FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 31, 1986
vs.	)	265
ALFRED DAVID CHILDERS,	)	5-602 85-413
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Pottawattamie Court (CRF 19545) Paul H. Sulhoff, Judge.

Defendant appeals his conviction of first degree murder alleging he was denied his constitutional right to proceed pro se and that he received ineffective assistance of counsel. **AFFIRMED.**

Troyce A. Wheeler of Anderson & Wheeler, Council Bluffs, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

Defendant appeals his conviction of first degree murder. He alleges he was denied his constitutional right to proceed pro se and that he received ineffective assistance of counsel. We affirm.

On July 2, 1984, defendant was arrested for the first-degree murder of his mother. He was also charged with first-degree burglary. An attorney from the public defender's office was appointed to represent defendant and he requested and received permission for defendant to have a psychiatric evaluation. A plea of not guilty was entered and a jury trial was set for September 18, 1984. Plea negotiations took place but were terminated on October 25, 1984. At this time an additional attorney was appointed to help represent defendant. Because of the new counsel, the court allowed a continuance, additional depositions, and further independent psychiatric examinations which resulted in notice of a defense of diminished responsibility.

On January 3, 1985, defendant made an oral motion to dismiss his court-appointed counsel. He acknowledged that his attorneys were, in fact, trying, and did not at this time complain that he was receiving incompetent legal help. The record shows rather, that defendant was apprehensive about whether his attorneys could help him as much as he thought necessary. He could not, however, explain why he felt this anxiety or clearly relate to the court specifically what he wanted or could not receive from his attorneys. Because the court recognized defendant was not educated sufficiently to represent himself, defendant's request to change attorneys or proceed pro se was denied. The trial court then asked if there was anything more to be discussed and defendant responded, "Yeah, there is one other thing, man, that I'll do this motherfucker myself. I'm ready to leave." His defense counsel then expressed

a certain degree of uneasiness in further representing defendant but assured the trial court that they would be willing to proceed to trial.

Trial commenced on January 8, 1985, and defendant appeared with his court-appointed counsel. However, after defendant's father testified for the State, defendant insisted on changing his plea to guilty. His counsel recommended against changing his plea at this point but defendant refused to reconsider. Therefore, defendant entered a plea of guilty to first-degree murder, and the burglary charge was dropped.

The trial court found that defendant was under no physical or mental disability, and that his plea was knowingly and voluntarily made. Defendant was then found guilty of first-degree murder in violation of Iowa Code section 707.2(1) (1983). Immediately after the trial court's acceptance of his guilty plea, it questioned defendant as to the voluntariness of his plea pursuant to Iowa Rules of Criminal Procedure 8. The next day the trial court advised defendant that he had a right to challenge the legality and constitutionality of the proceedings by filing a motion in arrest of judgment at least five days before the date set for sentencing. Defendant was then sentenced on January 28, 1985, and advised of his right to appeal.

On appeal, defendant alleges the trial court erred in refusing to allow him to proceed pro se at trial and in accepting his plea of guilty. He argues that his counsel failed to adequately protect his constitutional rights under the fifth, sixth, and fourteenth amendments.

I. **Right to Proceed Pro Se.** Defendant argues that the trial court violated his sixth and fourteenth amendment rights by refusing to allow him to proceed pro se.

The rule is well settled that the right to proceed pro se is waived by the failure of an accused to make an unequivocal request to act as his own attorney.

State v. McCray, 231 N.W.2d 579, 580 (Iowa 1975); State v. Smith, 215 N.W.2d 225, 226 (Iowa 1974).

In this case, defendant relies heavily upon Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). In that case, the United States Supreme Court held that the sixth amendment, as made applicable to the states by the fourteenth amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so.

We are not convinced by the record that defendant made an unequivocal request to act as his own attorney. Five days prior to trial defendant stated that he "would like to be appointed another lawyer." After denying this request, the trial court and counsel representing both sides heard defendant say, "Yeah, there is one thing, man, that I'll do this motherfucker myself. I'm ready to leave." But later, on the day before trial, defendant stated on the record that he wished to have his counsel retained. We conclude, therefore, that defendant did not unequivocally request that he proceed pro se, and consequently, his claim that his sixth and fourteenth amendment rights were denied is without merit.

II. Guilty Plea. Defendant alleges that his guilty plea was not voluntarily and intelligently entered because he had been misinformed on the matter of self-representation. Our conclusion in the first issue raised in this appeal necessarily relates to our decision in this matter. Because we can determine no unequivocal desire by defendant to represent himself, we also necessarily conclude there was no error in the subsequent failure of counsel to file a motion in arrest of judgment.

The procedures available to a defendant for attacking errors made in challenging a guilty plea are well known.

Iowa Rule of Criminal Procedure 8(2)(d) states that during a guilty plea proceeding "[t]he court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceeding must be raised in a motion in arrest of judgment and that failure to so raise such challenge shall preclude the right to assert them on appeal." Iowa Rule of Criminal Procedure 23(3)(a) also mandates that the adequacy of a guilty plea must first be challenged in a motion in arrest of judgment in order to raise that issue on appeal.

In this case, the trial court personally informed defendant of the necessity of filing a Motion in Arrest of Judgment. It also informed defendant of the consequences of a failure to file the motion. Finally, the trial court told defendant that the motion was required to be on file at least five days before the date set for sentencing and that since sentencing was scheduled for January 28th, the motion must be on file by January 23rd to effectively preserve any errors in the guilty plea proceedings.

Defendant was repeatedly asked by the trial court whether he had any questions and whether he understood the court's explanation. Defendant's attorney then summarized the trial court's explanation for defendant and told him, "[I]f you want to attack the guilty plea that you entered yesterday, for whatever reason, you have got to let me know." When asked whether he understood his attorney's explanation, the defendant responded that he did understand.

Because defendant was personally informed by the trial court and by his attorney of the necessity of filing a motion in arrest of judgment, there is no basis for suspending the application of Iowa Rule of Criminal Procedure 23(3)(a). See State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980). Defendant's failure to

file a motion in arrest of judgment in the trial court precludes consideration of his challenges to his guilty plea on appeal. See State v. Spence, 282 N.W.2d 131, 132 (Iowa 1979).

Because we find defendant did not unequivocally request to represent himself, and since he has failed to file a motion in arrest of judgment, the conviction of defendant is affirmed.

AFFIRMED.