IN THE COURT OF APPEALS OF IOWA

No. 1-350 / 00-1110
Filed October 24, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

GARY LEROY MEYERS,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge.

On appeal from his plea of guilty to operating while intoxicated, first offense, the defendant claims the court accepted an illegal guilty plea and that trial counsel was ineffective in a number of particulars. **AFFIRMED.**

Jerald W. Kinnamon and Jon Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, J. Patrick White, County Attorney, and M. Victoria Dominguez, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Hecht, JJ.

VOGEL, J.

Gary Meyers appeals his conviction and sentence for operating under the influence, contending his written guilty plea was defective by failing to properly advise him of the full and correct penal consequences of his plea, and that his trial counsel was ineffective for failing to properly advise him in a number of related particulars. Because we find the plea was knowing and voluntary and, as there is no showing of prejudice, we affirm his conviction and sentence.

Background Facts and Proceedings. According to the complaint filed by the arresting officer, and the officer's attached statement, at approximately 1:55 a.m. on April 9, 2000, a university police officer witnessed a vehicle drive the wrong way on a one-way street. After the officer activated his lights, the vehicle backed up, almost striking the squad car. Upon approaching the vehicle the officer detected a strong order of alcohol on the breath of the driver, Gary Meyers. Meyers made statements to the officer that indicated he had been drinking, was unable to complete or performed poorly in field sobriety tests, and refused to take a preliminary breath test or submit to chemical testing. In the officer's opinion, Meyers' appearance, conduct and demeanor, which included slurred speech and staggering, all demonstrated he was under the influence of alcohol and/or drugs.

Meyers filed a written guilty plea on the charge of operating while under the influence in violation of Iowa Code section 321J.2. The plea form set forth the minimum and maximum penalties as follows:

> My attorney has discussed with me the nature and the elements of the charge; that this crime is:

> [X] a serious misdemeanor, and that the maximum punishment is incarceration in the county jail for a period of one (1) year ***(or six (6) months if the charge is Operating While Intoxicated, to-wit: in violation of Section 321J.2 of the Iowa Code);*** and by being fined at least $250.00 up to $1,500.00; or by both such incarceration and fine. In addition, I realize that if the charge is Operating While Intoxicated, in violation of Section 321J.2 that there is a minimum sentence of forty-eight (48) hours in the county jail and a fine of $1,000.00. (emphasis added)

The form also included the terms of a plea agreement, which provided for two days of incarceration and a $500 fine.

The trial court accepted Meyers plea based on the recitations and information within the written plea form. The district court immediately proceeded to sentencing, Meyers having waived his rights to be present for both plea and sentencing hearings, and his right to file a motion in arrest of judgment in the event the sentencing occurred within five days. In accordance with the plea agreement, the court imposed a jail term of two days and a fine of $500 and also imposed mandatory, statutory surcharges.

Scope of Review. As Meyers' attack on the validity of his plea implicates the due processes clause of the fourteenth amendment, *Saadiq v. State*, 387 N.W.2d 315, 324 (Iowa 1986), review of this issue is de novo. *State v. Watson*, 620 N.W.2d 233, 235 (Iowa 2000). We also conduct a de novo review of an allegation of ineffective assistance of counsel. *State v. DeCamp,* 622 N.W.2d 290, 292 (Iowa 2001).

Validity of Guilty Plea. Meyers contends a lack of correct information prevented him from entering a knowing and voluntary plea, as the written plea form erroneously mixed the penalties of marijuana possession and operating

while intoxicated, and failed to notify him of all the penal consequences of entering a guilty plea. The State contends Meyers' failure to file a motion in arrest of judgment equates to failure to preserve error on this issue. However, the district court never engaged Meyers in an oral colloquy and therefore failed to advise him of his right to file a motion in arrest of judgment. Accordingly, filing such a motion was not necessary to preserve a challenge to his guilty plea. *State v. Hook*, 623 N.W.2d 865, 868 (Iowa 2001).[1]

In assessing the validity of Meyers' guilty plea, we are guided by Iowa Rule of Criminal Procedure 8(2)(b). That rule requires substantial compliance by the district court with certain mandates, in order to assure that a plea is made knowingly, voluntarily, and with a factual basis. *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). One requirement is making sure a defendant is informed of the "mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 8(2)(b)(2). This has been interpreted as requiring dissemination of information on any direct consequence of a plea. *Saadiq v. State*, 387 N.W.2d 315, 324 (Iowa 1986).

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[1] Meyers also argues counsel was ineffective for failing to inform him the waiver of certain rights – presence at sentencing, a fifteen day delay before sentencing, and filing of a motion in arrest of judgment if sentencing was scheduled sooner than five days from the date of plea – allowed the court to proceed directly to sentencing, without scheduling a hearing. Meyers contends the immediate sentencing precluded him from filing a motion in arrest of judgment, which was necessary to preserve his right to challenge the guilty plea on appeal. As we have already found error to be preserved, we see no need to address this contention.

1. Erroneous information as to maximum term of confinement. Meyers correctly notes there was an error in the written plea, in that the paragraph defining the possible terms of punishment specified a six-month jail term for operating while intoxicated, carving out an exception to the general rule that serious misdemeanors carry a one-year maximum term.[2] While the exception exists, it applies to possession of marijuana, and operating while intoxicated is in fact subject to a one-year term. This misinformation about the maximum term of confinement does not render the guilty plea fatally defective, however.

When a defendant has been misinformed about the maximum sentence, the knowing and voluntary nature of the plea is affected only if the misstatement placed in a defendant's mind "the flickering hope of a disposition on sentencing that was not possible." *State v. West*, 326 N.W.2d 316, 317 (Iowa 1982) (citing *State v. Boone*, 298 N.W.2d 335, 338 (Iowa 1980)). The record on appeal must demonstrate the plea was induced by the misinformation. *See Stovall v. State*, 340 N.W.2d 265, 267 (Iowa 1983). Here, although Meyers was admittedly misinformed as to the maximum penal consequences, nothing in the record indicates that, but for erroneous language, a plea would not have been entered. Meyers was pleading pursuant to an agreement with the State, which recommended the mandatory minimum of two days. The fact that it was not a

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[2] Although Meyers also points to this paragraph as creating a misleading impression that he would receive either jail time or a fine, but not both, the language clearly indicates that Meyers was subject to the imposition of both penalties.

binding agreement has little relevance in light of Meyers' failure to even allege he would have proceeded to trial if only the written form had indicated the correct length of confinement. *See Hill v Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985).

2. Insufficient information about penal consequences. In his argument Meyers fails to specify which penal consequences were absent from the written plea form. However, based upon the argument presented in regard to his ineffective assistance of counsel claim, it appears he challenges the form's silence as to the imposition of mandatory surcharges. Whether this lack of information affects the voluntary character of the written plea is dependent upon the nature of surcharges. While a court has no obligation to inform a defendant of the indirect or collateral consequences of a plea, a defendant must be informed of any direct consequence, such as the maximum sentence or mandatory minimum punishment. *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998). Surcharge imposition is such a consequence only if it "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* (citations omitted). There is no doubt that a criminal surcharge is definite, immediate and automatic. It is not, however, a punishment.

As noted by the Iowa Supreme Court when discussing court costs as a form of restitution:

> [R]estitution . . . requires payment of money, just as a fine does, and both a fine and restitution are direct consequences of a guilty plea. But we do not agree . . . that "[b]oth are punishments authorized by law." Payment of money under a court order, standing alone, does not make it punishment. If it did, a civil

> judgment for compensatory damages could be considered to be punishment.

State v. Brady, 442 N.W.2d 57, 59 (Iowa 1989). Thus, while surcharges, court costs and fines are all monetary consequences flowing directly from a guilty plea, their shared pecuniary nature is insufficient to define them as punishment. *Id.*

We look to the purpose of the surcharge to determine whether its imposition is penal in nature. *See Carney*, 584 N.W.2d at 909 (finding that license revocation is not an effect on the range of punishment, even though carrying the sting of punishment, as its purpose is protection of the public). In this case, the purpose of surcharges has been clearly delineated by the legislature as "the maintenance and improvement of criminal justice programs, law enforcement efforts, victim compensation, crime prevention, and improvement of the professional training of personnel, and the planning and support services of the criminal justice system." Iowa Code § 911.1 (1999). Thus, surcharges are not aimed at traditional goals of punishment, such as retribution or deterrence, *see State v. Hill*, 555 N.W.2d 697, 701 (Iowa 1996), and their imposition cannot be fairly categorized as an effect on the range of punishment.

Meyers' reply brief implicitly addresses other issues raised in his ineffective assistance of counsel argument and their impact on the voluntary nature of his plea. Although the district court had the discretion to lower or eliminate the $1,000 mandatory minimum fine by either waiving $500 or imposing a community service alternative, Iowa Code § 321J.2(2)(a)(2) (1999), this fact

was not present on the face of the written plea form. Meyers contends that this was a penal consequence of which he should have been informed.

However, rule 8 does not require a defendant be informed of every possible sentencing option. It requires only that the court ensure a defendant is aware of any mandatory minimum sentence that limits its ability to impose what would otherwise be the minimum punishment for a particular class of misdemeanors or felonies. For example, although a serious misdemeanor normally carries a minimum fine of $250, in the case of operating while intoxicated, that minimum fine is raised to $1,000. Additionally, as the fine options are wholly within the discretion of the court, they are neither definite, immediate, nor largely automatic. As such, they are independent collateral consequences, and ignorance of their existence has no impact on the validity of the plea. *Carney*, 584 N.W.2d at 908. As the evidence fails to demonstrate the plea was anything other than knowing and voluntary, Meyers' claim of illegality cannot succeed.

Ineffective Assistance of Counsel. To establish his claim of ineffective assistance of counsel, Meyers must show his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In meeting his burden, Meyers must overcome the strong presumption of his trial counsel's competence. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To demonstrate prejudice he must show a reasonable probability that, but for counsel's unprofessional errors, he

would not have pled guilty, but proceeded to trial. *Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995). A reasonable probability is a probability sufficient to undermine confidence in the outcome of his case. *State v. Carillo,* 597 N.W.2d 497, 500 (Iowa 1999).

Meyers complains counsel was ineffective for failing to correct or clarify the erroneous six-month maximum sentence in the written plea form. Counsel cannot misadvise a defendant about plea consequences, even if the consequences are merely collateral. *Saadiq v. State*, 387 N.W.2d 315, 324 (Iowa 1986). This is because

> [a] guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options.

Id. at 325 (quoting *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir.1981) (citations omitted)). Thus, if Meyers' attorney did fail to accurately advise him as to his maximum possible sentence, counsel's performance fell below the standard of reasonable competence.

We cannot make such a finding, however, as the record is limited to the written plea, and counsel's actions or statements cannot be assessed with any level of certainty. Under such circumstances we are normally inclined to preserve the ineffective assistance claim for postconviction proceedings to allow trial counsel an opportunity to explain the facts and circumstances surrounding the disputed issue. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We need not do so in this case, as Meyers has failed to establish that he was

prejudiced. *See State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001) (allowing issue to be decided on direct appeal if defendant fails to show either deficient performance or prejudice).

As discussed above, Meyers cannot show that "the subject of the misinformation [was] of substantial importance . . . and [was] considered by him in deciding to plead guilty . . . ." *Saadiq*, 387 N.W.2d at 324. There is nothing before this court that indicates a fuller explanation or correction of the contested issues would have created a reasonable probability of Meyers maintaining his not guilty plea and proceeding to trial. This is particularly true in light of the strong factual basis evident within the record before the trial court. Unlike the defendant in *State v. King*, 500 N.W.2d 100 (Iowa Ct. App. 1993), who received a one-year sentence after being erroneously informed that the maximum jail term was six months, Meyers received the mandatory minimum sentence under the law, including the $500 waiver.

Meyers also complains that counsel was ineffective for failing to inform him of the mandatory surcharges and for failing to inform him of the discretionary fine options of waiver and community service. As previously discussed, both are a collateral, rather than direct consequences of the plea. Thus, while it is preferable for counsel to discuss these issues with Meyers, *see State v. Ramirez*, ___ N.W.2d___ (Iowa 2001), counsel was under no obligation to inform him of their existence. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). Moreover, Meyers knew the mandatory minimum set a fine of $1,000 and that even though the State was recommending a $500 fine, the court was not bound by the

recommendation. Since the court did honor the plea agreement, even with the surcharge imposed Meyers' total payment obligation was $350 less than the mandatory minimum. He therefore cannot demonstrate a reasonable probability that disclosure of the surcharge would have resulted in a decision to proceed to trial. As Meyers has failed to establish his claims of ineffective assistance of counsel, his judgment and sentence are affirmed.

AFFIRMED.