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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-650 / 90-438

**STEVEN ALLEN EVANS,**

Applicant-Appellant,

73

vs.

**STATE OF IOWA,**

Respondent-Appellee.

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Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

Evans appeals the district court denial of further review. **AFFIRMED.**

Roy W. Bachmeyer, Fairfield, for appellant.

Bonnie J. Campbell, Attorney General, Sarah J. Coats, Assistant Attorney General, Michael R. Brown, County Attorney, and John Jellineck, Assistant County Attorney, for appellee.

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

**SACKETT, J.**

In this appeal from the trial court's denial of a petition for postconviction relief, petitioner-appellant Steven Allen Evans contends his guilty plea was invalid because there was no factual basis for a violation of the statutes referred to in the plea and the sentencing proceedings. Evans also contends his attorney in the plea proceeding rendered ineffective assistance by failing to raise this issue during the plea proceeding, in a motion in arrest of judgment, or on direct appeal. We affirm.

Steven Evans entered a plea of guilty to a charge of fraudulent use of a prescription to obtain drugs, in violation of Iowa Code sections 155A.23(1) and 155A.24. Section 155A.24 provides that if the drug so obtained is a controlled substance, the person convicted shall be punished pursuant to sections 204.401(1) and 204.411. In Evans' case the drug obtained with a fraudulent prescription was a controlled substance, as defined in section 204.206(2)(a)(11).

Although Evans' crime was a violation of sections 155A.23(1) and 155A.24, the judgment entry did not refer to those sections. Instead, the judgment entry referred only to sections 204.206(2)(a)(11) and 204.401(1)(a). It also appears that during the plea proceeding and the sentencing proceeding, most if not all statutory references were to chapter 204 rather than to chapter 155.

Evans did not file a direct appeal from his conviction. His challenge of the conviction by application for postconviction relief was denied when the district court sustained the State's motion for summary judgment.

I.

The State first argues Evans is precluded from challenging the plea and sentence because they were challenged in an appeal from a trial court order denying Evans' request filed pro se to "End the Collection of Evans Wages" or set a hearing on a restitution order. Evans was sentenced on February 1, 1988. No timely appeal was taken from this judgment. See Iowa R. App. P. 101.

On April 11, 1989, the court denied Evans' request to end collection of his wages, and appeal from that order was filed May 4, 1989. The time for raising the challenges now before us had long past when Evans filed the May 4, 1989 appeal. Evans is not precluded by the May 4, 1989 appeal from challenging these issues in a postconviction relief proceeding.

II.

The next issue is whether the judgment should be set aside. The trial information charged that Evans

> while aiding and abetting and being aided and abetted by one Patricia Marie Wray-Bebber did attempt to obtain a prescription drug by fraud, deceit, misrepresentation or subterfuge, and/or by uttering a false prescription, said drug being a controlled substance, to wit: Dilaudid, a Schedule I Narcotic from Easters Food in Fairfield, Iowa, in violation of Sections 155A.23(1)(a) and 155A.24 of HF 594 of the 1987 Regular Session of the 72nd

> General Assembly and Sections 204.206(2)(a)(11) and 204.401(1)(a).

The notice of preliminary hearing referred to the above code sections, but the written arraignment and plea of not guilty, the order setting pretrial conference and trial, and the judgment entry only referred to Iowa Code sections 204.206(2)(a)(11) and 204.401(1)(a) (1987). Evans claims the omission of any reference to Iowa Code section 155A.23(1)(a) and 155A.24 (1989), means that he only pled guilty to Iowa Code section 204.401(1), which proscribes "manufacturing, delivering or possessing with the intent to manufacture or deliver controlled substances." He further contends because there is no evidence to support a guilty plea to "manufacturing, delivering or possessing with the intent to manufacture or deliver controlled substances" under Iowa Code section 204.206(2)(a)(11), his plea is not valid. Evans contends his attorney was ineffective for allowing him to plead guilty to something for which there is no factual basis.

Iowa Code section 155A.23 provides, in relevant part, as follows:

> 155A.23 **Prohibited acts.** A person shall not:
>
> 1. Obtain or attempt to obtain a prescription drug or procure or attempt to procure the administration of a prescription drug by:
>
> a. Fraud, deceit, misrepresentation, or subterfuge.

Iowa Code section 155A.23(1)(a). Iowa Code section 155A.24 provides in relevant part that

> A person who violates a provision of section 155A.23 . . . shall be punished as follows:
>
> If the prescription is a controlled substance, the person shall be punished pursuant to section 204.401, subsection 1, and section 204.411.

The drug Evans was accused of unlawfully procuring by a false prescription was Dilaudid, a controlled substance pursuant to Iowa Code section 204.206(2)(a)(11), which provides that "[h]ydormorphone, also known as dihydromorphinone," is a schedule II controlled substance. Presenting a false prescription for Dilaudid is properly punishable under Iowa Code section 204.401(1)(a), which provides, in relevant part, that

> Any person who violates this subsection with respect to:
>
> a. A substance classified in schedule I or II which is a narcotic drug or cocaine, is guilty of a class "C" felony.

Iowa Code § 204.401(1)(a) (1987).

Because the punishment for violation of Iowa Code section 155A.23(1)(a) is dependent upon whether Dilaudid is a controlled substance, inclusion of Iowa Code section 204.206(2)(a)(11) in the trial information was essential. Because Dilaudid is a controlled substance, inclusion of Iowa Code section 204.401(1)(a) was also necessary, not because Evans was being accused of "manufacturing, delivering or possessing with the intent to manufacture or deliver controlled substances," but because Iowa Code

section 204.401(1)(a) sets forth the appropriate punishment for violation of Iowa Code section 155A.23(1)(a) under Iowa Code section 155A.24.

Evans claims, however, that the omission of Iowa Code sections 155A.23(1)(a) and 155A.24 from the written assignment, plea hearing, and judgment entry indicates he was only charged with "manufacturing, delivering, or possessing with the intent to manufacture or deliver controlled substances" in violation of Iowa Code section 204.401(1). He further contends there was an insufficient factual basis to allow him to plead guilty to Iowa Code section 204.401(1).

The trial court is required to determine on the record if a guilty plea has a factual basis before accepting the plea. State v. Fluhr, 287 N.W.2d 857, 868 (Iowa 1980); Iowa R. Crim. P. 8(2)(b). The trial court may ascertain a factual basis 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. The record must disclose the factual basis relied on. State v. Johnson, 234 N.W.2d 878, 879 (Iowa 1975); State v. Randall, 258 N.W.2d 359, 361-62 (Iowa 1977). The bottom line is whether the defendant "understood the charge to which he was entering a plea of guilty." State v. Hackett, 201 N.W.2d 487, 490 (Iowa 1972).

A factual basis was established for the crime with which Evans was charged in the trial information, and defendant knowingly pled guilty to that crime--presenting a false prescription in violation of Iowa Code section 155A.23(1)(a). Evans knew prior to the plea proceeding he was being charged with violation of Iowa Code sections 155A.23(1)(a) and 155A.24, as evidenced by the mention of these provisions in Evans' application to extend attorney fees and application for depositions at State expense.

We find Evans did not enter the plea proceedings under any misconceptions. At the beginning of the plea proceeding, Evans' attorney stated that, "my client will enter a plea of guilty as charged in the trial information." Evans was asked if he went "over the Trial Information in some detail with your attorney because of your problem with reading." Evans replied he had. Evans was asked if the charges in the trial information were explained to him by his attorney and if he understood those charges, and he stated they were explained and he pretty much understood them. Evans and his attorney went through the minutes of testimony (which detailed the witnesses' version of Evans presenting a false prescription) several times, and Evans agreed with those witnesses' statements.

The trial court explained to Evans the State would have to prove that Evans

> attempted to obtain a prescription drug by fraud, deceit, misrepresenting, or subterfuge, and/or by uttering a false prescription . . . the drug in

> question is dilaudid, which is a Schedule II narcotic . . . .

Evans stated he understood this, as well as the fact the crime carried a maximum penalty of not more than ten years in prison and/or a $10,000 fine. The trial court also explained to Evans he faced a mandatory minimum of one-third of the minimum period of incarceration under Iowa Code section 204.413, which Evans also indicated he understood.

The following exchange subsequently occurred:

> [THE COURT]: Mr. Evans, keeping in mind all the things we have just discussed, do you still wish to enter a plea of guilty to the crime of attempting to obtain a prescription drug by fraud, deceit, misrepresentation or by uttering a false prescription, in violation of Section 204.206 and 204.401 as charged in the amended Trial Information.
>
> [EVANS]: Yes.
>
> Q. Keeping in mind that I cannot permit you to plead guilty unless you are in fact guilty, what [is] your plea? A. Guilty.
>
> Q. Would you tell me what you did on or about September 28, 1987 that led to the charge being filed? A. I came to Fairfield, this is Fairfield and went into the Easter's Store in Fairfield, Iowa, and I was going to try to present a false prescription.
>
> Q. For? A. Dilaudid.
>
> THE COURT: Does the State want any further factual basis:
>
> MR. BROWN: No, sir.
>
> MR. BELL: None, your Honor.

We find Evans knew he was pleading guilty to attempting to obtain a prescription drug by fraud, deceit, misrepresentation or by uttering a false prescription, contrary to his assertion. Under this record, the fact that the court cited to the provisions related to sentencing (Iowa Code sections 204.206 and 204.401) rather than the specific criminal provisions (Iowa Code sections 155A.23(1) and 155A.24) does not change Evans' guilty plea from a plea of "attempting to obtain a prescription drug by fraud, deceit, misrepresentation or by uttering a false prescription" under Iowa Code sections 155A.23(1)(a) and 155A.24 to a plea of "manufacturing, delivering or possessing with the intent to manufacture or deliver controlled substances" under Iowa Code section 204.401(1). We agree with the trial court's statement in ordering summary judgment for the State in the postconviction proceeding that the "omission [of reference to Iowa Code section 155A.23(1) and 155A.24] did not result in any misunderstanding nor was it prejudicial to the defendant."

II.

Evans last contends his trial counsel was ineffective. Evans has not shown his counsel's performance fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 688, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984). Evans has not shown that he would not have pled guilty had the court specifically mentioned "155A.23(1)(a)" in the plea proceeding. We affirm.

**AFFIRMED.**