IN THE COURT OF APPEALS OF IOWA

No. 6-663 / 96-0369

000471

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CLEVELAND DEWAYNE STEPHENS,

Defendant-Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Defendant appeals from the judgment and sentence entered after his guilty plea to delivery of a controlled substance, cocaine base, in violation of Iowa Code section 124.401(1)(c)(3) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HABHAB, C.J.

In July 1995, the State charged defendant Cleveland Dewayne Stephens with delivery of a controlled substance and sought enhanced penalties because he was convicted of a prior delivery charge in 1994. Stephens entered a guilty plea on December 19, 1995, pursuant to a plea agreement in which the State would recommend an indeterminate thirty-year prison sentence and a fine. The State agreed to either move to dismiss a probation revocation application or recommend the sentence imposed on the probation revocation run concurrently with the delivery sentence. Apparently the disposition of the State charges would be beneficial in the resolution of Stephens' pending federal charge.

At the guilty plea hearing, Stephens submitted a four-page application to withdraw his not guilty plea and to plead guilty. The document included, among other things, enumerated constitutional rights and a paragraph explaining his right to file a motion in arrest of judgment. He initialed each paragraph of the document indicating he understood the contents. He also signed and dated the document. The court asked Stephens if he "checked all these rights" and if he understood the rights contained in the document. Stephens answered affirmatively to both questions. The court also asked Stephens' counsel if he was satisfied that Stephens understood his rights. His counsel indicated he was satisfied. The court then asked Stephens a series of questions regarding the factual basis for the charge and whether he was guilty of

the charge. The court, Stephens, and counsel discussed the plea agreement. The court asked Stephens if he stood by his plea and he responded affirmatively. Finally, the court noted Stephens' right to file a motion in arrest of judgment was covered in paragraph twenty of the written form. Stephens did not file a motion in arrest of judgment.

On February 9, 1996, Stephens was sentenced to an indeterminate thirty-year prison sentence and a fine was imposed. The State moved to dismiss the probation revocation application and the sentencing court granted the motion.

Stephens appeals. He asserts the guilty plea was not voluntarily and intelligently given because the court did not personally address him about each of his constitutional rights. He contends because he was pleading guilty to a felony, his guilty plea was not subject to the waiver provision under Iowa Rule of Criminal Procedure 8(2)(b). Furthermore, he never agreed to a waiver. Stephens argues that without a waiver, strict compliance with the rule is required.

The State argues that absent a waiver the court must make an inquiry into whether there was substantial compliance with the rule. The State contends there was substantial compliance because Stephens executed a written guilty plea form. At the hearing the court established Stephens read the form and understood its contents, inquired into the factual basis for the plea, and asked Stephens if he wanted to plead guilty.

I. Challenge to Guilty Plea. Our review of a challenge to a guilty plea involving constitutional safeguards is de novo. *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

Iowa Rule of Criminal Procedure 8(2)(b) provides, in pertinent part:

> **b. Pleas of Guilty**. 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) 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 or aggravated misdemeanor.

"The purpose of rule 8(2)(b), as suggested by its first paragraph, is to ensure that guilty pleas are made voluntarily, intelligently, and with a factual basis. . . ." *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). Although Stephens did not waive the proceedings under rule 8(2)(b), "the rule does not establish a litany that must be followed without variation before a guilty plea may be accepted." *Id.* Strict

compliance with rule 8(2)(b) is not necessary; substantial compliance is all that is required. *Id.* at 804; *State v. King*, 500 N.W.2d 100, 101 (Iowa App. 1993). We must find Stephens entered his plea "intelligently in the sense that [he] had been informed of, and understood, the matters listed in rule 8(2)(b)." *King*, 500 N.W.2d at 101 (citing *Kirchoff*, 452 N.W.2d at 804).

The disclosure within Stephens' written guilty plea clearly states:

> I understand that if I wish to attack the validity of the procedures involved in the taking of my guilty plea, I must do so by a motion in arrest of judgment filed with this Court. I understand that such motion must be filed at least five days before sentencing and also within 45 days of the date my plea of guilty is accepted by the Court.

Furthermore, the first paragraph in Stephens' application to withdraw his guilty plea reads, "DO NOT INITIAL ANY PARAGRAPH IN THIS DOCUMENT IF YOU DO NOT UNDERSTAND IT OR IF ANY PART OF ITS CONTENTS ARE INCORRECT." Stephens initialed the above paragraph. The court inquired as to Stephens' understanding of the written application:

> Q. And did you check all these rights? A. Yes, sir.
> Q. And do you understand all the rights? A. Yes, sir.
> THE COURT: Are you satisfied your client understands his rights?
> MR. LEFF: Yes, Your Honor.

In addition, the following exchange took place on the record:

> MR. DILLARD: Is the matter of the motion in arrest of judgment covered in the form?
> THE COURT: I believe it is.
> MR. LEFF: Yes, it's in there.

THE COURT: It's number 20 of the form.
MR. DILLARD: Good.

In our de novo review of the record, we find the trial court substantially complied with Iowa Rule of Criminal Procedure 8(2)(b). We find these oral in-court colloquies, coupled with Stephens' written statement, sufficiently compliment each other to the extent that rule 8 requirements have been met. *See Kirchoff*, 452 N.W.2d at 805; *State v. Yarborough* 536 N.W.2d 493, 495 (Iowa App. 1995). Both Stephens and his attorney acknowledged his understanding of his need to file a motion in arrest of judgment within forty-five days to challenge any procedure involved in the taking of his guilty plea. There is no reason for us to believe that Stephens' understanding of the situation was "undermined by the use of the completed, signed and acknowledged petitions to plead guilty. Quite the opposite is probably true." *See Oldham*, 515 N.W.2d at 47 (citing *Kirchoff*, 452 N.W.2d at 805). Consequently, error has not been preserved and Stephens is precluded from challenging his guilty plea as he has failed to file a motion in arrest of judgment. *See* Iowa R. Crim. P. 23(3)(a).

II. Ineffective Assistance of Trial Counsel. Our review of an allegation of ineffective assistance of counsel is 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKendrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

We have found there was substantial compliance with rule 8 requirements. As such, Stephens has not overcome the strong presumption of his trial counsel's competency. We find trial counsel breached no duty and Stephens has suffered no prejudice. Our confidence in Stephens' conviction has not been undermined.

AFFIRMED.