

IN THE COURT OF APPEALS OF IOWA

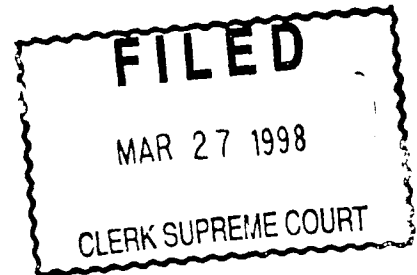
No. 8-033 / 97-605

000459

STATE OF IOWA,
Appellee,

vs.

TOBY LEE SWAIM,
Appellant.



Appeal from the Iowa District Court for Wapello County, Richard E. Meadows, Jr., Judge.

Toby Swaim appeals from his conviction, following a guilty plea, for voluntary absence from custody in violation of Iowa Code section 719.4(3) (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Victoria Siegel, County Attorney, and Kenneth A. Duker, Assistant County Attorney, for appellee.

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

CADY, C .J.

~~Defendant~~ Toby Swaim pled guilty to numerous charges, including the crime of absence from custody in violation of Iowa Code section 719.4(3). During the plea hearing, the following dialog took place concerning the factual basis for the guilty plea:

COURT: And then with respect to the absence from custody charge--

DEFENSE COUNSEL: Yes, your honor. On or about the 15th of November, 1996, Mr. Swaim was ordered by the court to report to the Wapello County jail, and he did not report at that time.

COURT: And you admit that, Mr. Swaim?

DEFENDANT: Yes, I do.

After reviewing the factual basis for the pleas and accepting the pleas, the court carefully advised the defendant concerning his right to challenge the plea proceeding by a motion in arrest of judgment:

COURT: Mr. Swaim, you are advised that you have a right to challenge the plea proceedings just completed by filing what is called a motion in arrest of judgment. You would file that motion based on alleged defects in these proceedings, and you need to file that motion no later than five days before you are sentenced. If you don't challenge these proceedings in that manner or method, then you'll waive or give up any right you have to come back later and challenge the plea proceedings. Do you understand?

DEFENDANT: Yes, I do.

COURT: You are entitled to 15 days between now and sentencing. You may waive the 15 days and be sentenced now. If you waive the 15 days and are sentenced now, you'll waive your right to come back later and challenge the plea proceedings by filing the motion in arrest of judgment. In other words, there wouldn't be time to do so. Do you understand?

DEFENDANT: Yes, I do.

COURT: Concerning the 15 days, do you want to wait the 15 days or do you want to proceed with sentencing today?

DEFENDANT: I want to be sentenced today.

COURT: You want to waive the time and be sentenced today?

DEFENDANT: That's correct.

... [question to the State]

COURT: Mr. Swaim, you want to waive the time with respect to each of these cases?

DEFENDANT: That's correct.

COURT: And be sentenced on all of them today?

DEFENDANT: That's correct.

On appeal, the defendant argues the trial court erred in accepting his guilty plea to the absence from custody charge without a factual basis for the plea. He bases his argument primarily on his interpretation of the word "committed" in Iowa Code section 719.4(3), claiming it is synonymous with "confined." He concludes because he had not yet been confined, but only failed to report for confinement, he could not be absent from custody. He also claims his defense counsel was ineffective in allowing him to plead guilty to the offense, and in allowing the court to enter judgment.

The State asserts the defendant did not file a motion in arrest of judgment and, therefore, is precluded from challenging the guilty plea proceeding. The State also argues defense counsel was not ineffective because the defendant presented a factual basis for the plea to the court. The State challenges the defendant's interpretation of section 719.4(3), asserting the term "committed" is synonymous with "mittimus." It argues defendant was "committed" to the jail at sentencing, which was then withheld until a specific time. When defendant failed to report as ordered, he was absent from the place he was required to be, as required to sustain a conviction for the crime of absence from custody.

I. Guilty Plea.

We review challenges to guilty plea proceedings for correction of errors at law. Iowa R. App. P. 4; *State v. Glenn*, 505 N.W.2d 818, 819 (Iowa App. 1993). If a defendant does not file a motion in arrest of judgment after being informed by the court of the need to file such motion, the defendant is precluded from challenging the guilty plea. Iowa R. Crim. P. 8(2)(d); Iowa R. Crim. P. 23(3)(a); *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). The exception to this requirement is if failure to file the motion in arrest of judgment resulted from ineffective assistance of counsel. *Brooks*, 555 N.W.2d at 448; *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982).

We conclude from the record the defendant knowingly and voluntarily waived the fifteen-day period before sentencing, and understood this waiver would not allow him to file a motion in arrest of judgment. We also conclude the defendant clearly understood the necessity of filing such a motion to challenge his guilty plea and the consequences of not filing the motion. We, therefore, hold the defendant cannot challenge his guilty plea on appeal.

II. Ineffective Assistance.

We review claims of ineffective assistance of counsel, a violation of the defendant's Sixth Amendment right to effective counsel, de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680

(Iowa 1992). If an attorney allows a client to plead guilty to a charge which has no factual basis and the attorney does not file a motion in arrest of judgment, we will find the attorney failed to perform an essential duty. *Brooks*, 555 N.W.2d at 448. However, “[i]f a factual basis existed, counsel was not ineffective for failing to file a motion in arrest of judgment.” *Id.*

Our appellate courts have not previously decided if section 719.4(3) applies to the facts of this case. We have held, however, that a breach of physical confinement is not necessary to implicate subsection three. *State v. Burtlow*, 299 N.W.2d 665, 668-69 (Iowa 1980). Thus, a person who knowingly and voluntarily fails to return to jail following a furlough or some other temporary release violates the statute. *Id.* The specific question raised in the context of the ineffective assistance claim is whether the statute applies without initial physical confinement.

We do not believe this is a question we should address on direct appeal. We recognize the record is void of any explanation by defense counsel. The written plea of guilty filed in this case indicated defendant told his attorney all the facts concerning the charge. The minutes of testimony indicated as well that the witnesses would testify to additional relevant facts. In particular, there is nothing to indicate if any processing occurred by the sheriff following the sentencing which might supply additional support for the charge. Without a complete record, we decline to address this issue.

We affirm the conviction and preserve the claim of ineffective assistance of counsel.

AFFIRMED.