IN THE COURT OF APPEALS OF IOWA

FILED
MAY 31 1996
CLERK SUPREME COURT

No. 6-201 / 95-1194

IN RE THE MARRIAGE OF DYRA S. THORPE AND BYRON RAY THORPE

Upon the Petition of
DYRA S. THORPE,

Appellee,

And Concerning
BYRON RAY THORPE,

Appellant.

Appeal from the Iowa District Court for Polk County, Michael J. Streit, Judge.

Byron Thorpe appeals an order modifying the decree dissolving his marriage to Dyra Thorpe. **AFFIRMED.**

Gerald B. Feurhelm, Des Moines, and Byron Thorpe, pro se, for appellant.

Kathy Goudy, Des Moines, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ. Streit and Vogel, JJ., take no part.

PER CURIAM

Byron Thorpe appeals the custody provisions of the district court order modifying the decree dissolving his marriage to Dyra Thorpe. We affirm.

Byron and Dyra Thorpe were married on March 14, 1981. They have three children. Jason, born January 13, 1981; Bobbi, born May 17, 1985; and Nick, born March 16, 1989. During the marriage, the parties lived in a trailer home on Dyra's family's farm in Ankeny Dyra's parents lived in an adjacent residence as did Dyra's sister, Brenda, who resided in a third home on the property with her two children.

The Thorpes' marriage was dissolved by a decree entered on August 6, 1993. The decree incorporated a stipulation allowing joint legal and physical custody of the children Byron retained residence in the trailer house, though the decree specified that he was to attempt to find different housing for himself and the children within one year of the decree At the time of the modification hearing, Byron was still living in the trailer home though he expressed his intent to move as soon as he was financially able to do so Dyra currently lives in her sister Brenda's basement apartment and intends to move into the trailer home when Byron finds another residence

Byron filed a petition for modification in September of 1994 He claimed the joint custody arrangement was not working in the best interest of the children and requested the decree be modified to grant him sole physical custody At the modification hearing, Byron testified that Dyra had become uncooperative with regard

to the joint custody arrangement. He claimed that while he intended to leave the trailer home and purchase a new home for himself and the children, Dyra was refusing to adjust the custody arrangements to conform to his changing needs. He further claimed that Dyra should not be the primary caregiver for the children based on her failure to maintain the children's personal hygiene and her work schedule which requires her to wake the children at 5 a.m. each morning.

Dyra also testified the joint physical care arrangement was not working but claimed she was the better primary caregiver for the children. She stated that she was able to provide more stability for the children based on her family relationship and her mother's willingness to care for the children She further claimed that because she intended to stay living on her parents' property, the children would not be required to change schools should Byron decide to leave the trailer home.

The district court found the failure of the joint physical care arrangement constituted a substantial change of circumstances warranting modification of the decree The court determined Dyra had been the children's primary caregiver throughout the joint physical care arrangement and had been meeting their basic needs The court also concluded that Dyra had the closer relationship with the children and was able to provide them with more stable living arrangements than Byron The court awarded the parties joint legal custody with primary physical care given to Dyra Byron

was allowed liberal visitation and ordered to pay $1200 per month in child support. Byron appeals the custody provisions only.

Our review in this matter is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514-15 (Iowa 1973) The trial court has reasonable discretion in determining whether modification is warranted, and that discretion will not be disturbed on appeal unless there is a failure to do equity *In re Marriage of Kern*, 408 N W 2d 387, 389 (Iowa App 1987) (citing *In re Marriage of Vetternack*, 334 N W 2d 761, 762 (Iowa 1983)) In child custody cases, the best interests of the child is the first and governing consideration *In re Marriage of Urban*, 359 N W 2d 420, 424 (Iowa 1984).

Our review of the record reveals Dyra is the preferred primary caregiver for the children She has a close and nurturing relationship with them and has been meeting thier emotional, social, and educational needs since the time of the parties' divorce She is involved with the children's school activities and has a schedule that permits her

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to spend considerable time with them after school and in the evenings. The children identify Dyra's home as their home and maintain a close and loving relationship with Dyra's family. The availability of Dyra's family to care for the children provides the children with a safety net that would be lost should Byron move with the children to another home. The children have enjoyed the stability created by the close living arrangement with Dyra's family and are currently thriving in this environment. Accordingly, we see no reason to remove the children from Dyra's care.

On our de novo review, we find Dyra is the parent who can provide the more stable home for the children. We affirm the decision of the district court.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

FILED
AUG 3 0 1996
CLERK SUPREME COURT

No. 6-482 / 95-1194

STATE OF IOWA,

Appellee,

v.

HELEN PARROW,

Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKendrick, Judge.

Helen Parrow appeals from her conviction, following a guilty plea, for carrying a weapon in violation of Iowa Code sections 703.1 and 724.(1) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ

STREIT, J.

Defendant challenges the acceptance of her guilty plea, asserting the district court erred when it failed to personally ensure her plea was made voluntarily and intelligently. In the alternative she argues her objections at sentencing constituted a motion to withdraw her plea which would have been timely.[1]

Helen Parrow was convicted, on her plea of guilty, of carrying a dangerous weapon, in violation of Iowa Code section 724.4 (1995) and sentenced to serve a term of not to exceed two years in prison and fined $500.00.

A plea agreement was entered into by Parrow and the State under which related charges of fourth degree theft and possession of a controlled substance would be dismissed in exchange for Parrow's plea of guilty to the present charge.

There were no plea proceedings. Parrow filed a two page written guilty plea to the charge of carrying weapons containing a paragraph informing Parrow of her right to file a motion in arrest of judgment. Parrow initialed the paragraph in the margin and the guilty plea was endorsed by her attorney.

At sentencing, the district court asked if there was any reason it could not proceed. At that point Parrow indicated she did not understand her guilty plea,

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[1] A defendant may move to withdraw her guilty plea at any time before judgment and sentencing. Iowa R. Crim. P. 8(2)(a). It is discretionary with the trial court whether to grant or deny a withdrawal of a plea of guilty. *State v. Ramirez*, 400 N.W.2d 586, 588 (Iowa 1987).

specifically why it was better for her to plead guilty and what an open plea bargain was. The court noted that no motion in arrest of judgment was filed but that Parrow had been advised of this right and considered her statements at sentencing to be in the nature of a motion in arrest of judgment. The court denied the motion as untimely.

Parrow challenges the acceptance of her guilty plea, asserting the district court erred when it failed to personally ensure her plea was made voluntarily and intelligently. In the alternative she argues her objections at sentencing constituted a motion to withdraw her plea which would have been timely.

We review the district court's plea proceedings for corrections of errors at law. Iowa R. App. P. 4. In considering a challenge to a guilty plea proceeding involving constitutional safeguards, we make an independent evaluation of the circumstances as shown by the entire record, which we review de novo. *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

The adequacy of the plea proceeding is determined under Iowa Rule of Criminal Procedure 8(2)(b). Parrow contends that her plea of guilty was not shown to have been made voluntarily and intelligently. Her argument focuses on the fact the district court did not engage in colloquy with her before sentencing to ensure her plea was being made voluntarily and intelligently, particularly when she did not waive personal colloquy with the court.

The personal colloquy requirement, like the other components of Iowa Rule of Criminal Procedure 8(2)(b), codifies the due process mandate that a waiver of constitutional rights, implicit in all guilty pleas, must be made voluntarily. *State v. Mensah*, 424 N.W.2d 453, 455 (Iowa 1988). In the case of aggravated misdemeanors, the legislature expressly authorizes judges to dispense with rule 8(2)(b) procedures with defendant's approval. Parrow was charged with an aggravated misdemeanor, *see* Iowa Code § 724.4(1), and her written plea detailed her understanding and knowing waiver of the rule 8(2)(b) requirements.

There is no record of colloquy between the district court and Parrow, nor has Parrow included an express waiver of her right to a colloquy with her written plea. A court need, however, only substantially comply with the requirements of rule 8(2)(b). *Odham*, 515 N.W.2d at 46. The defendant must be at least minimally informed that there is a waiver involved if the defendant fails to file a motion in arrest of judgment. *Id.*; *see also, State v. Burden*, 445 N.W.2d 395, 396-97 (Iowa App. 1989); *State v. Cameron*, 440 N.W.2d 616, 617 (Iowa App. 1989). On August 28, 1995, Parrow and her attorney filed a written plea that included Parrow's hand written initials next to paragraph 10 containing the following language:

> 10. If I claim there are any irregularities or errors in this guilty plea, I must file a Motion in Arrest of Judgment not later than 45 days after this plea of guilty or in any case, not later than five days before the day of sentencing. Failure to do so will preclude my right to assert any defects in this plea in any appeal to the Iowa Supreme Court.

On October 24, 1995, fifty-seven days after the written guilty plea was filed, sentencing was entered on the calendar for November 1, 1995. Parrow did not make a motion for arrest of judgment during this time.

Here, we believe the colloquy contained in paragraph 10 of the plea agreement initialed by Parrow was sufficient to notify her of the consequences for failure to file the motion. Her initials in the margin next to paragraph 10 constitute an acknowledgment that she read and understood her situation.

Under Iowa Rule of Criminal Procedure 23(3)(a), a "defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such a challenge on appeal." Defendant did not file a motion in arrest of judgment before sentencing. Defendant's objections at sentencing were properly considered in the nature of a motion in arrest of judgment and were untimely. Defendant was adequately informed of the necessity of filing a motion in arrest of judgment. She did not do so, and she is precluded from challenging her guilty plea on appeal.

In the alternative, Parrow claims her objections were more appropriately characterized as a motion to withdraw her plea. Iowa Rule of Criminal Procedure

8(2)(a) provides "any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted."

Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). Defendant failed to make a motion to withdraw her guilty plea and will not be considered for the first time on appeal.

We conclude the defendant's objections were based solely on the knowledge and disappointment that the other people arrested with her were not also being charged with carrying a dangerous weapon. The defendant did not state her wish to withdraw her plea to the trial court at sentencing. The court correctly considered defendant's objections in the nature of a motion in arrest of judgment which was untimely, consequently, the defendant is barred under rule 23(3) from attacking the trial court's acceptance of her guilty plea.

AFFIRMED.