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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

261

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
v.	)	6-192 85-1101
DONALD BLACK, a/k/a JACK LEE HUFF,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (No. 41639) - Richard F. Branco, Judge.

The defendant entered a guilty plea to a charge of sexual abuse in the third degree. **REVERSED AND REMANDED.**

Charles Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Elizabeth E. Ciebell, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell and Hayden, JJ.

OXBERGER, C.J.

Defendant Donald Black appeals from his conviction and sentence upon a guilty plea to a charge of third degree sexual abuse. He contends that the trial court erred: (1) in accepting his guilty plea in light of circumstances questioning his mental capacity to enter it; and (2) by failing to determine on the record that the plea was voluntary and intelligent. For the reasons stated below, we reverse and remand.

I. PRESERVATION OF ERROR

We first address the consequence of the defendant's failure to file a motion in arrest of judgment as required by rule 23(3)(a) of the Iowa Rules of Criminal Procedure. Pursuant to rule 23(3)(a), a defendant must challenge the validity of his guilty plea by filing a motion in arrest of judgment in the trial court in order to preserve the alleged error for appellate consideration. State v. Smith, 300 N.W.2d 90, 91 (Iowa 1981). Failure to comply with this rule, however, does not preclude appellate review unless the trial court advised the defendant of the necessity of filing the motion, and the consequences of his failure to do so. State v. Hansen, 344 N.W.2d 725, 728 (Iowa Ct. App. 1983); see also Iowa R. Crim. P. 8(2)(d).

After entering his guilty plea, the defendant in the instant case requested immediate sentencing. Although the court had previously advised him of his obligation to file a motion in arrest of judgment at least five days before sentencing, the court never apprised him of the fact that by waiving the time between the plea and the sentence, he would lose his right to file the motion and be precluded from challenging the validity of his plea upon appeal. Accordingly, we conclude that rule 23(3)(a) does not bar our consideration of the defendant's attack upon the plea proceeding. See State v. Smith, 300 N.W.2d at 92; State v. Hansen, 344 N.W.2d at 728.

II. ACCEPTANCE OF GUILTY PLEA

263

The defendant asserts that the trial court erred in accepting his guilty plea because an issue existed concerning his competency. He contends that the evidence was sufficient to require that the trial court suspend further proceedings and hold a hearing on his competency as provided in Iowa Code section 812.3.

In State v. Kempf, 282 N.W.2d 704 (Iowa 1979), the Iowa Supreme Court set forth the following principles governing our review of a criminal defendant's subsequent claim of incompetency during the trial court proceedings:

> When the defendant's competency during trial court proceedings is challenged on appeal, our task is to examine the information before the trial court to determine if at the relevant time an unresolved question of the defendant's competency reasonably appeared. Because constitutional safeguards are implicated, we make our own evaluation of the totality of the circumstances. This means we review the record de novo.

Id. at 706 (citations omitted). The supreme court has recognized the relevancy of the following factors in determining whether due process requires an inquiry as to competency: (1) the defendant's irrational behavior; (2) the defendant's demeanor; and (3) any prior medical opinion on the defendant's competency. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982); see also Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed.2d 103, 118 (1975). It is not necessary that any one of these factors be sufficient to cause a reasonable person to find that a substantial question of the defendant's competency to plead guilty existed; rather, "[t]he issue is determined by their cumulative effect." State v. Kempf, 282 N.W.2d at 709. The critical inquiry is whether the defendant had sufficient ability to consult with his attorney and whether he had a rational understanding of the proceedings against him. State v. Lucas, 323 N.W.2d at

233; see also Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed.2d 824, 825 (1960).

We have reviewed the record in the instant case in light of these principles, and conclude that no unresolved reasonable doubt as to the defendant's competency can be said to have existed at the time that the trial court accepted his plea. The record discloses that two competency hearings were held prior to the entry of the defendant's plea. At the first hearing, held May 8, 1985, the defendant was found incompetent. The basis for this determination was a report prepared by Dr. Keith Barnett. Barnett had visited with the defendant on two occasions and concluded that he was incompetent. At a second hearing held June 10, 1985, however, the defendant was found competent. At the second hearing, an evaluation prepared by Dr. Curtis Fredrickson was admitted into evidence. The evaluation indicated that the defendant had been admitted to the Iowa Medical and Classification Center in April 1985, and had been assessed by Dr. Fredrickson throughout his two month stay. Dr. Fredrickson concluded that the defendant was competent to continue with the case and assist in his defense.

In State v. Jackson, 305 N.W.2d 420 (Iowa 1981), the supreme court stated that:

> Once a defendant is found competent, the presumption of competency continues until contrary evidence is produced...[A]fter an adjudication of competency, new or additional evidence must be produced by defendant to overcome the presumption of competency the law imposes.

Id. at 425 (citations omitted).

We find no evidence in the instant case sufficient to cast doubt upon the adjudication of the defendant's competency. The defendant urges that sufficient doubt was cast by his attorney's reiterated objections to the entry of the plea, the tenor of the defendant's responses in the plea proceeding, and the defendant's

alleged use of medication. In the facts of this case, we do not find any of these considerations sufficient either by themselves or in conglomeration to raise a reasonable doubt as to the defendant's competency.[1] See State v. Walton, 228 N.W.2d 21, 23 (Iowa 1975).

III. VALIDITY OF THE GUILTY PLEA

A. Voluntariness of Plea. The defendant contends that his guilty plea was not shown to have been voluntary because the trial court failed to inform him of his right to confront and cross-examine witnesses, and his right to compulsory process to obtain witnesses on his behalf. The procedure for the acceptance of a guilty plea is set forth in rule 8(2)(b) of the Iowa Rules of Criminal Procedure. The rule provides that before accepting a plea, the court must inform the defendant and determine that he understands both that he has a right to be tried by a jury and all of the component rights inherent therein.

The supreme court has recognized, however, that a trial court need not literally comply with the requirements of rule 8(2)(b) if the record demonstrates a "substantial or material compliance." State v. Fluhr, 287 N.W.2d 857, 862-64 (Iowa 1980); see also State v. Smothers, 309 N.W.2d 506, 508 (Iowa 1981). We think that the trial court substantially complied with the requirements of the rule in the case at bar. Before accepting the plea, the trial judge explained the nature and elements of the charge of sexual abuse in the third degree; the defendant indicated that he understood. In addition, the judge explained the mandatory prison term attendant with the charge. Despite the defendant's insistence that he knew his rights, the judge then explained his right to a trial by jury, his right to the assistance of counsel, his right against self incrimination, and his right to call witnesses in his behalf. The court also explained that if

[1]Both the defendant's use of medication and his demeanor were explicitly considered at the second competency hearing.

the defendant plead guilty, he would forfeit these rights. In light of the above, we find the court's omission of the right to cross-examine witnesses and compulsory process of no consequence; we think that the court's extensive compliance with the rule's requirements precludes any doubt as to the voluntariness of the plea. See State v. Smothers, 309 N.W.2d at 508.

B. Knowing and Intelligent Alford Plea. The defendant also asserts that his Alford plea was not shown to have been knowingly and intelligently entered because the trial court failed to determine whether he was aware of the factual basis, or the state's evidence, against him. It is axiomatic that before accepting an Alford plea, the trial court must determine that the defendant intelligently concluded that his best interest requires the entry of a guilty plea, and that the record contains strong evidence of actual guilt. See North Carolina v. Alford, 400 U.S. 25, 37, 91, S. Ct. 160, 166-67, 27 L. Ed.2d 162, 171 (1970); see also Iowa R. Crim. P. 8(2)(b). The purpose of the requirement that the trial court set forth a factual predicate for the plea was explained in Wallace v. Turner, 695 F.2d 545, 548 (11th Cir. 1983), as follows:

> [T]he purpose of placing the facts on the record is not to establish guilt as a basis for a judgment of conviction. Rather it is to aid in the constitutionally required determination that the defendant entered the plea intelligently and voluntarily.... A factual basis demonstrates a defendant's recognition—despite his denial of guilt—that the evidence negates his claim of innocence, he has nothing to gain by a trial, and much to gain by pleading guilty. (citations omitted).

In the instant case, the court summarized the factual basis of the defendant's plea as follows:

> The Court concludes that there is a factual basis for his plea of guilty based upon the minutes of the evidence, the depositions that are in the file, and the Court does accept the defendant's plea, which the Court considers to be an Alford plea in this case, and does make a finding of guilt.

We do not think that this mere reference to the minutes of testimony sufficed to establish that the defendant's plea was knowingly and intelligently entered; the trial court never inquired as to whether the defendant was aware of the contents of the minutes or whether he felt the minutes contained evidence sufficient to support a finding of guilt if he were to proceed to trial. Absent the presentation of some basic facts surrounding the charge, it was impossible for the court to determine that the plea was intelligently made. See State v. Heinen, 252 N.W.2d 454, 455 (Iowa 1977) (Alford plea intelligently made despite possible intoxication defense where trial court "carefully probed and demonstrated the defendant's understanding of the charges" and judge had prosecutor summarize the state's evidence). Accordingly, we conclude that the cause should be reversed and remanded, and the sentence vacated so that the defendant can plead anew.

REVERSED AND REMANDED.

Hayden, J. concurs; Snell, J. concurs in part, dissents in part.

Although I agree with parts I, II, and III.A of the majority opinion, I believe the court's analysis in part III.B reflects a fundamental misunderstanding of the law applicable in the context of Alford pleas. As this misapplication of the law results in the majority erroneously reversing the district court and remanding this case for a new plea, I feel constrained to dissent.

The majority today reverses the district court because that court:

> never inquired as to whether the defendant was aware of the content of the minutes [of testimony] or whether [the defendant] felt the minutes contained evidence sufficient to support a finding of guilt if he were to proceed to trial.

As a result of this failure, reasons the majority, it was impossible for the district court to determine the plea was voluntarily made. I disagree.

The standard for determining the validity of guilty pleas, including Alford pleas, is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162, 171 (1970). A criminal defendant may voluntarily and intelligently enter a plea of guilty even though he or she is unwilling to admit his or her participation in the crime. Alford, 400 U.S. at 37, 91 S. Ct. at 167, 27 L. Ed. 2d at 171. In this situation, however, the federal constitution requires that a factual basis for the plea be established. Alford, 400 U.S. at 37-38, 91 S. Ct. at 167-68, 27 L. Ed. 2d at 171-72; Farley v. Glanton, 280 N.W.2d 411, 416 (Iowa 1979). This factual basis is the means of resolving "the conflict between the waiver of trial and the claim of innocence." Alford, 400 U.S. at 38, n.10, 91 S. Ct. at 168, n.10, 27 L. Ed. 2d at 171, n.10; Farley, 280 N.W.2d at 416. Although the determination that this factual basis exists must be made on the record, State v. Hansen, 344 N.W.2d 725, 728 (Iowa Ct. App. 1983), it need not be established through inquiry of the accused. Id.

In Hansen, this court expressly delineated the methods by which the factual basis for an Alford plea may be established. Hansen states that, in the context of an Alford plea

> [t]he trial court may ascertain that a factual basis for a guilty plea exists by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony.

Id. at 728. In Hansen, the defendant had entered an Alford plea. On appeal, he argued that no factual basis had been established in support of the degree of theft to which he had pled. Although in that case the district court had discussed the minutes of testimony with the defendant, we stated that "even without [the defendant's statements concerning the minutes], . . . the minutes of testimony provide a sufficient factual basis to establish the [value of the stolen goods]." Id. at 729. The district court in the present case opted for the fourth method approved in Hansen for establishing the factual basis of an Alford plea. That the court did not discuss the minutes of testimony with the defendant is inconsequential as it was under no constitutional or statutory duty to do so.

Nor am I persuaded by the majority's citation to Wallace v. Turner, 695 F.2d 545 (Cir. 1983). That case dealt with the issue of whether state trial courts are required by the federal constitution to ascertain a factual basis before accepting a plea of guilty or nolo contendere that is not accompanied by a claim of innocence. Wallace, 695 F.2d at 548. Wallace is not an Alford plea case. Accordingly, anything that case says concerning Alford pleas is obiter dicta and certainly provides scant support for the majority's decision to reverse the district court. Additionally, the portions of Wallace cited by the majority do not support its result. The quotation from Wallace cited by the majority, when read in context of the full Wallace opinion, merely states the rationale behind the requirement of "a judicial finding of some factual basis" in support of an Alford plea. Wallace,

695 F.2d at 548 (emphasis added). This judicial finding was made in the present case. Wallace does not stand for the proposition that the district court must "inquire as to whether the defendant was aware of the contents of the minutes [of testimony] or whether [the defendant] felt the minutes contained evidence sufficient to support a finding of guilt if he were to proceed to trial." This has never been a prerequisite to the acceptance of an Alford plea.

The Eighth Circuit Court of Appeals was presented with a case similar to the one at bar in Gregory v. Solem, 774 F.2d 309 (8th Cir. 1985). In Gregory, a habeus petitioner claimed there was no factual basis for his earlier guilty plea to a conspiracy charge. At trial, petitioner pled to the charge even though he denied his participation in the agreement that constituted the conspiracy. The trial court, in accepting the plea, did not set out in detail the factual basis for the charge. Instead, the court made the following finding:

> Okay, for the record, the Court finds that there is a factual basis for the plea, and I previously having determined that the plea was voluntarily made, it is accepted and Mr. Gregory is adjudged guilty of the offense of conspiracy to commit murder.

Id. at 311. The Eighth Circuit noted that this finding was based upon the trial judge's familiarity with the case against the defendant. The court then expressly stated that this finding was adequate, holding that it was not impermissible for the trial court to refer to evidence not explicitly made part of the record to support the finding of a factual basis. Id. at 312. This result follows logically from an understanding of the purpose of the factual basis requirement. That purpose, said the court in Gregory

> [i]s to assure the plea's accuracy through the presence of sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense.

Id. (emphasis added). Given this purpose, the trial court in Gregory was not

in error in finding that a sufficient factual basis was established by the preliminary hearing transcript and other documents before the trial court at the time it accepted the plea. Id. at 313. In the present case, the district court determined that the factual basis was established by the minutes of testimony and depositions on file. No mention was made in Gregory of the requirement imposed for the first time by the majority today that the district court discuss the minutes of testimony or any other part of the State's case with the accused prior to accepting the sentence. See also White Hawk v. Solem, 693 F.2d 825 (8th Cir. 1982) ("as long as there is in fact a strong factual basis supporting a guilty plea, it is valid even if the defendant protests his innocence"); United States v. Beck, 606 F.2d 814 (8th Cir. 1979) ("in view of the nature of the evidence against him and the fact that the district court judge reviewed the government's case and determined that there was a factual basis for Beck's plea, the validity of his plea cannot be seriously questioned"). The record discloses that the district court carefully probed and demonstrated defendant's understanding of the charge and his awareness of the penal consequences of his guilty plea. I think the district court adequately made the determination that Black's Alford plea was voluntary and intelligent and that it was supported by a factual basis. Accordingly, I would affirm.