IN THE COURT OF APPEALS OF IOWA

No. 1-300 / 00-1560
Filed July 18, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARRY WAYNE COOK,
Defendant-Appellant.

Appeal from the Iowa District Court for Cass County, James M. Richardson (guilty plea and sentencing) and Keith E. Burgett (motion in arrest of judgment), Judges.

Defendant appeals from his convictions for two counts of delivery of methamphetamine, one count of possession of marijuana with intent to deliver and one count of possession of methamphetamine with intent to deliver. **AFFIRMED.**

Michael J. Burdette and William G. Brewer of McEnroe, McCarthy & Gotsdiner, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and James P. Barry, County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

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ZIMMER, J.

Garry Cook appeals from his convictions for two counts of delivery of methamphetamine in violation of Iowa Code section 124.401(1)(c)(6) (1999), one count of possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d), and one count of possession of methamphetamine with intent to deliver in violation of Iowa Code section 124.401(1)(c)(6). He contends (1) the court erred in failing to establish that his guilty plea was informed and voluntary, (2) the court erred in failing to find a factual basis for his plea, (3) the court erred in failing to fully advise him as to the purpose of filing a motion in arrest of judgment, and (4) he was provided ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings. On May 13, 1999, a confidential informant made a controlled purchase of methamphetamine from the defendant, Garry Cook. On June 9, 1999, another confidential informant made a purchase of methamphetamine from him. On June 25, 1999, a third individual purchased drugs from the defendant under the supervision of police officers. Police subsequently secured a search warrant for the defendant's home, where they discovered marijuana, methamphetamine, weapons and evidence of drug dealing, including notes of drug transactions.

On October 25, 1999, the State filed a trial information charging the defendant with nine drug-related offenses. Defendant was initially represented by attorney Thomas Anderson. After extensive plea negotiations, the defendant appeared before a district court judge on March 27, 2000, and pled guilty to two

counts of delivery of methamphetamine, one count of possession of marijuana with intent to deliver and one count of possession of methamphetamine with intent to deliver. *See* Iowa Code §§ 124.401(1)(c)(6), 124.401(1)(d). As part of the plea agreement, the State agreed not to pursue any enhanced sentencing provisions and agreed to drop other charges.

On May 2, 2000, the defendant filed a pro se motion in arrest of judgment, alleging he had been pressured into a plea bargain. Attorney Robert Wright, Jr., became defendant's attorney of record on June 19, 2000. Cook's motion in arrest of judgment was set for hearing on August 16, 2000. Wright filed an amended motion in arrest of judgment on the day Cook's motion was heard. The court overruled the motion. On August 28, 2000 Cook was sentenced to ten years in prison on each of the methamphetamine delivery counts and five years on the marijuana conviction. The court ordered the defendant to serve these sentences concurrently. The court also sentenced Cook to ten years on the remaining methamphetamine conviction, and ordered that this sentence be served consecutively to the other sentences imposed. Upon recommendation of the State, all fines were waived.

The defendant appeals. First, he contends the court failed to establish the guilty plea was voluntary when it failed to advise him as to his right to remain silent if he went to trial, the nature and elements of the charges, and the maximum and minimum penalties he faced by pleading guilty. Second, he asserts the court erred in failing to make a finding of a factual basis for his guilty plea. Third, he claims the court erred in failing to fully advise him of his right to

file a motion in arrest of judgment and misrepresented the purpose of filing such a motion. Finally, he argues he was provided ineffective assistance of counsel.

II. Voluntary and Intelligent Plea. Cook first contends the court erred in denying his request to withdraw his guilty plea. He claims his motion in arrest of judgment should have been granted because the trial court failed to establish his guilty plea was informed and voluntary. He contends the trial court failed to advise him of (1) his right to remain silent, (2) the nature and elements of the charges and (3) the minimum and maximum penalties for the charges, including the possibility of consecutive sentences.

A. Scope of Review. We review the district court's decision to deny defendant's request to withdraw his guilty plea for abuse of discretion. *State v. Hightower,* 587 N.W.2d 611, 612 (Iowa Ct. App. 1998). An abuse of discretion is shown when a court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

B. Right to Remain Silent. Cook acknowledges the trial court personally advised him of a number of his constitutional rights, but contends the court erred in failing to grant his request to withdraw his guilty plea because he was never informed of his right to remain silent. However, Cook did not allege in either his motion in arrest of judgment or his amended motion in arrest of judgment that his guilty plea was not intelligently and voluntarily given because he was not informed of his right to remain silent. An issue that was not raised before the district court will not be considered for the first time on appeal. *State v. McCright,* 569 N.W.2d 605, 607 (Iowa 1997). Therefore, we will not consider this issue on appeal.

C. Nature and Elements of the Charges. Cook next contends the district court erred in failing to advise him of the nature and elements of the charges to which he pled guilty.

Iowa Rule of Criminal Procedure 8(2)(b) requires the court to determine that a guilty plea is being made voluntarily. To ensure a voluntary and intelligent guilty plea, the court must determine that the defendant understands the nature of the charge to which the plea is offered. Iowa R. Crim. P. 8(2)(b)(1). However, rule 8(2)(b) does not establish a litany to be followed before a guilty plea may be accepted. *Hightower,* 587 N.W.2d at 613. Substantial compliance with the rule is all that is required. *Id.* at 613-14.

The record shows the district court did not personally discuss with Cook each element of the crimes to which he pled guilty. However, lack of explanation of an element of an offense is not reversible error if, under the circumstances, the accused understood the nature of the charge. *See State v. Watts,* 225 N.W.2d 143, 144-45 (Iowa 1975); *State v. Yarborough,* 536 N.W.2d 493, 496 (Iowa Ct. App. 1995). In fact, in some situations the name of the offense itself has been found to be sufficiently descriptive. *Watts,* 225 N.W.2d at 145. Where the trial information charges the offense in language containing the elements, no additional explanation may be required. *Id.*

We find the record as a whole indicates Cook understood the nature of the charges to which he pled guilty. The trial information filed in this case details the elements of the offenses to which Cook pled guilty. The charges against Cook were also discussed at some length when Cook's plea agreement was described to the trial court. During the guilty plea hearing, Cook told the court his guilty

plea was voluntary and indicated he had no questions concerning his plea agreement. He advised he was happy with his attorney's representation and that all his questions had been answered. At the hearing on Cook's motion in arrest of judgment, Cook admitted that he knew it was a crime to deliver drugs to somebody. When given the opportunity, he could not explain what it was about the elements of intent to deliver controlled substances that he found confusing. The defendant further stated that he pled guilty to "avoid stiffer penalties down the road," but then changed his mind shortly after the guilty plea hearing. In the absence of an affirmative showing that Cook misunderstood the nature of the charges against him, he should not be permitted to withdraw his plea. Therefore, we conclude the district court did not abuse its discretion in denying defendant's request to withdraw his guilty plea.

D. Penalties. Cook also contends his guilty plea was not voluntary and intelligent because he was not advised of the minimum and maximum sentences that he faced, including the possibility his sentences could run consecutively.

Iowa Rule of Criminal Procedure 8(2)(b)(2) requires that before it can accept a guilty plea, the court must determine if the defendant understands the "mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." In order for an accused to be fully aware of the direct consequences of a guilty plea, the court must also determine that the defendant understands the possibility of receiving sentences to be served consecutively. *State v. White,* 587 N.W.2d 240, 246 (Iowa 1998).

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While the trial court failed to inform the defendant of the penalties for possession of marijuana and the possibility of consecutive sentencing, we find the district court did not abuse its discretion in overruling Cook's request to withdraw his guilty plea. At the hearing in which Cook entered his plea of guilty, the court informed him of the maximum penalty for possession of methamphetamine, a Class C felony. The court did not inform him of the minimum sentence for a Class C felony. However, this information was not required because there is no minimum sentence. Iowa Code § 902.9(4); *Kinnersley v. State*, 494 N.W.2d 698, 700 (Iowa 1993).

The court also failed to personally inform Cook of the possibility his sentences would be served consecutively. However, the prosecutor informed the judge of this option in Cook's presence at the guilty plea hearing. Additionally, although the court did not inform Cook of the maximum sentence for possession of marijuana, Cook indicates in his motion in arrest of judgment that his attorney informed him his total sentence was to be thirty-five years. Under this record, it appears Cook was aware of the maximum penalty he was facing, as well as the possibility of receiving consecutive sentences. Finally, because the trial court sentenced Cook to concurrent terms for three of his offenses, his twenty year term of incarceration is less than the thirty-five year term requested by the prosecutor. We conclude the court did not abuse its discretion in overruling Cook's request to withdraw his guilty plea. *See State v. Reppert*, 215 N.W.2d 302, 307 (Iowa 1974) (holding that the requirement that an accused be aware of the penalty to which they are subject is satisfied where the accused has knowledge of the penalty from the judge, his lawyer or from another source).

III. Factual Basis for Plea. Cook argues the court erred in failing to make a finding of a factual basis upon which his guilty plea could be accepted.

Iowa Rule of Criminal Procedure 8(2)(b) prohibits a court from accepting a guilty plea if no factual basis for the plea exists. *State v. Schminkey,* 597 N.W.2d 785, 788 (Iowa 1999). The court may determine the existence of a factual basis for a guilty plea by inquiring of the defendant or the prosecutor, examining the presentence report or by referring to the minutes of testimony. *Hightower,* 587 N.W.2d at 614. Our review is for abuse of discretion. *Id.* at 612.

At the hearing in which the court accepted Cook's guilty plea, the court referenced the minutes of testimony and concluded the elements of proof for his guilty plea were satisfied. After reviewing the evidence, we are satisfied the court did not abuse its discretion in making this determination.

IV. Motion in Arrest of Judgment. Cook argues the court erred in failing to fully advise him of his right to file a motion in arrest of judgment. He claims the court misled him into believing he could withdraw his guilty plea at will. However, Cook failed to argue this contention in either his motion in arrest of judgment or amended motion in arrest of judgment. Therefore, he has not preserved this issue for appeal. Cook then contends any failure to preserve the issue is the result of ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's

error. *Id.* Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin,* 587 N.W.2d 606, 609 (Iowa Ct. App. 1998).

Iowa Rule of Criminal Procedure 8(2)(d) requires the court to inform a defendant that any challenges to a guilty plea based on defects in the plea proceeding must be raised in a motion in arrest of judgment. Cook contends the district court failed to abide by the requirements of rule 8(2)(d) because it did not inform him that a motion in arrest of judgment must allege defects in the plea proceeding.

At Cook's hearing, the court informed him he had the right to withdraw his guilty plea "pursuant to Rule 23 which is a motion in arrest of judgment of criminal procedure rule your attorney can explain to you in detail." However, it is the court that must personally advise a defendant as to his right to file a motion in arrest of judgment and not the defendant's attorney. *See State v. Hook,* 623 N.W.2d 865, 868 (Iowa 2001). Therefore, we preserve this issue for a postconviction relief proceeding, if any is brought.

V. Ineffective Assistance of Counsel. Cook next contends Attorney Anderson rendered ineffective assistance of counsel in failing to fully advise him as to the nature and terms of the plea offers made by the State, failing to answer all of his questions and failing to explain his change in attitude with respect to the weaknesses of the State's case and the merits of their defenses. Because the

record is not fully developed with regard to counsel's alleged failure to advise Cook of the nature and terms of the State's plea offers, we preserve this claim for a postconviction relief proceeding, if any is brought. However, Cook's other claims of ineffective assistance of counsel lack the necessary specificity required for this court to assess their viability. See *State v. Astello,* 602 N.W.2d 190, 198 (Iowa Ct. App. 1999) (holding that a defendant "must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome). Therefore, we decline to preserve them for postconviction relief.

AFFIRMED.