

FILED

OCT 27 1981 538

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 27, 1981

vs.

)

MARTIN JESSEE WELBORN,

)

1-285

65527

Defendant-Appellant.

)

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals his conviction entered upon his plea of guilty to the crime of first degree robbery in violation of section 711.2, The Code 1979, asserting 1) that his plea was invalid because he did not comprehend the consequences of the waiver of an intoxication defense and 2) that trial court failed to determine he understood that by pleading guilty he would not be given a trial. AFFIRMED.

R. Earl Barrett, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Martin Jessee Welborn, appeals his conviction entered upon his plea of guilty to the crime of first degree robbery in violation of section 711.2, The Code 1979.¹ He asserts 1) that his plea was invalid because he did not comprehend the consequences of the waiver of an intoxication defense and 2) that trial court failed to determine he understood that by pleading guilty he would not be given a trial. We affirm.

On March 26, 1980, a preliminary information was filed in Polk County District Court charging defendant with the crime of robbery in the first degree. In a hearing on June 18, 1980, defendant entered a plea of guilty to this charge. Defendant had previously pled not guilty. Following a colloquy with defendant, trial court accepted defendant's guilty plea and immediately sentenced him to a term of confinement not to exceed 25 years. Defendant did not challenge his guilty plea through a motion in arrest of judgment, but challenges his guilty plea now in this appeal.

I. Scope of Review. Our review of a final judgment in criminal cases is generally on error and not de novo. Iowa R. App. P. 4. Where petitioner alleges a violation of a constitutional safeguard, however, we will make our own evaluation of the totality of the circumstances under which the ruling was made. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980); Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). This is equivalent to a de novo review. Sims, 295 N.W.2d at 522; Hinkle, 290 N.W.2d at 30.

II. Motion in Arrest of Judgment. Pursuant to State v. Worley, 297 N.W.2d 368 (Iowa 1980), defendant can challenge his guilty plea proceeding without filing a motion in arrest of judgment because trial court failed to inform defendant of the consequences of failing to file such a motion.² Id. at 370.

¹ Defendant's brief erroneously states that this appeal is "from judgment of guilty of Burglary in the second Degree in violation of Section 713.1 and 713.3 of the Code of Iowa." It appears that defendant, at the time of the instant guilty plea proceeding, was on probation following an earlier plea of guilty to a charge of second degree burglary.

² Trial court's colloquy, as quoted at length in the body of this opinion, included the following statement:

Q. Also you're entitled to a period of fifteen days between a plea of guilty and a sentencing, during which time your attorney would have a right to contest the legality of these proceedings that we're having right now.

III. Guilty Plea. Defendant contends that trial court did not comply with the requirements of Iowa R. Crim. P. 8(2) in two respects: 1) failure to determine that defendant comprehended the consequences of his waiver of an intoxication defense; and 2) failure to determine defendant understood that by pleading guilty he would not be given a trial. We find no merit to defendant's allegations.

Iowa R. Crim. P. 8(2) provides:

The court may refuse to accept a plea of guilty, and shall not accept such plea without first addressing the defendant personally and 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 such trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself.
- (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.

Only substantial compliance with this rule is required. Worley, 297 N.W.2d at 371.

State v. Fluhr, 287 N.W.2d 857, 864 (Iowa 1980).

Before accepting defendant's guilty plea, trial court engaged in a discussion with the defendant during which it satisfied itself that the plea was voluntarily and intelligently entered and that defendant understood, as a consequence of his plea, he would not be given a trial. The court had the following discussion with the defendant about his plea:

He can't do that if you're sentenced immediately. Do you want to waive this time and request immediate sentencing?

A. Yes.

This arguably represents substantial compliance with rule 8(2)(d). See State v. Taylor, 301 N.W.2d 692, 693 (Iowa 1981). However, the State concedes in footnote 1 of its brief that defendant is entitled to maintain this appellate challenge to his guilty plea because "it appear [sic] that the trial court did not make it clear that the consequences of failure to do so [challenge of plea through a motion in arrest of judgment] is the preclusion of an appellate challenge to the plea."

By the Court:

* * *

Q. ...

You understand that if you continue with your plea of guilty you will be entitled to a speedy and public trial by jury, and that involves certain constitutional rights which I want to talk to you about.

First, you understand you'll be provided an attorney at public expense if you can't afford to hire your own attorney.

Do you understand that?

A. Yes.

Q. Second, you have a privilege against self-incrimination. In other words, whether or not you testify in your own behalf or remain silent would be entirely your decision, and if you elected not to testify and to remain silent, no adverse inferences could be drawn from that fact by any member of the jury or by anyone else.

Do you understand that?

A. Yes.

Q. You understand that on trial the State would have to have any witnesses against you appear in court and testify, and when they did that they would be subjected to cross-examination by your attorney.

You understand that.

A. Yes.

Q. You understand that you are presumed to be innocent of this offense until such time, if ever, the State proves your guilt by competent evidence beyond a reasonable doubt to the satisfaction of a jury of twelve persons.

You understand that.

A. Yes.

Q. You understand that on trial you would be entitled to all the compulsory processes of this court to compel the attendance of any witnesses in your favor to appear in court and testify.

You understand that.

A. Yes.

Q. You understand that by pleading guilty you won't have a jury trial and you will in effect be waiving these constitutional rights we've been talking about.

Do you understand that?

A. Yes.

* * *

Q. Your attorney has explained to you the defense of intoxication to a felony charge.

You understand that, do you?

A. Yes, sir.

Q. You do understand that if you knew what was going on and capable of forming the requisite intent, that's not a defense.

You understand that, don't you?

A. Yes, sir.

Q. You're not contending here that you were so intoxicated that you didn't know what was going on, is that true?

A. No, sir.

* * *

Q. Also you're entitled to a period of fifteen days between a plea of guilty and a sentencing, during which time your attorney would have a right to contest the legality of these proceedings that we're having right now.

He can't do that if you're sentenced immediately. Do you want to waive this time and request immediate sentencing?

A. Yes.

THE COURT: Can either attorney suggest to the Court any legal cause why sentence should not be pronounced at this time?

MR. BARRETT: No, Your Honor.

MR. THOMAS: Your Honor, I don't think so, but I just want to make sure on it.

By Mr. Thomas:

Q. Mr. Welborn, you understand if you had any possible defense like intoxication or drugs or anything like that, that you're waiving that defense by entering a plea today?

A. I can still appeal that, can't I?

MR. BARRETT: You still have that.

THE DEFENDANT: Yes.

We conclude this discussion clearly establishes that defendant comprehended the consequences of the waiver of an intoxication defense and that he understood that by pleading guilty he would not be given a trial. We believe that the defendant's inquiry, "I can still appeal that, can't I?," concerns a possible challenge to his guilty plea and not whether he could assert an intoxication defense on appeal.

We thus find substantial compliance with rule 8(2) in the instant case and affirm defendant's conviction.

AFFIRMED.