

IN THE COURT OF APPEALS OF IOWA

FILED

APR 29 1980

CLERK SUPREME COURT

570

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed April 29, 1980

vs.)

JAMES C. MORGAN,)

Defendant-Appellant.)

0-41
63006

Appeal from Woodbury District Court - David J. Blair, Judge.

Postconviction applicant-defendant appeals from trial court's judgment denying him relief. AFFIRMED.

Donald H. Molstad of Shuminsky & Shuminsky, Sioux City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; and Charles Thoman, Assistant Woodbury County Attorney; for plaintiff-appellee.

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

Postconviction applicant, hereinafter called defendant, appeals from trial court's judgment denying him relief. His application seeks to nullify his March 3, 1978 conviction and sentence for second degree theft, entered following a plea of guilty. We consider his several assignments of error and affirm the trial court.

I. Defendant first contends that the transcript of the guilty plea proceedings fails to establish a factual basis for accepting the plea, pursuant to requirement outlined in Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 618-19 (Iowa 1974). The State suggests that section 663A.8, The Code 1977, precludes consideration of this contention because of defendant's failure to assert it on a direct appeal from his conviction. We view this as an affirmative defense which was waived as a result of the State's failure to assert it in the trial court.¹

In considering defendant's contention on the merits, we note that inquiry was made on the record by the court as to defendant's theft of several watches, as specified in the trial information, and that defendant, on the record, admitted to stealing same. While accepting this state of the record, defendant claims that the deficiency in establishing factual basis stems from a lack of showing as to the value of the watches taken. We disagree. The court at the plea proceedings advised defendant as to the value element required for second degree theft, advised him as to the allegations of the minutes of testimony and then asked defendant, "Did you do that?" The defendant answered in the affirmative.

In addition to the foregoing, the record reflects that defendant's plea was pursuant to an agreement where, in exchange for his guilty plea to a class "D" felony, based upon theft of property of a value exceeding \$500, the State was to dismiss a second degree burglary charge based upon the same criminal act. That charge was a class "C" felony without regard to the value of the property taken and carried a longer prison sentence. Based upon this record, we believe the defendant, both expressly and impliedly, conceded a factual basis existed sufficient to show him guilty of the crime to which he entered the plea.

¹ The State did assert in the trial court that defendant's claim with respect to the invalidity of his guilty plea cannot be asserted because of failure to follow the procedure specified in State v. Reeves, 254 N.W.2d 488 (Iowa 1977). On appeal, the State concedes that Reeves is inapplicable to the present case. Any misconception by the trial court as to the applicability of Reeves is cured by our consideration of the plea-related issues on the merits.

II. Defendant next urges that the postconviction court erred in rejecting that portion of his claim based on newly discovered evidence. This claim is premised upon an affidavit of the victim of the theft, stating the value of the property taken was less than \$500. This affidavit was first produced as part of defendant's postconviction application. The trial court concluded that defendant failed to meet the requirement of State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976) that the evidence was not discoverable earlier in the exercise of reasonable diligence. We agree with this conclusion. In addition, we note the situation here presented is not the same as asking for a new trial or similar relief following an adverse verdict. The conviction was based upon a plea of guilty. In order to avoid the consequences of such plea, defendant must show that it was invalidly obtained. State v. Burtlow, 210 N.W.2d 438, 439 (Iowa 1973). There is an insufficient showing of some nexus between the claimed newly discovered evidence and the validity of defendant's guilty plea.

III. We next consider and reject defendant's claim that he was under such mental and physical disability at the time of the plea as to render it involuntary. The record reflects that he was asked and denied that such was the case during the plea proceeding. No showing has been made to cause us to disbelieve the assertion that was made at the time of the plea.

IV. Lastly, we reject the defendant's assertions that (1) his sentence is in excess of that allowed by law, and (2) the postconviction court erred in not considering his claim that jurisdiction was not shown in the sentencing court. The former claim is based upon the same grounds that were rejected in division I of this decision. The latter claim was obviously rejected by the trial court as part of its denial of the defendant's application. No lack of jurisdiction on the part of the sentencing court has been made to appear.

We have considered all grounds presented and find no basis for reversal.

AFFIRMED.