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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	
DANIEL B. FITE,	)	5-554 85-414
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County, Phillip T. Steffen, Jr., and Jack F. Broderick, Judges.

The defendant entered a plea of guilty to the serious misdemeanor of driving while his license was suspended. He has appealed from the resulting conviction and sentence. **AFFIRMED IN PART; SENTENCE VACATED - REMANDED FOR RESENTENCING.**

Linda Del Gallo, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and Mary Howes and Elaine Kopf, Assistant Scott County Attorneys, for plaintiff-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

DONIELSON, P.J.

The defendant entered a plea of guilty to the serious misdemeanor of driving while his license was suspended. He has appealed from the resulting conviction and sentence. He contends the court erred by failing to obtain the defendant's personal approval after his attorney purported to waive a guilty plea colloquy. He also contends the court erred by failing to determine on the record that the plea was voluntary and intelligent and was supported by a factual basis.

At the defendant's guilty plea proceeding, the defendant's attorney stated that the defendant waived any personal colloquy with the court concerning the factual basis for the plea or the constitutional rights waived by the plea. Iowa Rule of Criminal Procedure 8(2)(b), as amended on July 1, 1984, now permits the court to waive the usual colloquy procedures, with the defendant's approval, in serious misdemeanor cases. The defendant argues that he may raise these issues, in spite of his failure to file a motion in arrest of judgment, because the court did not advise him that such a motion was a prerequisite to raising his issues on appeal. The State responds that counsel's waiver acted as a waiver of the right to receive such advice from the court.

Finally, defendant contends the sentencing court abused its discretion by relying on unproved allegations of other crimes in imposing a jail term rather than probation. The sentencing court considered the criminal history report showing prior felony arrests, but the disposition of these charges was not available.

I.

At the hearing before the district court, defendant's attorney stated:

> Okay, at this time, your Honor, I ask the court to allow him to change his prior plea of not guilty to the charge,

> and I would waive any personal interrogation as to the facts or of his constitutional rights.

According to defendant, the district court should have personally addressed him, not his attorney so as to satisfy Iowa Rule 8(2)(b) and no factual basis existed to find the plea was voluntarily and intelligently entered to satisfy the same rule and the due process clause of the fourteenth amendment of the United States Constitution. Both claims must fail.

Before reaching the merits of defendant's claims, the state submits that defendant failed to file a motion in arrest of judgment under Iowa Rules of Criminal Procedure 8(2)(d) and 23(3)(a) which precludes him from raising the issue on appeal. The court did not inform defendant of the requirement to file such a motion. Defendant relies on State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980), as authority to raise the issue on appeal. On the other hand, the State contends that Worley was decided before the amendment to Rule 8 (2)(b) which obviates the trial court's duty to inform defendant of a motion in arrest of judgment. The State's argument runs as follows: Because the in-court colloquy for a serious misdemeanor can be waived, a defendant's presence at the hearing is not mandatory; and, if the defendant is not required to attend, then it serves little purpose to discuss the motion in arrest of judgment. We choose not to address the State's interpretation of rule 8(2)(b) regarding a situation where the defendant is not present. We do hold that when a defendant is present, the trial court must inform the defendant of the motion in arrest of judgment even when the in-court colloquy is waived.

As to the merits of defendant's appeal, Iowa Rule 8(2)(b) provides:

> The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.
>
> Before accepting a plea of guilty, the court must address the defendant personally in open court and inform

> the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> (3) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
>
> (4) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.
>
> The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious misdemeanor.

This rule applies because driving with a suspended license is a serious misdemeanor under Iowa law. See Iowa Code §§ 321A.14, 321A.32 (1983).

Defendant relies on Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980) as authority for the proposition that defense counsel cannot speak on behalf of the defendant and plead guilty. He contends that only the defendant personally can plead guilty. Defendant's argument is misplaced.

Sims provides that defense counsel cannot decide whether a defendant should plead guilty; that decision is placed entirely upon the defendant. Our situation is distinguishable because the record indicates defendant did make the decision to plead guilty. After decision was made by defendant, however, he had his attorney communicate his decision to the court. Had defendant objected to the information his counsel relayed to the court in his presence, we can only assume defendant would have commented to the court that his attorney's statement did not reflect his views. We are convinced that defendant's assertion on appeal that he, rather than his attorney speaking on his behalf, must plead guilty to a serious misdemeanor under rule 8(2)(b) is without merit.

We have no difficulty accepting the attorney's comments as accurately reflecting defendant's sentiments in this case.[1]

Defendant asserts that the guilty plea in this case cannot be considered as voluntarily and intelligently given under Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969), and also that no factual basis for the plea was made by the trial court. Defendant claims this requirement can, however, be met by a written plea signed by defendant or by defense counsel's assurances.

We have already found that defendant, in effect, personally stated his plea so that the voluntary and intelligent guilty plea requirement was also waived by defendant. Thus, we cannot find merit in the constitutional assertions on this issue. As to the factual basis claims under the United States Constitution and Iowa Rule 8(2)(b), defendant also waived this provision when he pleaded guilty. We hold that after defendant waived his right to an in-court colloquy regarding his guilty plea, a complete waiver of the additional requirements involving a guilty plea resulted. The requirements of rule 8(2)(b) are satisfied when a defendant decides to plead guilty, has his attorney communicate this decision to the court at the plea hearing in defendant's presence, and the defendant does not manifest any disapproval of the attorney's characterization of the defendant's decision to the court.

II.

Defendant's final asserted error is that the trial court should not have considered two prior felonies because the disposition of such charges was not

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[1]It appears as though defendant wanted to plead guilty in anticipation of receiving a community service sentence. The judge apparently imposed a harsher than anticipated sentence, which was sixty days in jail. After the sentence was imposed appears to be the first time defendant entertained the possibility of contesting the charges and appealing.

available to the court at sentencing. According to defendant, he did not admit to committing these felonies nor did the court question him in this regard. The State submits the defendant tacitly admitted to perpetrating the offenses so that consideration of such acts was permissible.

Imposition of sentences is within the "trial court's discretionary power and will be set aside only for an abuse of discretion." State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981). The decisions of the trial court are cloaked with a strong presumption in their favor, and until the contrary appears, the presumption is that the discretion of the trial court was rightfully exercised. State v. Hansen, 344 N.W.2d 725, 730 (Iowa Ct. App. 1983) (citing State v. Pappas, 337 N.W.2d 490, 493 (Iowa 1983)). An abuse will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. at 729.

However, "it is impermissible for a court in imposing sentences to rely upon prior, unprosecuted offenses, unless they are admitted to by the defendant, or the facts before the court show the accused committed the crime. State v. Hansen, 344 N.W.2d at 730 (citing State v. Messer, 306 N.W.2d at 732-33.).

The defendant's criminal history record indicated that on September 14, 1982, defendant was charged with burglary and possession of burglar's tools. The disposition of these two felonies was not available at sentencing.

Defense counsel suggested community services as an appropriate punishment for driving with a suspended license. The following discussion ensued:

> THE COURT: I'm not sure that this is going to work. You've got two felonies here.
>
> MR. SHIFLEY (defense counsel): I don't know —
>
> MS. HOWES: (assistant county attorney): Oh, he's got a burglary and possession of burglary tools from '82.
>
> MR. SHIFLEY: Well, I would just state to the Court and the County Attorney's Office that that — that doesn't help him not having the funds with which to pay a fine.

> For the record, he has asked me to — he still believes that with his [seasonal] employment, which the weather has just broke, and he can work, that he can earn the money to pay this fine, and he just does not have — does not have the employment and hasn't had the unemployment [sic] to raise the money. It's strictly a matter of dollars, your Honor, rather than willfully telling the Court that he just isn't going to do anything.
>
> THE COURT: Well, I don't see that I can have community service in this. I'm going to sentence the Defendant to serve a term of sixty days in the Scott County Jail, and bond in the event of appeal then will be set in the sum of $1,000.

Clearly, there is no showing in the record of the disposition of the two felonies relied upon by the sentencing court and the prosecuting attorney. These felony charges appear on defendant's rap sheet without any explanation or showing they were prosecuted, if defendant plead guilty to one or both of them, or if they remained pending at time of sentencing. Defendant was not questioned about his involvement, if any, by the trial court. There is no factual background showing defendant's culpability or guilt in those unexplained felony charges. The sentencing court cannot rely upon those two unexplained charges in considering the appropriate sentence of the defendant in this case. State v. Hagemier, 310 N.W.2d 218, 219 (Iowa 1981).

We cannot assume that defense counsel conceded the charges and instead chose to address the defendant's inability to pay a fine as the State suggests. We find consideration of such felonies for sentencing purposes was impermissible.

AFFIRMED IN PART; SENTENCE VACATED - REMANDED FOR RESENTENCING.