufficiently descriptive of its nature to obviate further explanation. *Id.* The lack of an explanation of the elements of an offense is not reversible error if, under all the circumstances, it is apparent the accused understood the charge. *Id*; *State v. Hansen*, 221 N.W.2d 274, 276 (Iowa 1974).

Defendant contends nothing in the plea proceeding shows he understood the nature of second-degree robbery. He advances he is nineteen years old and

scored in the sixth percentile on the standard Iowa Tests for Educational Development in ninth grade, and in the seventh percentile on the test in the tenth grade. The state refutes this argument stating that there was evidence that showed he obtained a high school equivalency diploma from Des Moines Area Community College. Also, there was evidence he had the potential to score higher. The defendant had more than adequate educational skills to understand a clear explanation of the charge. *See generally State v. Dryer*, 342 N.W.2d 881, 884 (Iowa App. 1983).

The defendant in further support of his argument points to (1) the fact the trial information was amended on the morning he pled guilty; (2) the fact that attached to the trial information were the same minutes used on the information charging first-degree robbery; (3) the fact the state allegedly did not establish the elements of the offense; and (4) the fact the judge did not read the statute or identify the elements of second-degree robbery. The elements of the crime were set out in the amended trial information. The defendant was well aware from the first trial information of the evidence the state intended to introduce to support the charge. The information also supported the lesser charge. Defendant had ample opportunity to review the minutes of testimony attached to the first information. Defendant has not shown he was prejudiced or surprised by the state's using the same minutes of testimony to support the second-degree robbery charge as it did to support the first-degree robbery charge. The second information was sufficient to inform the defendant of the charge to which he pled guilty. *See State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa App. 1995).

Furthermore, the district court conducted a lengthy and careful colloquy addressing the elements of the charge while eliciting a factual basis from defendant. The court referred to the assault element and the intent to commit a theft element. The judge specifically asked defendant, "Wasn't that the plan, to take something from him?" The defendant answered, "Right." The court then asked what was to be taken from Boosalis and defendant responded he and the third man were going to take money.

While defendant contends he did not understand what was going on, a review of the record convinces us that he understood what was happening. He was able to answer the judge's questions and relate the details of the incident without coaching from his attorney. He gave a rendition of the plan and the actual event. The district court made a careful inquiry of defendant and was assured that he understood the nature of the charges against him. We affirm on this ground.

Defendant next contends that the judge failed to inform him of the penal consequences of his guilty plea. A defendant must be fully aware of the direct consequences of a guilty plea before constitutional rights can be deemed to be knowingly and intelligently waived. Iowa R. Crim. P. 8(2)(b); *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980). That is, he must be told of the mandatory minimum, if any, and the maximum possible punishment for the offense or offenses to which the plea is offered. Iowa R. Crim. P. 8(2); *State v. Rand*, 268 N.W. 2d 642, 648 (Iowa 1978).

The record supports a finding defendant was informed of and aware of the penal consequences of his plea. Before the court accepted defendant's plea the following colloquy occurred:

> THE COURT: All right. Mr. Shaw, again, as I indicated to you when we first started this process, if at any time you change your mind, you want to withdraw and back out of this deal, you can. I will remind you of that. *When I asked you if you knew what the maximum possible sentence was, we talked about ten years. Did you realize that was a mandatory sentence*? THE DEFENDANT: Yes. THE COURT: *And that also in –that you have to serve at least 85 percent of that sentence before you are eligible for parole*? THE DEFENDANT: Yes.

(Emphasis supplied.)

The district court's explanation and the defendant's answers at the time when he was advised he could still withdraw the plea negate the defendant's argument on this issue.

Defendant next contends that his attorney did not give him adequate representation as he did not advise him of the consequences of his plea and considerations he should make before pleading guilty. We disagree with the defendant. The record reflects that he was told of the consequences of the plea.

Defendant claims his attorney should have filed a motion in arrest of judgment attacking the factual basis of the guilty plea. He argues there is not a sufficient factual basis for second-degree robbery as defendant did not attempt to take money or property from Boosalis. He also contends that the extent of Boosalis' injury is not shown by the record.

In order to establish the charge the state was required to prove (1) on the specified date, the defendant had a specific intent to commit a theft; and (2) in