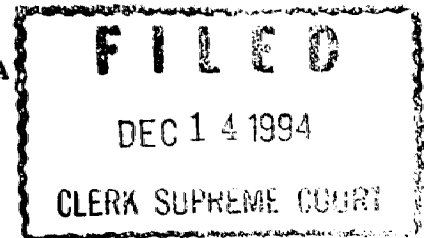


IN THE COURT OF APPEALS OF IOWA

No. 4-351 / 93-1746



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STATE OF IOWA,

Plaintiff-Appellee,

vs.

KELLY DENE ANDEWAY,

Defendant-Appellant.

Appeal from the Iowa District Court for Keokuk County,
Richard J. Vogel, Judge.

The defendant challenges the trial court's denial of his motion in arrest of judgment seeking to set aside his guilty plea to manufacture of marijuana. **AFFIRMED.**

R. E. Breckenridge and Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, John E. Schroeder, County Attorney, and John Courter, Special Prosecutor, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but decided en banc.

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HABHAB, J.

The sheriff's office executed a search warrant at the home of Kelly Dene Andeway and found marijuana seeds, twenty-nine marijuana plants, scales and cash. The State then charged Andeway, by trial information, with manufacture of marijuana in violation of Iowa Code section 124.401(1)(d) (1993). The court appointed Randall Stravers to represent Andeway.

Andeway filed a motion to suppress challenging the search warrant on the ground it was based upon false and misleading information. The district court denied the motion.

Andeway entered into a plea bargain with the State in which he agreed to plead guilty to manufacture of marijuana and the State agreed to recommend the mandatory minimum fine of \$1000 and that Andeway be sentenced to up to five years. The State also agreed to recommend Andeway's sentence be suspended, he be placed on two years of probation and he be responsible for the costs and fees of the case.

After Andeway entered his plea, he was assessed a drug tax of approximately \$29,000 resulting in a seizure of assets by the Iowa Department of Revenue and Finance. Andeway claimed he was not informed by his counsel that such an assessment could be a consequence of his plea.¹

1. The United States Supreme Court has recently found a drug tax statute in Montana to be unconstitutional for violating double jeopardy. Dept. of Revenue of Montana v.

Andeway retained a new attorney, Thomas Walter, and filed a motion in arrest of judgment claiming his plea was not voluntarily and intelligently made. He claimed that not only did he not know he would be subject to the tax assessment but also that he did not know his plea of guilty would preclude him from challenging the denial of his motion to suppress. The district court denied the motion. Andeway appeals. We affirm.

I. Scope of review. The parties dispute the proper scope of review in this case. The State contends proper review should be for correction of errors at law, while Andeway argues a de novo review is proper.

Andeway's claim on appeal is the district court erred in not granting his motion in arrest of judgment based on a claim his guilty plea was involuntary and unknowledgeable.

A defendant who enters a plea of guilty waives several constitutional rights. For the waiver to be valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, there must be an intentional relinquishment of known rights or privileges.

Kurth Ranch, 511 U.S. ____, 128 L. Ed. 2d 767, 114 S. Ct. ____ (1994) (opinion filed on June 6, 1994). Since Andeway has not challenged the validity of Iowa drug tax statute on double jeopardy grounds, we decline to rule on this issue. The Iowa supreme court has found Iowa's drug tax law does not violate the protection against multiple punishments under the Double Jeopardy Clause. State v. Gallup, 500 N.W.2d 437 (Iowa 1993). While we are not deciding this issue, we do note that the tax in Kurth Ranch was conditioned on the commission of a crime. This is not required under Iowa Code chapter 453B (1993). In Iowa, taxation is not dependent upon a criminal conviction. Gallup, 500 N.W.2d at 445.

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938). If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of constitutional guarantees of due process and is therefore void. McCarthy v. United States, 394 U.S. 459, 463-64, 89 S. Ct. 1166, 22 L. Ed. 2d 418, 423-24 (1969). The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712-13, 23 L. Ed. 2d 274, 279-80 (1969).

The Boykin holding makes federal standards applicable to state guilty plea proceedings. We recognized this and promulgated our own procedures and guidelines. See State v. Sisco, 169 N.W.2d 542, 548-51 (Iowa 1969). These have been expanded and incorporated in Iowa R. Crim. P. 8. When constitutional safeguards are involved, our method of review is to make an independent evaluation of the totality of the relevant circumstances shown by the entire record and thus review the evidence de novo. Rhinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

State v. Boone, 298 N.W.2d 335, 337 (Iowa 1980). We determine a de novo review of the evidence is proper in this case. Id. at 337-38.

II. Motion in arrest of judgment. Andeway contends his motion in arrest of judgment should have been granted because his guilty plea was involuntary and unknowledgeable. Andeway argues the plea was unknowledgeable because he did not have a full understanding of the consequences of his plea. He claims this lack of understanding was specifically due to ineffective assistance of counsel.

Andeway has two claims of ineffective assistance of counsel. First, Andeway contends his original court

appointed counsel failed to advise him of Iowa's drug tax laws under Iowa Code chapter 453A. Second, he contends counsel failed to tell him he would lose his right to appeal the denial of his motion to suppress evidence when he pleaded guilty. Andaway claims if he had received effective assistance of counsel, then he might have pleaded differently.

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. State v. McKettrick, 480 N.W.2d 52, 55 (Iowa 1992). If Andaway is unable to prove one of the prongs of this test, then his claim of ineffective assistance of counsel must fail. See State v. Welch, 507 N.W.2d 580, 584 (Iowa 1993). If Andaway is unable to prove ineffective assistance of counsel, then we must find his guilty plea was voluntary and knowing.

We find Andaway's claim of ineffective assistance of counsel based on the tax consequences must fail since Andaway cannot meet the prejudice prong of the test. Andaway cannot show prejudice because the tax assessment was not contingent upon the outcome of the criminal charges brought against him. See Gallup, 500 N.W.2d at 445. The drug tax in chapter 453B is "due and payable immediately

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upon manufacture, production, acquisition, purchase, or possession by a dealer." Iowa Code § 453B.3 (1993). Since the tax is not dependent upon a finding of criminal guilt, his plea of guilty did not bring about a different result in terms of tax consequences.

We also find Andeway's claim of ineffective assistance of counsel, based on the loss of his right to appeal an adverse finding on his motion to suppress evidence, cannot meet the prejudice prong of the test. Although it cannot be clearly determined if counsel advised Andeway he would lose his right to appeal the denied motion to suppress, this does not matter. Andeway was not prejudiced since there is not a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. We find Andeway did not have a reasonable probability of succeeding on appeal. Since we find Andeway did not have a reasonable probability of prevailing on an appeal, he was not prejudiced by counsel's performance.

In addition, we find Andeway was thoroughly advised of his rights by the district court. A portion of the exchange during the plea proceedings between the district court judge and Andeway is set out below.

THE COURT: Before proceeding further, I'm going to advise you that I will not accept your plea until I'm satisfied that you are guilty of the offense charged and unless I'm satisfied that you fully understand all your rights, and in order to determine those matters, I'm going to ask you a number of questions. If you don't understand any of the questions, let me know and I'll explain in further detail. If you wish to talk to an attorney before answering any of the questions, feel free to do so.

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. . .

THE COURT: You do understand what's going on here this morning?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Andeway, have you read the county attorney's trial information, that being the statement of charges that are being made against you?

THE DEFENDANT: Yes.

THE COURT: Have you gone over those with your attorney?

THE DEFENDANT: Yes.

THE COURT: Has he explained them to you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand them?

THE DEFENDANT: Yes.

THE COURT: Have you read the minutes of testimony attached to that trial information, that being the statements of what witnesses for the State would testify to at a trial regarding what happened that brought about the filing of these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Just as a general proposition, do you agree with those statements of witnesses as to what happened?

THE DEFENDANT: Yes.

THE COURT: Mr. Andeway, you understand that you have a right to plead not guilty and to persist in that plea of not guilty?

THE DEFENDANT: Yes.

THE COURT: You understand that your plea of guilty will have the same effect or result as if this case had been tried to a court or jury and you had been found guilty?

THE DEFENDANT: Yes, sir.

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THE COURT: Mr. Andeway, I'm going to read to you the rights you're going to be giving up if you enter a plea of guilty, so listen carefully. If you plead not guilty, you would be entitled to a speedy and public trial by a jury. You could have the case tried to a judge and without a jury if you wish. You have a privilege against self-incrimination, which means you could not be required to testify at trial. At a trial the State would have to bring forward the witnesses on whom it relies to obtain a conviction, and you, through your attorney, could cross examine those witnesses. At a trial you would be presumed innocent until such time, if ever, as the State established your guilt by evidence to the satisfaction of a court or jury beyond a reasonable doubt, and at a trial you would be entitled to compulsory process, and that means to subpoena witnesses to come in and testify on your own behalf.

Mr. Andeway, did you hear the rights I just read to you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe you understand those rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand or realize that by entering a plea of guilty, you waive or give up those rights?

THE DEFENDANT: Yes, sir.

. . .

THE COURT: Have you had sufficient opportunity to fully and completely discuss the facts of this case with your attorney?

THE DEFENDANT: Yes.

THE COURT: Have you discussed the charges made against you and the matter of your plea with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the representation Mr. Stravers has given you in this case?

THE DEFENDANT: Yes, I am.

THE COURT: Mr. Stravers, have you fully advised the defendant of all his constitutional rights in this case?

MR. STRAVERS: Yes, I have, Your Honor.

THE COURT: Are you willing to defend him at trial if he desires a trial?

MR. STRAVERS: Yes, I am, Your Honor.

THE COURT: Mr. Andeway, keeping in mind all the things we have just discussed, do you still wish to plead guilty to the crime of manufacture of marijuana?

THE DEFENDANT: Yes.

THE COURT: Is it your own personal and voluntary decision to enter a plea of guilty to that crime as charged in the trial information?

THE DEFENDANT: (Nodded his head).

THE COURT: Keeping in mind I won't permit someone to plead guilty who claims to be innocent, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: Mr. Andeway, I want you to tell me just briefly what you were doing, what was going on, on the 20th day of May, 1993, that brought about the filing of this charge.

THE DEFENDANT: Well, the county attorney's office came in and I had a dozen small marijuana plants growing in my basement.

THE COURT: All right. At that time, then, you were in the process of growing marijuana, is that right?

THE DEFENDANT: Yes, sir.

THE COURT: What did you say you had, about a dozen plants?

THE DEFENDANT: Less than 20. I don't know exactly.

THE COURT: They were growing where?

THE DEFENDANT: In my basement.

THE COURT: How long had they been growing?

THE DEFENDANT: Less than a week.

THE COURT: All right. What was your purpose in growing marijuana?

THE DEFENDANT: Make some money.

A district court may assume a defendant understands he waives his rights to challenge the admissibility of evidence when he waived his right to a trial. State v. Rhodes, 243 N.W.2d 544, 545 (Iowa 1976). The district court is not required to inform and advise a defendant of every "but for" consequence which follows a guilty plea. Id. We, like the supreme court in Rhodes, find it inconceivable in viewing the record that Andeway was unaware he was waiving his right to challenge the adverse ruling on his motion to suppress evidence. We find Andeway was not prejudiced by his counsel's performance, nor did the district court err in accepting Andeway's guilty plea.

We find Andeway's guilty plea was voluntary and knowing. As a result, we affirm the district court's overruling the motion in arrest of judgment. We further determine, because we find no prejudice as to either of Andeway's claims of ineffective assistance of counsel, we do not preserve them for possible postconviction relief proceedings. We affirm the ruling of the district court.

AFFIRMED.

SACKETT, J. (concurring specially)

I concur with the result reached by the majority but for different reasons. I do not find defendant has shown clear prejudice because the issue of defendant's responsibility for the tax has not been litigated and there remains a question of whether defendant has a valid challenge to the tax on a theory of double jeopardy.

The majority has not directly addressed the issue of whether or not an attorney is not effective counsel when he or she, in representing a defendant on a charge of manufacture of marijuana in violation of Iowa Code section 124.401(1)(d)(1993), fails to advise a defendant of the implications of Chapter 453B, an excise tax on unlawful dealing in certain substances. The majority has decided the issue by finding defendant cannot show prejudice because the tax assessment was not contingent on the outcome of the criminal charges.

First, I would find the failure of an attorney to advise a client of the possible implications of Chapter 453B before he or she pleads to a violation of section 124.401(1)(d)(1993) is ineffective assistance of counsel. I recognize the difficulty an attorney has when, as here, penalty provisions appear in different sections of the Code and the State does not file all its demands in the same proceeding.

Second, while I agree with the majority's conclusion that an imposition of tax under the section is not

contingent of a finding of guilt, I do not find this to be the only question. To impose the tax, there must be facts to prove defendant was involved in activities to justify imposition of the tax and, in this case, the facts that show defendant's guilt are the same facts that show his involvement in activities that justify imposition of the tax. The question on the motion to suppress evidence is, therefore, relevant to the Chapter 453B issue. And defendant's plea of guilty is an admission against his interest and can be used by the State as evidence of the elements necessary to impose the tax.

I would not reverse because the facts of this case may be such that defendant has a challenge to the imposition of a tax under 453B on double jeopardy grounds. While I recognize, as the majority sets out in a footnote, the double jeopardy issue is not before us in this case, the double jeopardy issue in this scenario would be raised in a challenge to the levy of the tax and any claims, that defendant will be forced to pay the tax, are premature in this action.

I address the double jeopardy issue because I consider this issue in arriving at my conclusion that, at this juncture, defendant has not show prejudice.

Unquestionably Iowa could impose the tax if it had not already found the defendant guilty on the charge and punished him or if it had assessed the tax in the same proceeding that resulted in his conviction. Department of

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Revenue v. Kurth Ranch, 511 U.S. ---, --- 114 S. Ct. ---, ---, 128 L. Ed. 2d 767, 778 (1994).¹ However, Kurth Ranch provides assistance to defendant in waging a double jeopardy defense in seeking not to pay the tax.

The majority, again in a footnote, appears to dismiss the implication of the holding in Kurth Ranch on the theory the Iowa tax is not dependent on a criminal conviction. The actual distinction between the Montana tax and the Iowa tax is the Iowa tax is imposed and due and payable immediately upon manufacture, production, acquisition, purchase, or possession by a dealer, see Iowa Code § 453B.3;² see also State v. Gallup, 500 N.W.2d 437, 445 (Iowa 1993), while the Montana tax requires taxpayers to file a return within seventy-two hours of their arrest, Kurth Ranch, 511 U.S. at ---, 114 S. Ct. at ---, 128 L. Ed. 2d at 773, and, therefore, the Montana tax is triggered by arrest, not a finding of guilt. However, the Montana tax is only collected after any state or federal fines and forfeitures have been satisfied. Id.

A valid argument can be made that the holding in Kurth Ranch does not hinge on the distinction between the Iowa

1. Interestingly, if this plea were to be set aside and the tax was sought in the penalty portion of the plea, the defendant would lose.

2. [A] statute imposing a tax on unlawful conduct may be invalid because its reporting requirements compel taxpayers to incriminate themselves. Kurth Ranch, 511 U.S. at ---, 114 S. Ct. at ---, 128 L. Ed. 2d at 778 (citing Marchetti v. United State, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968)).

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 law and the Montana law. Kurth Ranch appears to disagree with part of the reasoning employed by the Iowa court in Gallup to reject a double jeopardy challenge. That being the statute is civil rather than criminal. See Gallup, 500 N.W.2d at 445. The United States Court in Kurth Ranch said, "we rejected the Government's submission that the Double Jeopardy Clause only applied to punishment imposed in criminal proceedings, reasoning that its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Id. 511 U.S. at ---, 114 S. Ct. at ---, 128 L. Ed. 2d at 777 (citing United States v. Halper, 490 U.S. 435, 447, 109 S. Ct. 1892, 1901, 104 L. Ed. 2d 487, 501 (1989)). In making such an assessment, "the labels 'criminal' and 'civil' are not of paramount importance." Id. Halper thus decided that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character. Id.

Nor is a tax immune from double jeopardy inquiry simply because it is a tax. Id.

Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue raising purpose that are imposed despite their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

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Kurth Ranch, 511 U.S. at ---, 114 S. Ct. at ---, 128 L. Ed. 2d at 780.

In a footnote in Kurth Ranch, the court noted it significant that the same sovereign that criminalized the activity also imposed the tax. Id. The court in a footnote in Kurth Ranch also distinguished Marchetti, 390 U.S. at 44-47, 88 S. Ct. at 700-02, 19 L. Ed. 2d at 895-97 (involved a federal tax on gambling activities primarily prohibited under state law, though as the Court there noted, some federal statutes also prohibited activities ancillary to wagering), James v. United States, 366 U.S. 213, 214, 81 S. Ct. 1052, 1052, 6 L. Ed. 2d 246, 250 (1961) (a federal tax on embezzled money was imposed upon a man who had pleaded guilty in state court to conspiracy to embezzle), and United States v. Contintine, 296 U.S. 287, 293, 56 S. Ct. 223, 226, 80 L. Ed. 233, 237-38 (1935) (involved federal excise tax on retail liquor sales that violated state law), which imposed federal tax on activities prohibited under state law.

Kurth Ranch appears to pave the way for requiring the states to impose all penalties for a criminal act against the state in the same proceedings.