IN THE COURT OF APPEALS OF IOWA

No. 1-091 / 00-0469
Filed June 13, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOHN THEDE, SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, David S. Good, Judge.

Defendant appeals from his conviction following a guilty plea to possession of less than five grams of methamphetamine with intent to deliver and assault causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Brent D. Hereen, County Attorney, and Richard Vander Mey, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

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HECHT, J.

Robert John Thede appeals from his conviction following a guilty plea to possession of less than five grams of methamphetamine with intent to deliver and assault causing bodily injury. He contends trial counsel was ineffective in failing to file a motion in arrest of judgment. We affirm.

I. Factual Background and Proceedings. Thede was charged with possession with intent to deliver methamphetamine to a minor, sexual exploitation of a minor, and assault causing bodily injury. The minutes of testimony alleged Thede engaged in sexual activity with a seventeen-year-old female, S.H., and supplied her with methamphetamine. S.H. was found walking along the highway in the early morning hours of April 1, 1999. In her report to police, she indicated she and Thede had been engaged in a sexual relationship and he gave her methamphetamine and alcohol in exchange for sex. She also stated on the morning of April 1, Thede pushed her out of his van causing her several scrapes and abrasions. Thede pleaded guilty to possession with intent to deliver and assault causing bodily injury. The district court sentenced him to an indeterminate ten-year term of incarceration for the possession charge and a one-year indeterminate term of incarceration for the assault charge.

II. Standard of Review. We review claims of ineffective assistance of counsel de novo. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

III. Ineffective Assistance of Counsel. Thede claims his trial counsel was ineffective for failing to file a motion in arrest of judgment challenging his guilty plea. He argues there was no factual basis for his plea and he did not

enter the plea knowingly and voluntarily in accordance with Iowa Rule of Criminal Procedure 8(2)(b). The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). To prevail, the defendant must prove by a preponderance of the evidence that his counsel failed in an essential duty and prejudice resulted. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999).

Claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings. *State v. Schminkey,* 597 N.W.2d 785, 788 (Iowa 1999). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed and the allegedly ineffective attorney may have the opportunity to explain his or her conduct. *State v. Mulvany,* 603 N.W.2d 630, 633 (Iowa Ct. App. 1999). That is particularly true where the challenged actions of counsel implicate trial tactics or strategy that might be explained in a record fully developed to address those issues. *State v. Rubino,* 602 N.W.2d 558, 563 (Iowa 1999).

A. Factual Basis for the Plea. We will first address Thede's claim that trial counsel was ineffective for failing to file a motion in arrest of judgment challenging the factual basis of his guilty plea. In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report.

Schminkey, 597 N.W.2d at 788. The record clearly supports a factual basis for Thede's guilty plea. He admitted to possessing methamphetamine and giving the drug to his friends. S.H.'s report was corroborated by the search of Thede's house, which revealed evidence of drugs, illicit sexual activity, and photographs of S.H. Although Thede did not admit to the State's version of the assault on S.H. at the plea hearing, he admitted he was in the van with her on that morning and he caused injury to her. The record supports the inference his actions were intentional rather than accidental. We therefore find trial counsel had no duty to file a motion in arrest of judgment regarding the factual basis of Thede's guilty plea. Thede cannot succeed on this claim of ineffective assistance of counsel.

B. Compliance With Rule 8(2)(b). Thede next claims trial counsel was ineffective for failing to file a motion in arrest of judgment challenging the district court's adherence to Iowa Rule of Criminal Procedure 8(2)(b). During the plea colloquy, the district court referenced a form called "trial rights" which "summarizes and sets forth *all of the rights* [Thede] would be giving up by not having a jury trial." (Emphasis supplied). Thede acknowledged he had reviewed the form with his trial counsel prior to the plea hearing and he understood the form and the rights he would waive if he pled guilty. However, the record does not indicate which rights were enumerated in the form and the form was not made part of the record. The district court did not specifically identify on the record the rights Thede was waiving by pleading guilty. Thede contends his trial counsel should have challenged the district court's failure to assure on the record that the guilty plea was entered knowingly and voluntarily.

At the time Thede entered his plea in this case, the decisions of our supreme court required only substantial compliance with rule 8(2)(b) in misdemeanor cases. *See State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990) ("[Defendant] will not be allowed to plead anew merely because he was informed of the matters listed in rule 8(2)(b) in writing instead of orally"). The substantial compliance standard had also been applied in felony cases. *State v. Ludemann*, 484 N.W.2d 611, 613 (Iowa Ct. App. 1992). As of the time Thede pled guilty to a felony in this case, our supreme court had not yet decided the specific question of whether the information to which a defendant is entitled pursuant to rule 8(2)(d) may be communicated to him in whole or in part in writing in felony cases. After the parties submitted their briefs in this appeal, however, the court held a written guilty plea to a felony charge cannot serve as a substitute for information the district court must provide to the defendant in a "full, oral colloquy." *State v. Hook*, 623 N.W.2d 865, 871 (Iowa 2001).

Unlike the defendant in *Hook*, however, Thede was advised by the sentencing court on the record of the consequence of failure to file a motion in arrest of judgment. Thede's failure to move in arrest of judgment bars a direct appeal of his conviction. Iowa R. Crim. P. 23(3)(a). Nevertheless, this failure will not bar a challenge to a guilty plea if it resulted from the ineffective assistance of counsel. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982).

We now turn to the question of whether Thede's counsel had a duty to anticipate our supreme court's ruling in *Hook*. The standard against which we judge trial counsel's effectiveness does not require him to be a "crystal gazer"

who must predict future changes in established rules of law in order to provide effective assistance to a criminal defendant. The standard only requires counsel to exercise reasonable diligence in deciding whether an issue of first impression is "worth raising." *Westeen*, 591 N.W.2d at 210. Although trial counsel may have a duty in some instances to raise an issue of first impression,[1] we do not believe this is one of them. Numerous Iowa appellate decisions extant at the time Thede entered his plea indicated the district court need only substantially comply with the requirements of rule 8(2). Because of those authorities, Thede's counsel did not have a duty to file a motion in arrest of judgment challenging the district court's failure to engage in a full, oral colloquy covering the substance of rule 8(2)(b).

The question remains, however, whether Thede's trial counsel was ineffective for failing to assure the district court substantially complied with rule 8(2)(b). As noted above, Thede admitted during the plea colloquy he had read and understood a "trial rights" form. The district court described the form as one "that summarizes and sets forth all of the rights that [Thede] would be giving up by not having a jury trial." However, the form was not made a part of the record

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[1] *See Westeen*, 591 N.W.2d at 210-11 (concluding trial counsel was ineffective where (1) the statutory language establishing the disputed element of the charged offense had never been interpreted by our supreme court; (2) courts from other jurisdictions interpreting the same statutory language had uniformly supported the postconviction applicant's interpretation; and (3) the legislature had instructed Iowa courts to construe the Iowa statute so as to make it uniform with the law of other states enacting the uniform act in question); *Schoelerman*, 315 N.W.2d at 72 (concluding trial counsel rendered ineffective assistance where (1) there were no Iowa cases foreclosing the argument counsel was faulted for not making; (2) a review of the statute "would have lent substantial weight" to the defendant's argument; and (3) case law from other jurisdictions supported the defendant's position).

and we are therefore unable to determine from the record whether the plea taking procedure substantially complied with rule 8(2)(b). Accordingly, we preserve this aspect of Thede's ineffective assistance of counsel claim for possible postconviction relief proceedings.

AFFIRMED.