FILED
NOV 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 30, 1983
vs.)
HARVEY E. AUSTIN,) 3-229/83-17
Defendant-Appellant.)

Appeal from Pottawattamie District Court - Keith E. Burgett, Judge.

Defendant appeals from his guilty plea conviction of third degree kidnapping. AFFIRMED.

Thomas J. Miller, Attorney General and Lona Hanson, Assistant Attorney General, for defendant-appellee.

F. J. Kraschel, Kraschel & Comes, Council Bluffs, Iowa, for defendant-appellant.

Heard by Donielson, P. J., Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant, Harvey E. Austin, appeals his guilty plea conviction of third degree kidnapping, challenging the guilty plea proceedings. We affirm.

Austin was charged with kidnapping in the second degree following his arrest on July 30, 1982. Austin retained private counsel, Mr. Kraschel, who appeared with him on his initial appearance but subsequently withdrew as defense counsel. He was replaced by Mr. Heckerman, a Pottawattamie County public defender, on September 21, 1982. Trial was originally scheduled for October 12, 1982, but was continued on two occasions and was finally set for November 9, 1982. On November 8 the defendant requested a continuance so that he could obtain private counsel. The trial court denied the requested continuance. Austin was presented with a plea bargain on the afternoon of the 8th, which he tentatively accepted. On the morning of the 9th, however, he again stated that he wished to retain private counsel and take his case to a jury. He was then informed by the court that a continuance would not be granted and that if he wished to have a jury trial, the court was ready to proceed. The court specifically stated:

> You have a very competent, capable, skillfull trial attorney who has handled many cases and whatever your reasons are for wanting another attorney or a continuance at this time are not valid and they're not permissible by the Iowa Rules of Criminal Procedure. It appears to the Court as simply another attempt to delay the trial and so this is all there is to it.

Austin then discussed the proposed plea bargain with his attorney. He told his attorney that he would discuss the matter further with his brother and sister over the noon hour. When he returned, Austin informed his attorney that he would enter the plea of guilty to third degree kidnapping. The trial court was informed of Austin's decision to accept the plea bargain. The court then questioned Austin to ensure that he fully understood the plea bargain and the consequences of entering a guilty plea. The court finally accepted Austin's plea of guilty to

kidnapping in the third degree and set a date for sentencing. Austin then hired private counsel, Mr. Kraschel, and filed a timely motion in arrest of judgment, alleging that his guilty plea was "not knowingly and voluntarily made." Austin specifically alleged that trial counsel did not fully explain the plea bargain, that trial counsel had coerced him into entering a guilty plea, and that he was "confused, fearful and incapable of making a logical and objective decision." A hearing was held on the motion in arrest of judgment on December 7, 1982. At that hearing Austin testified that he had contacted a total of five attorneys regarding the kidnapping charge. Mr. Heckerman testified that during the nine-day period prior to the time of trial he was contacted by at least three of those attorneys regarding the status of the case. The court overruled the motion and set a sentencing date for December 30, 1982. At that time Austin was sentenced for a period not to exceed ten years. Austin filed a timely notice of appeal.

In his appeal Austin now alleges: (1) that there was no factual basis for his guilty plea; and (2) that the trial court's findings of fact and conclusions of law in its ruling on the motion in arrest of judgment were not supported by the evidence. Because we find the defendant's arguments to lack merit, we affirm the conviction and sentence of the trial court.

I. Factual basis for guilty plea

A. Failure to preserve error. Austin first argues that there was no factual basis for his guilty plea and therefore the plea should not be allowed to stand. The state responds that since Austin did not raise this issue by way of his motion in arrest of judgment, he is precluded from raising it now.

Iowa Rule of Criminal Procedure 23(3)(a) specifically provides:

> . . . A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal.

The defendant counters this by arguing that his motion in arrest of judgment sufficiently preserved the issue of the factual basis for the plea even though not specifically raised therein. The argument seems to be that the timely filing of the motion preserved the defendant's right to challenge any aspect of the plea proceedings, even though the trial court, when considering the motion, was not apprised of each ground for relief. We disagree. The supreme court has repeatedly held that issues not raised before the trial court may not be raised for the first time on appeal. State v. Hansen, 286 N.W. 2d 163, 165-66 (Iowa 1979). The defendant offers no authority for the proposition that an exception to that rule is applicable where a motion in arrest of judgment is timely made. Because the defendant's motion did not call the trial court's attention to the particular grounds for relief now urged, the alleged error was not preserved for review. See State v. Guess, 223 N.W. 2d 214, 216 (Iowa 1974).

B. Waiver of failure to preserve error. Defendant next urges this court to waive any failure to preserve the error and decide the issue on its merits. This argument is based on the trial court's failure, when informing Austin of his right to challenge the guilty plea proceedings by motion in arrest of judgment, to specify the grounds upon which such a motion may be based. We agree that, where the trial court fails to comply with rule 8(2)(d) (requiring court to inform defendant that challenges to alleged defects in plea proceeding must be raised in motion in arrest of judgment), rule 23(3) does not preclude our review. See State v. Taylor, 301 N.W. 2d 692, 693 (Iowa 1981). The court informed Austin at the guilty plea proceedings:

> . . . I want to advise you that if you wish to contest any of the proceedings that have taken place thus far from the beginning till now, you must do it by what is called a motion in arrest of judgment which your lawyer will explain to you. This is a Rule of Criminal Procedure Number 23 which permits you to contest or attack any of the proceedings prior to the time that sentencing date is scheduled. You must file that motion five days or more prior to the 7th of December, otherwise you waive all of

> your rights under that motion and they won't further be considered now or on appeal if you elect to appeal this case.

Defendant's argument is that, although he was informed of the necessity of filing a motion in arrest of judgment, rule 8(2)(d) required the court to go further and specify the grounds upon which the motion could be based. Since the court failed to specify those grounds, Austin argues that rule 23 should not operate to bar the argument on appeal. We disgree. Rule 8(2)(d) of the Iowa Rules of Criminal Procedure requires only that:

> [T]he court shall inform a defendant that any challenges to a guilty plea based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

The rule does not, on its face, require the court to specify all possible grounds for relief. Austin offers no support for his novel theory. We decline Austin's request to require more of the trial judge than is required under rule 8(2)(d). Because there was no failure on the part of the trial court to comply with rule 8(2)(d), we find no grounds upon which a waiver of the rule 23(3)(a) requirements may be based.

C. Miscarriage of Justice. Austin next argues that, even should his first two theories be rejected, this court should reach the merits of an issue not previously preserved if it will prevent a miscarriage of justice. See Iowa Code §814.20 (1983). Austin suggests that, because his new defense counsel received a transcript of the plea proceedings only shortly before the hearing on the motion in arrest of judgment, he was unable to fully address the issues raised therein. Austin concludes that, if unable to raise the issue of sufficiency of the factual basis for the plea, " a miscarriage of justice would occur," and that "under these extreme circumstances," we should consider the merits of his argument on appeal.

There is no evidence in the record that Austin's counsel, either at or prior to the hearing on the motion in arrest of judgment, complained of any prejudice

caused by a delay in the receipt of the transcript. Neither did defense counsel at any time request a continuance with respect to the motion in arrest of judgment. We do not find in this case any "extreme circumstances" which would require that we consider the merits of an issue not properly preserved for review.

D. Ineffective Assistance of Counsel. Austin finally argues that, because he was denied effective assistance of counsel at the plea proceedings, his failure to preserve the factual basis argument for appeal should be waived. He relies on State v. Schoelerman, 315 N.W. 2d 67 (Iowa 1982), in support of this argument. In Schoelerman the defendant appealed from the judgment entered on his guilty plea to the crime of false use of a financial instrument. After accepting defendant's guilty plea the court informed him of his right to challenge errors in the plea proceeding by filing a timely motion in arrest of judgment. Schoelerman failed to do so and asserted on appeal that there was no factual basis for the guilty plea and that he was denied effective assistance of counsel. The court found that his failure to file a motion in arrest of judgment resulted from denial of defendant's right to effective assistance of counsel and, accordingly, considered the merits of the appeal without regard to rule 23(3)(a). Id. at 73. The court in Schoelerman noted that, "[o]rdinarily, the record on a direct appeal is insufficient to allow us to adjudicate a claim of ineffective assistance of counsel," but concluded that in that case the record was adequate to allow adjudication of that claim. Id. at 71. We, like the court in Schoelerman, find the record sufficient to permit adjudication of Austin's claim of ineffective assistance of counsel. The test we apply in determining the ineffective assistance of counsel question is whether under all the circumstances counsel's performance was within the range of normal competency. Hinkle v. State, 290 N.W. 2d 28, 30 (Iowa 1980). After a careful review of the guilty plea proceedings, we find no support for Austin's claim of ineffective assistance of counsel. The record reflects that Austin was fully

informed of the penal consequences of his plea, of the waiver of constitutional rights by such a plea, and, more importantly, of the elements of the offense which he was charged with. We note that the trial court specifically found that Mr. Heckerman provided effective assistance to Austin. Because we find that Mr. Heckerman's performance with respect to the guilty plea proceedings was well within the normal range of competency, it follows that a Schoelerman waiver is not present in this case.

Because Austin failed to preserve the issue of factual support for the guilty plea for appeal, we will not now consider that argument.

II. Ruling on Motion in Arrest of Judgment

Austin argued, in his motion in arrest of judgment, that his guilty plea was not knowingly, voluntarily and intelligently given, and that it therefore should not have been accepted by the trial court. Austin now argues that the trial court's ruling on the motion was not supported by the evidence. Austin claims that his counsel, Mr. Heckerman, told him that he would be in court "on his own" if he did not accept the plea agreement. Austin further claims that Mr. Heckerman stated that he would not put character witnesses on the stand on Austin's behalf and that he would not thoroughly cross-examine the witnesses. Austin also argues that the plea was not knowingly made because it was not based on accurate information regarding the elements of the offense, specifically the element of specific intent. We find no support in the record for these allegations. Before accepting Austin's plea, the court satisfied itself that the plea was made knowingly, voluntarily and intelligently. At the hearing on the motion in arrest of judgment, Mr. Heckerman testified that he did not coerce Austin into pleading guilty; rather, he merely told Austin that he was "on his own as far as whether or not he was making the decision to go to trial or accept the plea agreement." As to the character witnesses, Mr. Heckerman testified that he advised Austin that the danger of

calling character witnesses on his behalf would far outweigh any favorable character evidence. He testified further that he did not refuse to cross-examine the victim. Rather, he indicated that he would use a selective cross-examination so as to minimize the impact of the victim's testimony.

After considering all of the testimony presented with respect to the motion in arrest of judgment, the trial court found "as a matter of law that the Defendant knowingly, voluntarily and with a full understanding of the ramifications of such a plea, entered his plea of guilty to the reduced charge of kidnapping in the third degree." The trial court's finding is supported by the record. We find no error.

AFFIRMED.