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IN THE COURT OF APPEALS OF IOWA

JAMES R. STEELE,

Plaintiff-Appellant,

vs.

STATE OF IOWA,

Defendant-Appellee.

Filed February 5, 1980

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2-62717

Appeal from Polk District Court - John N. Hughes, Judge.

Plaintiff appeals denial of postconviction relief and overruling of motion in arrest of judgment. Affirmed in part; dismissed in part.

James Cleary, Des Moines, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for defendant-appellee.

Heard by Donielson, P.J., Snell, Carter and Johnson, JJ. Oxberger, C.J., takes no part.

DONIELSON, J.

Plaintiff appeals denial of postconviction relief and overruling of motion in arrest of judgment. We affirm in part and dismiss in part.

I.

In 1975 plaintiff was charged by information with robbery without aggravation, in violation of sections 711.1 and 711.3, The Code 1975. The trial court accepted plaintiff's guilty plea, finding he understood the plea and a factual basis for the plea existed. Plaintiff received a suspended sentence of not more than ten years and was placed on probation for two years. Plaintiff did not appeal this conviction directly. Plaintiff's probation was revoked in 1976.

In 1977 plaintiff filed a pro se application for postconviction relief alleging he was denied effective assistance of counsel and did not understand the proceedings when he pleaded guilty. Plaintiff subsequently obtained counsel who amended the application to include an allegation that an insufficient factual basis existed for acceptance of plaintiff's guilty plea. In the postconviction relief hearing on August 4, 1978, the trial court denied relief because plaintiff failed to establish his claims by a preponderance of the evidence. The trial court found each essential element of the crime charge had been factually established, plaintiff understood the elements of the crime, and plaintiff's counsel provided effective assistance.

On August 25, 1978, plaintiff filed a pro se motion in arrest of judgment in the postconviction relief proceeding, asserting he had not yet been given the opportunity to present adequately his claims of ineffective assistance of counsel at the guilty plea proceeding, his probation revocation hearing, and the postconviction relief proceeding; he raised again his lack of understanding at the guilty plea proceeding. On October 3, 1978, plaintiff filed a pro se notice of appeal from the final judgment denying postconviction relief to preserve appeal since the motion to arrest judgment had not been ruled on and the sixty days in which to file a notice of appeal was about to end. On January 22, 1979, the trial court that denied plaintiff postconviction relief overruled the motion in arrest without providing for a hearing on the motion. From that order and the final judgment denying postconviction relief, plaintiff appeals.

II.

A person seeking postconviction relief must establish the claim asserted by a preponderance of the evidence. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). If the trial court's fact-findings in support of its judgment denying postconviction relief are supported by substantial evidence and justified as a matter of law, the reviewing court will not disturb the judgment. Stanford, 279 N.W.2d at 31; Benton v. State, 199 N.W.2d 56, 57 (Iowa 1972). Where, however, a violation of a constitutional safeguard is alleged, we evaluate the totality of the circumstances under which the postconviction ruling was made. Stanford, 279 N.W.2d at 31; Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); State v. Lemburg, 257 N.W.2d 39, 45 (Iowa 1977).

A preliminary issue is whether plaintiff's failure to appeal directly his conviction waives his right to bring this action. Failure to appeal does not alone constitute a waiver of the right to attack a conviction by a postconviction action. Stanford, 279 N.W.2d at 33 (quoting Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979)). However, failure to appeal bars relief in a postconviction action on the ground of abuse of process as to factual and legal contentions the postconviction applicant knew of at the original trial, but deliberately and inexcusably failed to pursue on appeal. Id.; Horn v. Haugh, 209 N.W.2d 119, 120-21 (Iowa 1973) (approving ABA Standard, Post-Conviction Remedies, § 6.1(c)); see Bledsoe v. State, 257 N.W.2d 32, 33-34 (Iowa 1977). Under this analysis, we believe petitioner has waived review in a postconviction relief action of whether a factual basis existed for his guilty plea. Redding, 274 N.W.2d at 317. Plaintiff did not appeal his conviction on this ground even though it could have and should have been reviewed in that manner. A postconviction relief hearing would and did produce only cumulative evidence on this issue since the guilty plea hearing colloquy between the trial court and defendant and the minutes of testimony presented only the factual issue that could have been decided on direct appeal. Since plaintiff has not presented an explanation for failing to directly appeal this issue, we believe he is barred from relief under it.

Regardless of the waiver issue, we find the trial court's ruling is supported by substantial evidence and the conclusions are justified as a matter of law. Stanford, 279

N.W.2d at 31. In reaching its decision the trial court had before it the minutes of testimony, the record of the guilty plea hearing, including the colloquy between the court and plaintiff, and the record of the postconviction relief hearing. These documents were proper sources of information to determine whether a factual basis existed for plaintiff's guilty plea. See Adams v. State, 269 N.W.2d 442, 444 (Iowa 1978) (posteonviction proceeding record); State v. Marsan, 221 N.W.2d 278, 280 (Iowa 1974) (minutes of testimony); Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 618 (Iowa 1974) (inquiry of defendant). Our review of this information shows sufficient evidence supports each element of the crime. See §§ 711.1, .3, The Code 1975.

Likewise, plaintiff's failure to raise the issue of his understanding of his guilty plea waives his right to appeal this finding since this claim rested on evidence in the guilty plea proceeding. Stanford, 279 N.W.2d at 33 (quoting Redding, 274 N.W.2d at 317); Horn, 209 N.W.2d at 120-21. The trial court questioned plaintiff concerning each element of the offense and plaintiff's related actions. This colloquy was in the record and available to plaintiff for direct appeal; his failure to appeal directly waives his right to raise the claim in a postconviction relief hearing.

On the merits, we conclude plaintiff has not proven by a preponderance of the evidence he lacked sufficient understanding of the charges against him. The test here is whether the judge explained the charge to the plaintiff and inquired into his understanding of it. Brainard v. State, 222 N.W.2d 711, 714 (Iowa 1974). The colloquy between plaintiff and the trial court shows his understanding of each element of the crime and of the consequences of his admissions. See State v. Hansen, 221 N.W.2d 274, 276 (Iowa 1974) (each element of offense need not be explained when it is apparent from the circumstances defendant understood elements).

Plaintiff contends the trial court erred in not discussing each element of the charge with him, particularly whether the taking of the victim's purse by plaintiff was done by putting the victim in fear. We find this argument unpersuasive. First, the crime of robbery without aggravation can be committed either by force or by putting the victim in fear. §§ 711.1, .3, The Code 1975. The guilty plea colloquy focused on plaintiff's acts of force in taking the victim's purse and knocking her down. There was

no need to inquire into whether plaintiff put the victim into fear since the showing plaintiff used force was sufficient to establish a violation of sections 711.1 and 711.3, The Code 1975. State v. Miller, 83 Iowa 291, 295, 49 N.W. 91, 91 (1891); State v. Carr, 43 Iowa 418, 423 (1876). Moreover, when a young man rushes up from behind an elderly lady, grabs her purse, possibly knocks her down, and then flees, a reasonable inference is that the victim was put in fear. Carr, 43 Iowa at 423. We conclude plaintiff understood the elements of the crime charged and the consequences of his plea.

Although a close question, we conclude plaintiff has not waived his right to raise the issue of ineffective assistance of counsel since the claim depended in part on evidence not in the plea proceeding record. See State v. O'Connell, 275 N.W.2d 197, 206 (Iowa 1979); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). Plaintiff asserts he learned after the plea proceeding State's only identification witness was a former friend of his who might have been impeached on bias grounds. He asserts his counsel should have apprised him of this defense when advising him to plead guilty.

In reviewing this argument, we make our own evaluation of the circumstances of the plea proceeding. Stanford, 279 N.W.2d at 31; Lemburg, 257 N.W.2d at 45. The performance standard for a criminal defense attorney is whether under the circumstances counsel's performance is within the range of normal competency. State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); O'Connell, 275 N.W.2d at 206; State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Effective or adequate assistance of counsel means conscientious, meaningful representation, where the accused is fully advised of constitutional and statutory rights. Kime v. Brewer, 182 N.W.2d 154, 156 (Iowa 1970).

Plaintiff has failed to establish inadequate or ineffective assistance of counsel. Counsel's strategic recommendation to plead guilty rather than run the risk of trial is within the range of normal competency. See id. If plaintiff had decided to stand trial, he would have risked receiving a harsher sentence than the probation he received on recommendation of the State. No affirmative factual basis demonstrating counsel's inadequacy of representation was established to warrant reversal. See Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976).

III.

Plaintiff also appeals overruling of his motion in arrest of judgment, asserting trial court erred in not providing a hearing for his claims of ineffective assistance of counsel in the guilty plea proceeding, the probation revocation proceeding, and the postconviction relief proceeding. Due to the circumstances of plaintiff's various filings, we dismiss this part of his appeal.

Initially, we note plaintiff's motion in arrest of judgment was not the correct motion to file in this postconviction relief proceeding. Such a proceeding is governed by rules and statutes applicable in civil proceedings. § 663A.7, The Code 1977; see Emery v. Fenton, 266 N.W.2d 6, 16 (Iowa 1978). A motion to arrest judgment is limited in Iowa to criminal actions, Iowa R. Crim. P. 23(3), and is not applicable in a postconviction relief proceeding. § 663A.7, The Code 1977; Iowa R. Crim. P. 1(1). Plaintiff should have moved for a new trial, Iowa R. Civ. P. 244. We do not, however, consider this error to be determinative.

We hold plaintiff's filing of a notice of appeal from the postconviction relief proceeding requires dismissal of his appeal of this issue. It is well settled that when a notice of appeal is filed, the trial court ordinarily loses jurisdiction of the case and jurisdiction is transferred to the appellate court. In re Estate of Tollefsrud, 276 N.W.2d 412, 417 (Iowa 1979); McCleeary v. Wirtz, 222 N.W.2d 409, 415 (Iowa 1974); State v. Olson, 259 Iowa 756, 762, 145 N.W.2d 645, 649; Pedersen v. Thorn, 258 Iowa 250, 252, 137 N.W.2d 588, 589 (1965); State v. Young, 255 Iowa 447, 450, 122 N.W.2d 847, 848-49 (1963); McCauley v. Municipal Court of Des Moines, 254 Iowa 1345, 1346-48, 121 N.W.2d 96, 96-98 (1963); State v. McKillop, 241 Iowa 988, 990-91, 42 N.W.2d 381, 382 (1950). But see Shaw v. Addison,, 236 Iowa 720, 726, 18 N.W.2d 796, 800 (1945); Rauch v. Des Moines Electric Co., 206 Iowa 1155, 1156, 221 N.W. 788 (1928); Kenwood Lumber Co. v. Armstrong, 197 Iowa 1238, 1243-44, 198 N.W. 521, 523 (1924); Cook v. Smith, 58 Iowa 607, 608, 12 N.W. 617, 617 (1882). When plaintiff filed, on October 3, 1978, his notice of appeal from the final judgment, the trial court lost jurisdiction to rule on the pending motion to arrest judgment. See Young, 255 Iowa at 450, 122 N.W.2d at 848-49; McKillop, 241 Iowa at 990-91, 42 N.W.2d at 382. As a result, we are also without

jurisdiction to consider plaintiff's appeal concerning this motion due to the trial court lacking jurisdiction to rule on the motion. Federal Land Bank of Omaha v. Jefferson, 229 Iowa 1054, 1060, 295 N.W. 855, 858 (1941); Anderson v. Meier, 227 Iowa 38, 42, 287 N.W. 250, 252 (1939); In re Appeal of Head, 141 Iowa 651, 663, 118 N.W. 884, 889 (1909); see Hall v. McMahan, 4 Greene 376, 377 (Iowa 1854).

The State's failure to challenge the trial court's or our jurisdiction does not confer jurisdiction to hear plaintiff's appeal. See Antrim v. Civil Service Commission of Des Moines, 261 Iowa 396, 401, 154 N.W.2d 711, 714-15 (1967); Harden v. Illinois Central Railroad, 254 Iowa 426, 429, 118 N.W.2d 76, 78 (1962); Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 40, 66 N.W.2d 859, 860 (1950). We are required to dismiss, on our own motion, an appeal when jurisdiction is lacking. DeKruyff v. Johnston, 252 N.W.2d 389, 390 (Iowa 1977); Harden, 254 Iowa at 429, 118 N.W.2d at 78; Hubbard v. Marsh, 239 Iowa 472, 473-75, 32 N.W.2d 67, 68 (1948). Plaintiff's appeal concerning overruling of motion to arrest judgment is dismissed.

We affirm the remainder of the trial court's judgment.

AFFIRMED IN PART; DISMISSED IN PART.