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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

WILBUR CHAPMAN BAKER,)

Defendant-Appellant.)

Filed September 6, 1984 268

4-213
83-1132

Appeal from the Iowa District Court for Sac County—Louie F. Beisser, Judge.

On appeal defendant asserts that his plea was not knowingly, voluntarily and intelligently entered and that he was rendered ineffective assistance of counsel. REMANDED WITH INSTRUCTIONS.

Charles Harrington, Appellate Defender and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Defendant, Wilbur Chapman Baker, appeals from the judgment imposed upon his guilty plea conviction for murder in the second degree in violation of Iowa Code §§707.1, 707.3 (1981). We remand this case for the limited and specific purpose of having the trial court make an adequate record as to the issue of effective assistance of counsel.

The defendant filed a Motion in Arrest of Judgment following entry of his guilty plea. In the motion to arrest it was asserted that his plea was not knowingly and voluntarily entered. Defendant claims that his guilty plea was not entered knowingly because of a disability which hampers his abilityto comprehend and communicate and his inability to understand his constitutional rights and the elements of the offense. He further contends that he was denied effective assistance of counsel when he entered his plea. The trial court overruled defendant's motions to arrest judgment and for a new trial and defendant appealed.

Pursuant to Iowa Rule of Criminal Procedure 8(2)(b), certain criterion need to be met before a trial court can accept a guilty plea from a defendant. Iowa R. of Crim. P. 8(2)(b)(1)-(4) (1978). In order to satisfy the requirements of due process:

> 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 offered.
>
> (2) The mandatory minimum punishment, if any, 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.

Id.

Prior to the enactment of the rule, the Iowa Supreme Court extensively discussed the proper procedures to be taken before accepting guilty pleas in the cases of Brainard v. State, 222 N.W.2d 711 (Iowa 1974), and State v. Sisco, 169 N.W.2d 542 (Iowa 1969). Sisco was a landmark case wherein the supreme court held that judges had an obligation to meaningfully comply with certain procedures designed to demonstrate and insure the voluntariness of guilty pleas. The court adopted provisions from the ABA Project on Minimum Standards for Criminal Justice, Pleas of Guilty (Approved Draft 1968). Sections 1.4, 1.5 and 1.6 require that a judge accepting a guilty plea must first address the defendant personally, determine that he understands the nature of the charge, inform him that by his plea he waives his right to trial by jury, inform him of possible penal consequences, determine that the plea was voluntarily entered, and, finally, determine that there is a factual basis for the plea.

Hence, from the Sisco opinion it was learned what a judge needed to accomplish before accepting a guilty plea. From the court's discussion in Brainard it was set out for the first time how a judge could meet the Sisco determinations. Brainard decided first that the judge should both explain the charge to the defendant and inquire into the defendant's understanding of it to the extent necessary to demonstrate his comprehension on the record. 222 N.W.2d at 714-15 (emphasis added). Secondly, to show the accused's awareness of the possible maximum penalty, Brainard advised, "This can be accomplished by telling the defendant the possible maximum sentence prior to his plea or having the defendant himself state his understanding as to the possible maximum sentence."

Id. at 715. Thirdly, while acknowledging that previous Supreme Court opinions and opinions of this court had not specified the manner in which the record must demonstrate the defendant's understanding of the constitutional rights he waived, Brainard decided that in all future cases "the judge must by personal colloquy inform the defendant of his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers, and determine that he understands he waives these rights by pleading guilty." Id. at 717-18. (emphasis added). In effect, Brainard decided that a thorough oral inquiry directed toward the defendant is the most effective means of probing and determining a defendant's appreciation of a guilty plea.

The reasons for such a rigorous adherence to the ABA Minimum Standards for Criminal Justice, outlined supra, were articulated in McCarthy v. United States. 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)(which concerned itself with the substantially similar Fed. R. of Crim. P. 11):

> "First, . . . it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas."

McCarthy, 394 U.S. at 465, 89 S.Ct. at 1170, 22 L.Ed.2d at 424-25 (footnotes omitted), quoted in Sisco, 169 N.W.2d at 545-46 (emphasis added). A guilty plea must be entered knowingly, intelligently and voluntarily because waiver of constitutional rights must satisfy due process. For a waiver to be valid under the due process clause, "it must be an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, ____, 82 L.Ed. 1461, 1466 (1938).

There is no standard, boiler-plate "personal colloquy" to be employed in satisfying the Brainard procedures. The guidelines established by Sisco do not require a ritualistic formula for interrogation by a court. Meaningful compliance is what is required. State v. Bell, 210 N.W.2d 423, 426 (Iowa 1973). A judge needs to apply a subjective test in order to determine whether a defendant has sufficient understanding of the consequences of a guilty plea, so as to satisfy due process. A judge needs to conduct a personal conversation with the defendant to such an extent as to inform the defendant of his privilege against self-incrimination, his right to a trial by jury, and of his right to confront his accusers. A determination needs to be made that the defendant understands he waives his right to these constitutional protections by pleading guilty.

A defendant cannot knowingly, intelligently and voluntarily waive his constitutional rights, pursuant to a guilty plea, unless he receives the effective assistance of counsel. Court compliance with the standards approved in Sisco is not a complete substitute for advice of counsel. State v. Mehuys, 172 N.W.2d 131, 136 (Iowa 1970). Its purpose is to compliment the defendant's right to counsel to insure that the defendant's plea meets the formal requisites for the plea. State v. Christensen, 201 N.W.2d 457, 459 (Iowa 1972).

In discussing the guilty plea the Iowa Supreme Court has said "...waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." In Zacek v. Brewer, 241 N.W.2d 41, 47 quoting Brady v. U.S., 397 US 742, 748, 90 S. Ct. 1463, 1468-1469, 25 L.Ed.2d 747 (1970). "To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision" State v. Mehuys, 172 N.W.2d 131, 136 (Iowa 1969).

The defendant has a communication impairment classified as simple aphasia characterized by a reduction of available language in all modalities. To effectively communicate with counsel defendant requires communication in a quiet place with someone who uses a loud voice, speaks slowly, allows adequate response time, restates questions and information, and speaks in short units. Widely spaced written material that is stated in simple terms and short units aid his comprehension and recall. Without the use of such techniques, defendant in the opinion of a speech pathologist, who examined defendant prior to trial, cannot fully assist his attorney.

The trial information was filed on October 11, 1982. Bush was appointed to represent the defendant on October 7, 1982. On November 29, 1982, some seven months prior to the time of plea, the defendant filed a letter written to Bush. The letter said:

> Warren Bush
> As you know, I can't write, that I have to use a friend. Look, I want a different lawyer.' If you con't give me another one, I will have somebody else tell the judge I want another lawyer. You haven't even called my brother. You haven't put out any supeonas (sic). You haven't called my friend from Des Moines. It took you three times to go and see my mother and it's only three blocks from where you live. In fact, you don't have the courtesy to let me know what you are doing. It's probably nothing that you do anyway.
> Signed W. C. Baker

The defendant claims he was kept in Oakdale until two days before trial and did not have an opportunity to obtain the witnesses he wished. He testified at sentencing that he had tried to fire Bush six or seven times. The county attorney acknowledged he had been advised that the defendant wished to terminate Bush. The defendant testified that Bush refused to remove himself from the case despite the defendant's request. Nothing happened on the defendant's request for new counsel until two weeks prior to the date set for trial when the court did not appoint a substitute counsel for the defendant but rather appointed co-counsel to work with Bush. The defendant claims the new attorney could not do an adequate job because two weeks is not sufficient time to prepare for trial.

The defendant at sentencing requested that Bush not be present in the court room. The defendant testified that he had many complaints against Bush. Defendant further indicated that Bush failed to call certain witnesses requested by defendant. "In the event the indigent defendant is dissatisfied with court appointed counsel, he has the right to ask appointment of new counsel stating the reasons for his dissatisfaction. The court then determines the propriety of appointing new counsel." State v. Taylor, 211 N.W.2d 264, 267 (Iowa 1973). "The subjective dissatisfaction of an indigent defendant with court-appointed counsel cannot be made the sole basis for demand for appointment of new counsel as a matter of constitutional right. In the event the indigent requests appointment of new counsel stating the reasons for his dissatisfaction. The court then determines the propriety of appointment of new counsel. . . [The Fourteenth] Amendment is not violated by failure to appoint additional counsel unless, under the circumstances by an appraisal of the totality of the facts in a given case there can be found a denial of fundamental fairness." Roberts v. Bennett, 258 Iowa 1101, 1107; 141 N.W.2d 628, 632 (1966).

We cannot determine from the record if the defendant was entitled to a new attorney. (This hearing was never given to him.)

It is clear from the record before us that a serious breakdown of communication has occurred between the defendant and his attorney. Very early in the proceeding this dissatisfaction was made known to Bush and the county attorney. The record is silent on the issue until two weeks before trial when (without hearing) a co-counsel was appointed to serve with Bush.

For the defendant to have the issue of ineffective assistance addressed on direct appeal the record must provide an adequate factual basis. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). The ultimate test for determining whether

a defendant has been denied effective assistance of counsel is "whether under the entire record and totality of circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Ineffective assistance of counsel occurs when an attorney fails to exercise "The customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." Long v. Brewer, 667 F2d 742, 744 (8th Cir. 1982)(applying Iowa law).

At this time the record is inadequate to allow a final adjudication on the claim of ineffective assistance of counsel. However, this is an issue that needs to be decided before a determination can be made on the validity of the defendant's guilty plea. Unless a defendant is effectively represented by counsel, he cannot knowingly, voluntarily, and intelligently waive his constitutional rights.

Because such a determination cannot be made on this record, the district court's order overruling the motion in arrest of judgment is vacated and the cause is remanded for the limited purpose of determining whether Baker's counsel was ineffective. Should such a finding be made, the plea should be vacated..

REMANDED WITH INSTRUCTIONS.