IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
CHARLES PETER BLAISE III,)
Defendant-Appellant.)

Filed November 30, 1987
7-197
86-517

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Appeal from the Iowa District Court for Lee County (Nos. CR1292(s)1285 and 1152(s)0585)- William S. Cahill, D.B. Hendrickson, Judges, (on motion to withdraw guilty plea), and John C. Miller, Judge, (on sentencing).

The defendant appeals from the judgment and sentence imposed upon his guilty pleas. **AFFIRMED.**

Clemens Erdahl, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Michael P. Short, County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant, Charles Peter Blaise III, appeals from the judgment and sentence imposed upon his guilty pleas. Defendant contends the trial court abused its discretion (1) by overruling his motion to withdraw his guilty plea, and (2) by refusing to grant a continuance of the sentencing hearing so defendant could obtain new counsel. Defendant also contends he was denied effective assistance of counsel.

I.

Defendant argues the trial court erred in overruling defendant's motion to withdraw his guilty plea.

On December 9, 1985, pursuant to a plea bargain, defendant pled guilty to the following crimes:

1. Possession with intent to deliver marijuana in violation of Iowa Code section 204.401(1)(b), a Class D felony.

2. Possession of stolen property in violation of Iowa Code section 714.2(3), an aggravated misdemeanor, and

3. Obstruction of prosecution or defense in violation of Iowa Code section 719.3, an aggravated misdemeanor.

At the sentencing hearing on January 29, 1986, defendant orally requested permission to withdraw his guilty plea. Defendant stated he was not guilty of the charges and he was coerced into pleading guilty by his attorney. Defendant claimed he was not telling the truth when he admitted the factual basis for the pleas. The hearing was continued so the State could obtain a transcript of the plea proceeding.

Defendant filed a motion for leave to withdraw his guilty plea on February 28. At the hearing on the motion defendant testified he had entered guilty pleas four previous times in unrelated actions. Defendant admitted that at

the time he entered his plea he knew the maximum punishments for the charges to which he pled guilty.

Defendant also testified that the judge did not mislead him at the plea proceeding and there were no threats or promises made to him regarding the plea bargain. Defendant stated, however, "It was silly of me to take the plea bargain," and reasserted his claim he was not guilty of any of the charged offenses. The trial court subsequently denied defendant's request to withdraw his guilty plea and set a date for sentencing.

Iowa Rule of Criminal Procedure 8(2)(a) provides in part:

> At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted.

It is within the trial court's discretion to grant or deny a withdrawal of a plea of guilty. State v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987). We will uphold a refusal of permission to withdraw a guilty plea where,

> a defendant, with full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, enters such a plea understandably and without fear or persuasion.

State v. Weckman, 180 N.W.2d 434, 436 (Iowa 1970). See Ramirez, 400 N.W.2d at 588.

Defendant contends his attorney coerced him into pleading guilty, but he fails to explain how the attorney coerced or misled him. Defendant admitted he was familiar with the plea process and entered his guilty plea with full knowledge of the charges against him, and of his rights and consequences of a plea of guilty.

The trial court found defendant's claims of coercion were unsupported by the record of the plea proceeding and defendant fully understood the charges against him, his rights, and the consequences of his guilty plea. We find the trial court did not abuse its discretion. See, e.g., State v. Hellickson, 162 N.W.2d

390, 394 (Iowa 1968) (court rejected defendant's argument guilty plea was procured by coercion where record showed no threats or promises were made).

II.

Defendant contends the trial court abused its discretion by refusing to grant a continuance at the sentencing hearing so defendant could obtain a different attorney. After the trial court denied defendant's motion for continuance, the sentencing hearing proceeded with defendant's original attorney representing him. We will not interfere or reverse for failure to grant a continuance unless there is a clear abuse of judicial discretion. State v. Hathaway 224 Iowa 478, 480, 276 N.W. 207, 208 (1937). See also State v. Birkestrand, 239 N.W.2d 353, 361 (Iowa 1976). We find no abuse of discretion.

Defendant first alerted the court he was dissatisfied with his attorney on January 29 when he requested permission to withdraw his guilty plea on the grounds his attorney had coerced him into admitting the factual basis for the plea. The sentencing hearing was held March 31. Defendant failed to take prompt corrective action after he expressed his lack of confidence in his privately-retained attorney. See id. Thus, defendant's request for a continuance grows out of his own fault. See Iowa R. Civ. P. 183(a).

Our review of the transcript of the sentencing proceedings reveals defendant's attorney competently represented defendant at the sentencing hearing. Defendant was not denied effective assistance of counsel at the hearing. See Birkestrand, 239 N.W.2d at 361. It logically follows neither abuse of discretion nor denial of due process can be fastened upon the overruling of defendant's belated continuance motion. Id. (no abuse in denial of continuance motion where defendant desired to change counsel); Hathaway, 224 Iowa at 481, 276 N.W.

at 209 (no abuse in denial of continuance motion where defendant's delay in securing new counsel limited time to prepare defense).

Defendant's second assignment of error is without merit.

III.

Defendant also contends he was denied effective assistance of counsel. He alleges his attorney was ineffective in the following respects:

a. In misleading him with respect to the severity of the charges and the certainty of conviction,

b. In coercing him to admit a false factual basis for the plea,

c. In failing to file a motion to suppress, and

d. In failing to challenge an allegedly defective charge originally filed against him.

Defendant urges us to address these issues, and we agree the record is sufficient to permit the review of these claims on direct appeal. See State v. Burrell, No. 86-681, slip op. at 6 (Iowa September 23, 1987).

To establish his ineffective assistance of counsel claim, defendant has the burden to prove by a preponderance of the evidence counsel failed to perform an essential duty, and prejudice resulted therefrom. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987).

a. The record strongly contradicts defendant's bald assertion he did not understand the severity of the charges and the certainty of conviction. At the hearing on defendant's motion to withdraw his guilty plea, defendant told the court he was advised of what the charges and penalties were and what the State would have to prove to convict him.

b. We do not accept defendant's assertion he was coerced into pleading guilty. Defendant admitted no threats or promises were made to him regarding the plea bargain. Defendant's attorney told the sentencing court he had never

coerced Mr. Blaise into lying to the court; he stated he "had no cause to coerce or force Mr. Blaise . . . and did not do so." The record does not support defendant's claim his guilty plea was not voluntarily entered. Defendant has failed to show counsel's advice to plead guilty was not within the normal range of competency demanded of attorneys in criminal cases. Mott v. State, 407 N.W.2d 581, 582 (Iowa 1987); Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977).

c. The record does not support defendant's contention his counsel was ineffective because counsel failed to challenge the search warrant. See State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987). A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have had to the charge. Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235, 243 (1973); Long, 253 N.W.2d at 553. It is not sufficient that defendant show if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings. Tollett, 411 U.S. at 267, 93 S.Ct. at 1608, 36 L.Ed.2d at 243.

The warrant was based on surveillance reports and the affidavit of one of the investigating officers. The facts presented to the magistrate were sufficient "to justify the belief of a reasonably cautious person that an offense has been or is being committed." State v. Groff, 323 N.W.2d 204, 207 (Iowa 1982).

The typed numbers in the address of the place to be searched were crossed out, new numbers (the address of defendant's residence) were written in by hand, and the change was initialed by the officer and the issuing magistrate. The judicial officer issuing a search warrant has the right to alter, modify, or correct that warrant before it is executed. People v. Watson, 668 P.2d 965,

966 (Colo. Ct. App. 1983) (typographical error, issuing judge changed address from 1213 to 1312); Santos v. State, 379 S.W.2d 667, 668 (Tex. Crim. App. 1964) (judge wrote digit 2 in ink over typewritten and initialed change); cf. Groff, 323 N.W.2d at 210 (deliberate misrepresentation a prerequisite for invalidating warrant issued on basis of false statement; officer said defendant "owned" marijuana field when in fact defendant only "farmed" it). Defendant fails to support his contentions that the warrant was based on less than sufficient evidence and that the fact the address had been corrected would invalidate the warrant.

A strategic decision not to file a suppression motion, based on the belief the motion would not prevail, is not necessarily an indication of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 565 (Iowa 1980). We conclude defendant has failed to show counsel's performance fell outside the normal range of competency.

d. We reject defendant's final claim counsel was ineffective in failing to challenge an allegedly defective charge on the ground defendant has failed to demonstrate prejudice. See Hildebrant, 405 N.W.2d at 841. Defendant was initially charged with possession with intent to deliver cocaine, a Class C felony with a maximum penalty of ten years; assault while participating in a felony, a Class D felony; possession of marijuana, a serious misdemeanor; obstruction of prosecution or defense and possession of stolen property. Defendant challenges the propriety of the assault while participating in a felony charge because possession with intent to deliver cocaine is a passive crime. See Iowa Code §708.3 (1985). Defendant argues counsel was ineffective for his failure to file a motion to dismiss or bill of particulars questioning this charge. Without addressing that issue, we find defendant was not prejudiced. We do not find that any error committed by defendant's counsel, if such error existed, worked to defendant's

substantial disadvantage. See State v. Simpson, 349 N.W.2d 783, 786 (Iowa App. 1984). The plea bargain agreement effectively dismissed the assault and the possession of marijuana charges. The plea bargain agreement also reduced the Class C felony (cocaine) to the Class D felony of possession with intent to deliver marijuana.

Finding no grounds for reversal, we affirm.

AFFIRMED.