

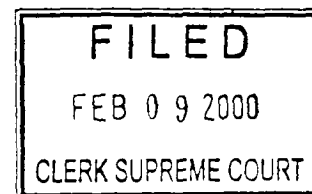
IN THE COURT OF APPEALS OF IOWA

No. 1999-571 (9-832) / 99-0261
Filed February 9, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TODD ANDREW VANAUWELAER,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, James E. Kelley, David E. Schoenthaler, and Bobbie M. Alpers, Judges.

Defendant appeals from the judgment and sentence entered upon his guilty pleas to possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(d) (1997), going armed with intent in violation of Iowa Code sections 708.8, 703.1, and delivery of marijuana in violation of Iowa Code section 124.401(1)(d). **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

MAHAN, P.J.

Todd Vanauwelaer appeals from the judgment and sentence entered upon his guilty pleas to possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(d) (1997), going armed with intent in violation of Iowa Code sections 708.8, 703.1, and delivery of marijuana in violation of Iowa Code section 124.401(1)(d). He contends (1) the trial court erred during the plea proceedings by failing to inform him of the possibility of consecutive sentences, and (2) trial counsel was ineffective by failing to file a motion in arrest of judgment to challenge the defective plea. We affirm.

The Scott County Attorney filed three trial informations charging Vanauwelaer with: (1) possession with intent to deliver marijuana, and violation of the Drug Tax Stamp Act in violation of Iowa Code sections 124.401(1)(d) and 453B.12; (2) terrorism with intent, assault while participating in a felony, and going armed with intent, in violation of Iowa Code sections 703.1, 708.3, 708.6 and 708.8; and (3) delivery of marijuana and violation of the Iowa Drug Tax Stamp Act, in violation of Iowa Code sections 124.401(1)(d) and 453B.12.

Following plea negotiations, Vanauwelaer entered guilty pleas during two separate plea proceedings. On January 6, 1999, Vanauwelaer entered a guilty plea to possession with intent to deliver marijuana, and delivery of marijuana. The State dismissed the violation of the Drug Tax Stamp Act counts.

During the plea proceeding, the district court advised Vanauwelaer of the maximum punishment as required by *State v. White*, 587 N.W.2d 240, 246-47 (Iowa, 1998), stating: "[i]f the Court accepts the plea agreement, do you understand the terms would be set to run concurrently, which means the two not to exceed five year

terms would be set to run at the same time to each other?" Vanauwelaer responded affirmatively and the court accepted his plea.

On January 27, 1999, Vanauwelaer entered a guilty plea to going armed with intent, and the State dismissed the terrorism with intent, and assault while participating in a felony counts. The plea agreement Vanauwelaer signed states, "the State recommends incarceration of 5 years consecutive to sentences." Vanauwelaer's attorney, Carol Walker, also signed the plea agreement, which states, "I have advised the Defendant of all particulars set out above and of the consequences thereof." During the plea proceeding, the district court informed Vanauwelaer, "[t]he State recommends incarceration of five years consecutive to sentences in two other files." Further, during the plea proceeding, the court engaged in the following dialog with Vanauwelaer.

THE COURT: Now, also, and as pursuant to this plea agreement - - you understand that this plea agreement provides that the State at your sentencing will recommend that you be incarcerated - -

THE DEFENDANT: Yes.

THE COURT: - for a five-year sentence? And that that five-year sentence would be consecutive to those sentences in two other criminal cases?

THE DEFENDANT: Yes, I do understand that.

THE COURT: By "consecutive" we mean after.

THE DEFENDANT: Right.

THE COURT: Not at the same time.

THE DEFENDANT: Correct.

Vanauwelaer did not file a motion in arrest of judgment prior to sentencing.

On February 11, 1999, the court sentenced Vanauwelaer on all three charges. In accordance with the plea agreements, the court sentenced Vanauwelaer to two five-year concurrent terms for the possession with intent to deliver marijuana, and

delivery of marijuana counts; and to a five-year term for the going armed with intent count, to run consecutively to the five-year concurrent terms. Vanauwelaer appeals.

I. Plea Proceedings. We review guilty pleas for errors at law. Iowa R. App. 4; *White*, 587 N.W.2d at 241.

Vanauwelaer contends the district court failed to properly advise him of the risk of consecutive sentences during the January 27, 1999, plea proceeding. The State argues Vanauwelaer has not preserved error because he did not file a motion in arrest of judgment prior to sentencing.

Iowa Rule of Criminal Procedure 23 governs post-trial motions. To preserve guilty plea challenges for appeal, a defendant must file a motion in arrest of judgment within forty-five days of entry of a guilty plea and no later than five days before the date set for sentencing. Iowa R. Crim. P. 23(3)(a). Vanauwelaer failed to file a motion in arrest of judgment before his sentencing, therefore he has failed to preserve error. See *State v. Carter*, 582 N.W.2d 164, 165 (Iowa 1998).

During the January 27, 1999, plea proceeding, the district court advised Vanauwelaer he would have to raise any challenges to his guilty plea in a motion in arrest of judgment, and failure to do so would preclude the right to challenge his plea on appeal. The court adequately explained the consequences of failing to file a motion in arrest of judgment. Iowa R. Crim. P. 23(3). But see *State v. Kirchoff*, 452 N.W.2d 801, 802-03 (Iowa 1990) (finding rule 23(3)(a) does not preclude review of plea proceeding where the district court failed to adequately explain the consequences of failing to file a motion in arrest of judgment).

Even assuming error had been preserved, the result would be the same. Before accepting a guilty plea, a judge must determine whether the plea is

intelligently and voluntarily made and has a factual basis. Iowa R. Crim. P. 8(2)(b). To ensure a plea is intelligently and voluntarily made, the court must advise a defendant of the mandatory minimum punishment, if any, and the maximum punishment before accepting a plea. Iowa R. Crim. P. 8(2)(b)(2). If the possibility exists a defendant will be sentenced to consecutive sentences, the court must explain the maximum possible punishment for consecutive sentences before accepting a plea. *White*, 287 N.W.2d at 246-47. Substantial compliance is the standard for determining whether the requirements of rule 8(2)(b)(2) are met.

During both plea proceedings, the district court explained the State's recommendation of a consecutive term of imprisonment for the going armed with intent charge. The court asked Vanauwelaer if he understood what consecutive sentences meant, and explained consecutive means not at the same time. Vanauwelaer responded, indicating he understood the meaning of consecutive sentences during both plea proceedings. We find the court substantially complied with the requirements of rule 8(2)(b). See *Kirchoff*, 452 N.W.2d at 804.

II. Ineffective Assistance of Counsel. In the alternative, Vanauwelaer argues his trial counsel was ineffective in failing to file a motion in arrest of judgment challenging the court's alleged failure to inform him of the maximum possible punishment during the January 27, 1999, plea proceeding prior to sentencing. Our review of an ineffective assistance of counsel claim is de novo. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). To succeed on appeal, Vanauwelaer must prove his trial counsel failed to perform an essential duty, and he was prejudiced by his counsel's error. *Carter*, 582 N.W.2d at 165.

To establish his trial counsel failed to perform an essential duty, Vanauwelaer must overcome the strong presumption his counsel's actions were "reasonable under the circumstances and fell within the normal range of professional competency." *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). To prove prejudice, Vanauwelaer must demonstrate his "counsel's error worked to his actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different." *Id.* We may dispose of Vanauwelaer's claim if he fails to prove his trial counsel breached a duty or prejudice resulted. *Id.*

We have carefully reviewed the record and conclude Vanauwelaer failed to prove either a breach of duty or resulting prejudice. Therefore, Vanauwelaer's counsel was not ineffective for failing to file a motion in arrest of judgment prior to his sentencing. We affirm the judgment and sentence entered by the district court.

AFFIRMED.