IN THE COURT OF APPEALS OF IOWA

No. 7-758 / 97-0268

000501

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEANO J. PUCCIO,

Defendant-Appellant.

FILED
FEB 25 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, R. J. Curnan and Alan L. Pearson, Judges.

Defendant appeals from his conviction for failure to appear in violation of Iowa Code section 811.2(8) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Fred McCaw, County Attorney, and Timothy J. Gallagher, Assistant County Attorney, for appellee.

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

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MAHAN, J.

Defendant Deano Joseph Puccio claims his trial counsel was ineffective for failing to file a motion in arrest of judgment to challenge defendant's guilty plea for failure to appear. We affirm by memorandum opinion pursuant to Iowa Supreme Court rule 9.

Defendant had been released on bail prior to trial pursuant to Iowa Code section 811.2. On January 12, 1996, defendant appeared for trial on two felony charges. He gave his direct testimony in the morning. He did not return after the lunch break to be cross-examined. The trial continued without him, resulting in convictions by the jury. On March 12, 1996, the State filed a trial information charging defendant with failure to appear in violation of Iowa Code section 811.2(8), a class D felony. He filed a motion to dismiss in April. The court denied the motion in July. On September 16, 1996, the day set for trial, defendant entered a guilty plea, which the court accepted. He did not file a motion in arrest of judgment. The court sentenced him to five years, to be served consecutively to his current incarceration on various felony convictions.

On appeal, defendant asserts his counsel was ineffective for failing to file the motion in arrest of judgment to challenge the factual basis for his plea. He argues he had a constitutional right to leave the trial; therefore, he should not be charged with a crime for exercising his rights. He also argues Iowa Rule of Criminal Procedure 25

supports his claim he was not required to stay for all the trial; therefore, he did not "fail to appear."

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). Allowing a client to plead guilty without a factual basis and then not filing a motion in arrest of judgment constitutes a failure to perform an essential duty. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996); *see State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). In determining whether a factual basis exists, we consider the entire record before the district court. *Brooks*, 555 N.W.2d at 448-49.

Iowa Code section 811.2(8) states in pertinent part,

> Any person who, having been released pursuant to this section, willfully fails to appear before any court or magistrate *as required* shall . . . be guilty of a class "D" felony.

Id. (emphasis added). Defendant argues he was not required to return. He bases his claim on a misunderstanding of Iowa Rule of Criminal Procedure 25. This rule provides, in part:

> 1. Felony or misdemeanor. In felony cases the defendant shall be present personally or by interactive audiovisual closed circuit system at the initial appearance, arraignment and plea, unless a written arraignment form as provided in R.Cr.P. 8(1) is filed, and pretrial proceedings, and shall be personally present at every stage of the trial including the impaneling of the jury and the return of the verdict, and

> at the imposition of sentence, except as otherwise provided by this rule. In other cases the defendant may appear by counsel.
>
> 2. Continued presence not required. In all cases, the progress of the trial or any other proceeding shall not be prevented whenever a defendant, initially present, does one of the following:
>
> a. Voluntarily absents himself or herself after the trial or other proceeding has commenced.

Id. Defendant argues sections 1 and 2 should be read *in pari materia* with the Code to mean "a defendant may waive personal presence at trial, after trial has commenced, and not be punished by a felony conviction for exercising this waiver." He apparently reads "shall be personally present at every stage of the trial" to mean something other than the plain meaning of the language. He asserts he has a right to absent himself voluntarily after the trial begins and be "present" by counsel. We find defendant's argument unpersuasive in light of Iowa Code section 811.2(8) and *State v. Gay*, 526 N.W.2d 294 (Iowa 1995). The rule, statute, and case law, required defendant's presence at every stage of the trial. The statute declares failure to appear constitutes a criminal offense.

Defendant was required to be at trial. He did not return after lunch. Therefore, he failed to appear as required by section 811.2(8). This provides the factual basis for the plea. Consequently, trial counsel did not fail in any essential duty by not filing a motion in arrest of judgment. In addition, defendant has not demonstrated prejudice under these circumstances. We therefore affirm the judgment and sentence of the district court.

AFFIRMED.