

IN THE COURT OF APPEALS OF IOWA

No. 7-789 / 97-1099

000529

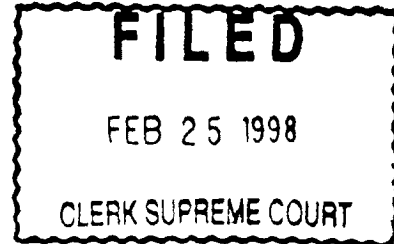
STATE OF IOWA,

Plaintiff-Appellee,

vs.

GARY RAY TUNINK,

Defendant-Appellant.



Appeal from the Iowa District Court for Clay County, Donavon D. Schaefer,
District Associate Judge.

Gary Tunink appeals from a judgment and sentence entered upon his plea of
guilty to the offenses of assault causing bodily injury and false imprisonment.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Michael L. Zenor, County Attorney, and Michael Houchins, Assistant
County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Defendant Gary Tunink appeals from the judgment and sentence of the district court following his written guilty plea and waiver of rights. He argues the court erred in accepting his guilty plea because there was no factual basis for the plea. He also asserts the court erred in not personally advising him concerning filing a motion in arrest of judgment. We affirm by memorandum opinion pursuant to Iowa Supreme Court rule 9.

Following a domestic dispute between defendant and his common-law wife, the State filed a trial information charging defendant with assault with a dangerous weapon, an aggravated misdemeanor, and false imprisonment, a serious misdemeanor. The trial information further stated defendant committed a domestic abuse assault and displayed a dangerous weapon in connection with the assault. The minutes of testimony include information defendant shoved his wife, hurt her back, and cut her hand.

Defendant filed a written waiver of rights/plea of guilty to both charges. In it, he described his acts as domestic assault and assaulting his wife by threatening her. The written document clearly set forth the information required by Iowa Rule of Criminal Procedure 8(2)(b). It also contained the plea agreement as required by section (2)(c) of the rule. The last page of the waiver/plea set forth the information concerning a motion in arrest of judgment and defendant's right to challenge the guilty plea as required by section (2)(d) of the rule.

The citations, trial information, guilty plea, judgment entries, and docket entries cite various provisions of the Iowa Code concerning the charges, not always consistent with the written description of the charges.¹ We note the difference between assault under section 708.1 and domestic abuse assault under 708.2A is not in the act, but in the relationship of the parties.² The trial information charged an aggravated misdemeanor. Pursuant to the plea agreement, defendant pleaded to and was sentenced for a serious misdemeanor. On appeal, defendant contends there is not factual support for his plea.

Under Iowa Rule of Criminal Procedure 23(3)(a), a defendant must challenge a guilty plea by a motion in arrest of judgment or be precluded from challenging the plea on appeal. Defendant did not file a motion in arrest of judgment as required. He argues the plea document does not satisfy the requirements of Iowa Rule of Criminal Procedure 8(2)(d) and the district court did not inform him personally of the necessity of challenging the plea by a motion in arrest of judgment. Rule 8(2)(d) does not expressly require a personal colloquy between the judge and the defendant. Defendant

¹ The citation cites domestic abuse, Iowa Code §§ 708.2A(2)(b) and 236.2. The trial information cites assault with a dangerous weapon and domestic abuse assault, Iowa Code §§ 708.1(3) and 708.2(3). The written plea lists domestic assault and assault causing bodily injury, Iowa Code §§ 708(1)(3) and 708.2(3). The judgment entry cites assault causing bodily injury, Iowa Code §§ 708.1(3) and 708.2(3). The docket entries cite domestic abuse assault without intent causing injury, Iowa Code 708.2A(2)(b).

² Domestic abuse assault requires a domestic relationship between the parties as defined in Iowa Code section 236.2. The circumstances of this case fall within the definition in section 236.2.

places too much emphasis on the word “personally” in *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980). In that case, Worley was not informed at all about the motion in arrest of judgment. In the case at bar, the plea document specifically informed defendant of the importance of a motion in arrest of judgment:

I understand that any challenges to my plea of guilty based on alleged defects in the plea proceedings must be raised by me in a motion in arrest of judgment and that my failure to so raise such challenges will preclude my right to assert them on appeal, or in any post-conviction relief proceeding, and I know that a motion in arrest of judgment must be filed within five days before sentencing. . . .

Because a written plea can satisfy the requirements of rule 8(2)(b), which uses the word “personally,” the document filed by defendant in this case certainly satisfies the requirements of rule 8(2)(d), which does not use the word “personally.” *State v. Kirchoff*, 452 N.W.2d 801, 804-05 (Iowa 1990) (allowing written pleas and overruling *State v. Fluhr*, 287 N.W.2d 857 (Iowa 1980), in part). Because defendant did not exercise his right to challenge the plea proceeding by filing a motion in arrest of judgment, as required by rule 23(3)(a), we do not address his challenge on appeal. He failed to preserve error.

Even if defendant had preserved error, he would not prevail in his challenge. The written plea document, the trial information, and the minutes of testimony provide a factual basis for defendant’s plea.

AFFIRMED.