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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID DANIEL LANKFORD,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

Filed March 9, 1988

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7-537
86-1880

Appeal from the Iowa District Court for Lucas County (No. 21520), Joel D. Novak, Judge.

Appellant appeals from the district court's denial of postconviction relief.

AFFIRMED.

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Daniel W. Perkins, Assistant Attorney General; and Paul M. Goldsmith, County Attorney, for resister-appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

On May 14, 1984, the appellant Lankford pled guilty to the charge of third offense, OWI. During the colloquy between the presiding judge, Judge Van Wifvat, and the appellant, the appellant was asked when and where the two prior offenses occurred. The appellant responded that the first had occurred in 1971 in Marion County and the second had occurred in 1980 or 1981 in Indianola (Warren County). These were the only two prior convictions for OWI which are reflected in the record of the plea proceedings. The appellant, acting on the advice of counsel, also waived his right to file a motion in arrest of judgment during the plea proceedings.

The appellant did not appeal his conviction. On May 20, 1986, the appellant, acting pro se, filed an application for postconviction relief. The application did not specifically allege ineffective assistance of counsel, but did mention that it was alleged when he previously attempted to initiate a state habeas corpus proceeding. On June 27, 1986, the appellant's appointed attorney filed a motion for summary disposition to enable the court to make a determination on the postconviction relief.

The motion asserted that the guilty plea for third offense OWI lacked a factual basis because the judge improperly considered a conviction which occurred more than six years prior to the OWI violation charged, in determining that the appellant was guilty of third offense OWI. It is settled law in Iowa that an OWI conviction occurring more than six years before the date of the violation charged cannot be considered in determining if the violation charged is a third offense OWI. Iowa Code section 321.281(2)(c) (1983).

The State filed its resistance to the motion on July 3, 1986. An affidavit in support of the resistance referred to attached certified copies of court records, which were not a part of the record of the plea proceeding, but which verify

that the appellant was convicted of two separate prior OWI violations on July 2, 1981, in Lucas County and on August 28, 1981, in Warren County. The affidavit urged a denial of the appellant's motion asserting that these records now established two prior OWI convictions within the six years prior to the OWI violation for which the appellant was charged.

On review, there are several issues to be addressed, most of which emanate from the issue of whether or not the appellant's waiver of his right to file a motion in arrest of judgment barred him from challenging the guilty plea for lack of a factual basis. "A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal." Iowa R. Crim. P. 8(2)(d), 23(3)(a); see also Wenman v. State, 327 N.W.2d 216, 217 (Iowa 1982).

The trial record clearly reveals that the appellant was aware of the consequences of not filing a motion in arrest of judgment. The court asked the appellant on several occasions if he understood what it meant to waive his right to file a motion in arrest of judgment. In addition, the appellant consulted with his attorney and thereafter chose to waive his right to file a motion in arrest of judgment and asked the court to immediately pronounce sentence.

Any ground for relief which has been "knowingly, voluntarily, and intentionally waived in the proceeding that resulted in the conviction . . . may not be the basis for a subsequent [postconviction] application." Iowa Code section 663A.8 (1987). An exception exists when the court finds a ground for relief which for sufficient reason was not asserted in the original proceeding. Ineffective assistance of counsel at the plea proceeding is such an exception. Munz v. State, 382 N.W.2d 693, 696-97 (Iowa App. 1985). Thus, if the appellant alleged that the waiver of the right to file a motion in arrest of judgment was a result

of ineffective assistance of counsel, he would not be barred from contesting the plea proceeding in the future. Id.

The issue now becomes whether or not the appellant sufficiently alleged in his application for postconviction relief ineffective assistance of counsel. In this respect the appellant did allege ineffective assistance of counsel in his earlier effort to obtain a writ of habeas corpus, and he asserted it again in his application for postconviction relief. However, in neither instance did he set forth the acts or omissions of appellant's counsel which were allegedly ineffective; nor did he allege that the waiver of the right to file a motion in arrest of judgment was a result of ineffective assistance of counsel. Based on these circumstances, the postconviction court denied the appellant's application.

It is noted that the appellant's application for postconviction relief was pro se. The pro se application was plainly the work of a person who had little experience drafting legal documents. Our supreme court has held that an applicant proceeding pro se is entitled to liberal construction of his pleadings, Munz v. State, 382 N.W.2d 693, 697 (Iowa App. 1985), and that state judges must learn to read inartfully drawn petitions liberally in favor of the appellant. State v. Mulqueen, 188 N.W.2d 360, 364 (Iowa 1971). In light of these decisions, we hold that the issue of whether the waiver of the right to file a motion in arrest of judgment was a result of ineffective assistance of counsel was preserved. But, as pointed out later in this ruling, this does not change the result reached by the trial court.

The postconviction court in accordance with Iowa Code section 663A.6 could have permitted appellant's counsel to amend the application for postconviction relief so as to allege that the waiver of the right to file a motion in arrest of judgment was a result of ineffective assistance of counsel. Id. However, even if the appellant had been permitted to amend, the postconviction court

held, and we agree, the appellant would not be entitled to postconviction relief. This is so, for under the circumstances here the deficiency in the factual basis for the guilty plea was cured by the extrinsic evidence introduced during the postconviction proceedings. Adams v. State, 269 N.W.2d 442, 444 (Iowa 1978) (testimony at postconviction hearing may correct deficiencies in plea stage record). The same would be true insofar as an assertion of lack of a factual basis under a motion in arrest of judgment.

The postconviction court held:

> However, if the petitioner were to so amend, the court is convinced that no further proceedings would be necessary, no purpose would be served thereby, and the petitioner would not be entitled to any post conviction relief. This is so because the factual basis for the guilty plea may be shown by extrinsic evidence introduced during the post conviction proceedings. State v. Gillespie, 271 N.W.2d 686, 689 (Iowa 1978) (record adhering on motion to arrest may correct deficiencies in plea-stage record); Adams v. State, 269 N.W.2d 442, 444 (Iowa 1978) (testimony at post conviction hearing may correct deficiencies in plea-stage record). Such evidence has already been supplied in the form of the respondent attorney's affidavit and the attached certified copies of court records which confirm the petitioner's two prior 1981 OWI convictions. The accuracy of this affidavit and the accompanying records has not been contradicted by the petitioner's counsel at hearing or by the introduction of opposing affidavits.

Thus we agree that further proceedings are unnecessary and no useful purpose would be served by holding another hearing. It is clear that when we couple the trial court record with the affidavit from the postconviction court that a factual basis does exist, for the appellant was convicted of three OWIs within six years. His claim to the contrary must be denied. For these reasons, we affirm the postconviction court's decision.

AFFIRMED.