FILED
FEB 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA)

Plaintiff-Appellee,) Filed February 26, 1980

vs.)

THOMAS ALAN JOHNSON,) 362
2-63280

Defendant-Appellant.

Appeal from Warren District Court - M. C. Herrick, Judge.

Defendant appeals from denial of application for postconviction relief asserting that his guilty plea was not voluntary and intelligent since he was not aware of his right against self-incrimination. - Reversed and Remanded.

Louis M. Fusco, of Wilson, Goodhue & Fowler, Indianola, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Thomas Alan Johnson appeals from the trial court's denial of his application for postconviction relief. He asserts that he was not informed or aware of his right against self-incrimination during his guilty plea proceedings. We reverse Johnson's conviction and remand to allow him to withdraw his guilty plea.

On August 25, 1975, Johnson appeared before the trial court and pleaded guilty to burglary in violation of section 708.1, The Code 1975. His guilty plea was accepted and he was sentenced to not more than twenty years. Johnson filed a notice of appeal but the appeal was dismissed after his counsel filed an application to withdraw. Johnson filed his application for postconviction relief in 1978 asserting that he was not informed or aware of his constitutional right against self-incrimination and did not become aware of that right until just prior to filing the application for postconviction relief. The postconviction court denied Johnson's application on the ground that although the record of the guilty plea proceeding showed no mention of the right against self-incrimination, there was sufficient evidence submitted at the postconviction hearing to show that Johnson had been advised of his right against self-incrimination by his court-appointed counsel prior to the guilty plea proceedings, and thus was aware of that right at the time he entered his plea.

The principles to be applied in reviewing a trial court's ruling on an application for postconviction relief were recently delineated in Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). The applicant must establish the facts asserted by a preponderance of the evidence. Id. The reviewing court will not disturb the trial court's judgment denying postconviction relief if the findings of fact in support of that judgment are supported by substantial evidence and justified as a matter of law. Id. The reviewing court makes its own evaluation of the totality of the circumstances under which the postconviction court ruling was made when a violation of a constitutional safeguard is alleged. Id.

Initially, we are confronted with the question of the applicability of the recent case of State v. Fluhr, No. 62749 (Iowa, filed Jan. 23, 1980), to the case at bar. In Fluhr, the Iowa Supreme Court held that Iowa R. Crim. P. 8(2) codified the requirements for the valid acceptance of a guilty plea set out in Brainard v. State, 222 N.W.2d 711, 714-18 (Iowa 1974), requiring the trial judge to address the defendant through a personal

colloquy to ensure that the defendant's guilty plea was voluntary and intelligent. Slip op. at 8. Rule 8(2) is not applicable to the case at bar, however, since it was not in effect at the time Johnson's guilty plea was accepted. Between the effective date of the rule and the filing date of Brainard, the case the rule codified, the Iowa Supreme Court decided the case of State v. Reaves, 254 N.W.2d 488 (Iowa 1977). In Reaves, the supreme court held that a personal colloquy between the trial judge and the defendant would not be necessary to communicate all the required knowledge to the defendant if by some other means it could be established that defendant was aware of that knowledge. 254 N.W.2d at 493. The question arises regarding the efficacy of Reaves after Fluhr. Since we conclude that the evidence in the case at bar was insufficient even to satisfy the Reaves standard, we do not need to address the retroactive effect of Fluhr on Reaves.

Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I would hold defendant had the requisite awareness of the rights he was waiving and affirm his guilty plea. This case was brought prior to the adoption of Iowa R. Crim. P. 8(2). Therefore, State v. Fluhr, No. 62749 (Iowa, filed January 23, 1980) does not control our analysis. In reviewing defendant's guilty plea, we rely on the standards of Sisco-Brainard. However, our focus is on defendant's awareness rather than the trial court's litany. State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977), (which retroactively applies to pleas entered before its filing date.)

Under Reaves, defendant demonstrated requisite awareness of the rights he was waiving by the his guilty plea. He was represented at trial by an attorney admitted to practice in Iowa. His attorney stated he likely advised defendant of his right against self-incrimination. Defendant had prior contact with the judicial system and would have been informed of his right against self-incrimination in juvenile proceedings. Under the totality of the circumstances, I would conclude defendant was aware of his right against self-incrimination at the time he entered his guilty plea. Therefore, I dissent from the decision of the majority.