IN THE COURT OF APPEALS OF IOWA

No. 9-274 (1999-87) / 98-1374
Filed May 26, 1999

STATE OF IOWA,
Appellee,

vs.

DAVID LEE TOMLINSON, JR.,
Appellant.

Appeal from the Iowa District Court for Marion County, Thomas Mott and Terry L. Wilson, Judges.

David Tomlinson, Jr., appeals from the judgment and sentence entered following his guilty plea to operating while intoxicated (third offense). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Terry E. Rachels, County Attorney, and Lois Vroom, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

STREIT, J.

David Tomlinson, Jr., appeals his conviction for operating while intoxicated contending the trial court erred in accepting his guilty plea; did not comply with Rule 8 mandates; and erred in releasing his presentence investigation to the State. He also contends his trial counsel was ineffective. We affirm the trial court's acceptance of the plea and find counsel acted competently in representing Tomlinson.

I. Facts & Procedural Background.

Tomlinson entered a written guilty plea to the charge of operating while intoxicated (third offense). Following a hearing, the court accepted the guilty plea and sentenced Tomlinson to an indeterminate five-year prison term and a $2500 fine. After the conviction, the State was granted access to Tomlinson's presentence investigation report in connection with murder charges in another proceeding. Tomlinson appeals.

II. Court's Acceptance of Tomlinson's Guilty Plea.

Tomlinson contends the trial court erred in accepting his guilty plea without determining it had a factual basis as required by Iowa R.Crim.P. 8(2)(b). He did not raise this issue by motion in arrest of judgment. However, the trial court did not advise Tomlinson in the plea proceeding of his duty to file such a motion in order to preserve error. Thus he is not precluded from raising the issue for the first time here. *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980); *State v. Birch*, 306 N.W.2d 781, 783 (Iowa 1981).

We review plea proceedings for correction of errors at law. Iowa R. App. P. 4. In conducting a plea proceeding, a trial court must substantially comply with Rule 8; strict compliance is not required. *State v. Ludemann*, 484 N.W.2d 611, 613 (Iowa App. 1992).

Tomlinson's first contention is governed by Iowa Rule of Criminal Procedure 8(2)(b). Under this rule, in entering a guilty plea a district court must determine the plea is: (1) made voluntarily and intelligently; and (2) has a factual basis. Iowa R. Crim. P. 8(2)(b). Substantial compliance is met unless the court's disregard for the requirements of rule 8(2)(b) raises doubt as to the voluntariness of the plea. *State v. Fluhr*, 287 N.W.2d 857, 864 (Iowa 1980).

Tomlinson argues although he admitted to the court he was under the influence of alcohol while driving, the court statements cannot form the factual basis of the plea because he, as a lay person, was not qualified to give an opinion on the legal issue of intoxication. He argues his confession had to be corroborated by other evidence. Tomlinson also argues the court improperly relied on the test results from the preliminary breath test in forming the factual basis of his plea.

Tomlinson's contention no factual basis exists in the record is simply without merit. A factual basis may be established by inquiry of the defendant, examination of the presentence report, or reference to the minutes of testimony. *Brainard v. State*, 333 N.W.2d 711, 722 (Iowa 1974). The factual basis in this case was established in the written plea of guilty and the court colloquy. The trial information alleges

Tomlinson operated his vehicle while he was influenced by alcohol and his blood alcohol level exceeded .10. Tomlinson admitted he was driving while intoxicated when questioned by the court. Corroboration of this in-court admission during a guilty plea was not necessary. *See State v. Delano*, 161 N.W.2d 66 (Iowa 1968). The written guilty plea advised Tomlinson of the nature of his offense. Tomlinson has not articulated any missing facts needed to establish the factual basis of the charge.

During the court's questioning of Tomlinson, the court, while apparently reading the complaint and affidavit, questioned Tomlinson and he admitted that his blood alcohol was .183. This blood-alcohol level was from a preliminary breath test (PBT), not the intoxilyzer test which was .139. Although a PBT may not be admissible if there is an objection, there was no objection and Tomlinson stated his breath test result was .183. *See State v. Zell,* 491 N.W.2d 196, 197 (Iowa App. 1992) (the statutory provisions of section 321J.5(a) provides the results of preliminary screening test shall not be used in any court action except to prove that a chemical test was properly requested). The failure to object waived any objection to the use of such a test. Even if objected to, the objection would have directed the trial court to two sentences later in the police citation saying his intoxilyzer breath test showed a blood-alcohol level of .139—well past the legal limit. Also, the defendant ignores the fact that besides the blood alcohol level being a factual basis, defendant admitted he was influence by the alcohol he consumed that day.

We find the court has substantially complied with Rule 8(2)(b) in establishing a factual basis for the plea.

Tomlinson's second contention is governed by Iowa Rule of Criminal Procedure 8(2)(d). He argues the court erred in not informing him, at the time of his guilty plea, of his right to file a motion in arrest of judgment based on defects in the plea process. Iowa R. Crim. P. 8(2)(d).

The court's colloquy was insufficient to comply with rule 8(2)(d). The court's only inquiry into the area was to ask Tomlinson if he had any questions regarding his rights. Tomlinson replied "no." This was not substantial compliance with the rule. *See State v. Glenn*, 505 N.W.2d 818, 819 (Iowa App. 1993). It is the court's duty to inform Tomlinson of his right to file a motion in arrest of judgment; not Tomilinson's to inquire into what his rights are. Under certain circumstances, a colloquy of this character is sufficient when complimented by a written petition to plead guilty. *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990). In this case, however, the written petition to plead guilty does not mention Tomlinson's right to file a motion in arrest of judgment.

While we find the trial court did not substantially comply with rule 8(2)(d), the effect on Tomlinson has been deminimis as we have considered the merits of his case on direct appeal. *See State v. West*, 326 N.W.2d 316, 317 (Iowa 1982)(appellate review not barred when court fails to comply with Iowa Rule of Criminal Procedure 8(2)(d) by not informing the defendant that "any challenges to a plea of guilty . . .

must be raised in a motion in arrest of judgment and that failure to do so precludes the right to assert them on appeal").

III. Release of Presentence Investigation Report.

Tomlinson contends the district court erred by releasing his presentence investigation report to the State without good cause, and without his consent, in violation of Iowa Code section 901.4. We find the court's decision was well within its discretion under Iowa Code section 901.4.[1] The court may, in its discretion, release the report upon a showing of need. *State v. Braun*, 460 N.W.2d 454, 456 (Iowa 1990). The State met this burden. Tomlinson was charged with murder of his father and sister. Investigators felt the report may contain information relevant to

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[1] That section states:

> The presentence investigation report is confidential and the court shall provide safeguards to ensure its confidentiality, including but not limited to sealing the report, which may be opened only by further court order. At least three days prior to the date set for sentencing, the court shall make all of the presentence investigation report available for inspection to the defendant's attorney, and to the attorney for the state. However, the court may conceal the identity of the person who provided confidential information. The report of a medical examination or psychological or psychiatric evaluation shall be made available to the attorney for the state and to the defendant upon request. The reports are part of the record but shall be sealed and opened only on order of the court. If the defendant is committed to the custody of the Iowa department of corrections and is not a class "A" felon, a copy of the presentence investigation report shall be forwarded to the director with the order of commitment by the clerk of the district court and to the board of parole at the time of commitment. The defendant or the defendant's attorney may file with the presentence investigation report, a denial or refutation of the allegations, or both, contained in the report. The denial or refutation shall be included in the report.

motive and provide insight into Tomlinson's mental stability. Under these circumstances, the court did not abuse its discretion in releasing the report.

IV. Ineffective Assistance of Counsel Claim.

Tomlinson contends his trial counsel was ineffective for allowing him to plead guilty without a sufficient in-court colloquy.

We review allegations of ineffective assistance of counsel de novo. *State v. Gregg*, 464 N.W.2d 431, 432 (Iowa 1990). To prevail in such a claim, defendant must prove counsel failed to perform an essential duty and prejudice resulted. *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). The test for the first element is whether the lawyer's performance was outside the range of normal competency. *Pettes v. State*, 418 N.W.2d 53, 56 (1988). The test for the second element is whether counsel's error affected the outcome of the case. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

At the plea proceeding the district court did not discuss the mandatory minimum and maximum punishment for Tomlinson's offenses or his waiver of his right to a trial. Both are required to be orally explained under rule 8. *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). The mere fact the court informed Tomlinson of his rights and the possible punishment for his offenses by use of written plea forms, rather than orally, does not require automatic reversal. *Kirchoff*, 452 N.W.2d at 805.

The matters were fully explained in Tomlinson's petition to plead guilty. The petitions were signed by Tomlinson prior to the plea proceeding, Tomlinson was represented by an attorney throughout, and the district court satisfied itself on the record that Tomlinson had read, understood, and freely signed the petition.

The record shows the court addressed Tomlinson in open court, satisfying itself he entered his plea voluntarily and the plea had a factual basis. By reference to the signed petition to plead guilty, the court determined the plea was entered intelligently in that Tomlinson had been informed of, and understood, the matters listed in rule 8(2)(b). Under these circumstances, the written petition to plead guilty and the in-court colloquy complemented one another. There is no reason to believe Tomlinson's understanding of his situation was undermined by use of the completed, signed, and acknowledged petitions to plead guilty. *See id.*

We conclude the trial court's colloquy, when viewed together with his petition to plead guilty which was introduced into the plea proceeding by direct reference and affirmed and acknowledged by Tomlinson in open court, substantially complied with rule 8(2)(b). *See id.* For these reasons, trial counsel was not ineffective for allowing Tomlinson to plead guilty at the plea proceeding. Tomlinson's ineffective assistance of counsel claim is denied.

AFFIRMED.

No. 98-1374. [9-274 (1999-87)] STATE v. TOMLINSON

Appeal from the Iowa District Court for Marion County, Thomas Mott and Terry L. Wilson, Judges. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. Sackett, C.J., takes no part. (8 pages $3.20)

David Tomlinson, Jr., appeals his conviction for operating while intoxicated contending the trial court erred in accepting his guilty plea; did not comply with Rule 8 mandates; and erred in releasing his presentence investigation to the State. He also contends his trial counsel was ineffective. Tomlinson argues although he admitted to the court he was under the influence of alcohol while driving, the court statements cannot form the factual basis of the plea because he, as a lay person, was not qualified to give an opinion on the legal issue of intoxication. Tomlinson's contention no factual basis exists in the record is simply without merit. The factual basis in this case was established in the written plea of guilty and the court colloquy. Tomlinson admitted he was driving while intoxicated when questioned by the court. Corroboration of this in-court admission during a guilty plea was not necessary. Tomlinson argues the court erred in not informing him, at the time of his guilty plea, of his right to file a motion in arrest of judgment based on defects in the plea process. The court's colloquy was insufficient to comply with rule 8(2)(d). The court's only inquiry into the area was to ask Tomlinson if he had any questions regarding his rights. Tomlinson replied "no." This was not substantial compliance with the rule. While we find the trial court did not substantially comply with rule 8(2)(d), the effect on Tomlinson has been deminimis as we have considered the merits of his case on direct appeal. The district court did not err by releasing Tomlinson's presentence investigation report to the State. Tomlinson was charged with murder of his father and sister. Investigators felt the report may contain information relevant to motive and provide insight into Tomlinson's mental stability. Under these circumstances, the court did not abuse its discretion in releasing the report. The trial court's colloquy, when viewed together with his petition to plead guilty which was introduced into the plea proceeding by direct reference and affirmed and acknowledged by Tomlinson in open court, substantially complied with rule 8(2)(b). For these reasons, trial counsel was not ineffective for allowing Tomlinson to plead guilty at the plea proceeding.