IN THE COURT OF APPEALS OF IOWA

No. 5-054 / 94-734

FILED
MAR 30 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JAMES HARRY,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Defendant appeals from judgment and sentence entered upon his plea of guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1993). **AFFIRMED.**

Scott T. Hunter, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Fred H. McCaw, County Attorney, and Timothy Gallagher, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

James Harry appeals from the judgment and sentence entered on his plea of guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1993). He contends he received ineffective assistance of counsel. According to Harry, his counsel should have moved in arrest of judgment to challenge the plea proceeding on grounds that he was not informed of the nature of the charge. We affirm and preserve the ineffective assistance of counsel claim for postconviction proceedings.

The State charged James Harry with sexual assault in the first degree. The charge was based on his wife's complaint that Harry shoved his fist into her vagina causing injuries that required surgery.

The State subsequently entered into a plea agreement with Harry. Under the agreement Harry pleaded guilty to third-degree sexual abuse and the State dropped the first-degree charge and recommend a ten-year sentence. At the plea proceeding, the court did not explain the elements of third-degree sexual abuse. He did, however, inquire whether Harry had read the minutes of testimony and Harry responded affirmatively. Pursuant to the plea agreement, Harry pleaded guilty to the reduced charge of third-degree sexual abuse. The court informed Harry that in order to challenge the plea he must file a motion in arrest of judgment. No motion in arrest of judgment was filed and the court sentenced Harry to ten years.

Harry appeals. He acknowledges that he failed to file a motion in arrest of judgment. He contends, however, trial counsel was ineffective because he failed to move in arrest of judgment to challenge the plea proceeding on grounds that Harry was not informed of the nature of the charge. The State claims Harry waived his ability to challenge the validity of his guilty plea by failing to file a motion in arrest of judgment. It also asserts Harry received effective assistance of counsel.

We review for correction of errors at law. Iowa R. App. P. 4; State v. Henning, 299 N.W.2d 909, 910 (Iowa App. 1980).

Iowa Rule of Criminal Procedure 8(2)(d) requires the court to inform the defendant that any challenges to a guilty plea proceeding must be raised in a motion in arrest of judgment and that failure to raise these challenges precludes the right to assert them on appeal. This rule is reiterated in Iowa Rule of Criminal Procedure 23(3)(a) which defines a motion in arrest of judgment. The purpose of these rules is to allow the trial court to correct any defects in the guilty plea proceedings before an appeal and eliminate the necessity for an appeal. Munz v. State, 382 N.W.2d 693, 696 (Iowa App. 1985).

We will not ordinarily review a guilty plea in the absence of a rule 23(3)(a) motion in arrest of judgment. Id.; State v. Lucas, 323 N.W.2d 228, 230 (Iowa 1982). An exception exists if the defendant can show his failure to

file the motion resulted from ineffective assistance of counsel. Munz, 382 N.W.2d at 696. The record in this case shows the court advised Harry of the necessity of filing a motion in arrest of judgment and Harry, nevertheless, failed to move in arrest of judgment. Thus, he is precluded from asserting error in the plea proceedings unless he can demonstrate that his failure to move in arrest of judgment resulted from ineffective assistance of counsel. See id. at 696.

Harry asserts his trial counsel was ineffective because he did not recognize the court's failure to inform him of the nature of the charge and failed to timely file a motion in arrest of judgment. The State contends it is clear from the favorable plea agreement Harry received that his counsel's failure to file a motion in arrest of judgment was a tactical decision and not a failure to perform an essential duty. The record is devoid of evidence to support either contention.

Generally, ineffective assistance claims are not adjudicated on direct appeal; only in rare cases will the trial record alone be sufficient to resolve the claim. State v. Rawlings, 402 N.W.2d 406, 408 (Iowa 1987). Ordinarily, a full evidentiary hearing is necessary to determine whether counsel was effective. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We believe the record on appeal is inadequate to resolve the issue of alleged ineffective assistance of counsel. There is no evidence of

counsel's rationale beyond the plea agreement itself and failure to file the rule 23(a) motion. Counsel should have the opportunity to respond to Harry's charges. See id. We preserve this matter for possible postconviction proceedings.

AFFIRMED.