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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

326

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
KORY TODD ORTH,	)	8-301 87-1523
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Worth County (No. 2336), Gilbert K. Bovard, Judge.

Defendant appeals from judgment and sentence, following a guilty plea, for second-degree burglary. **AFFIRMED.**

Raymond Rogers, Acting Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sarah J. Coats and Richard Williams, Assistant Attorneys General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

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Defendant appeals from judgment and sentence, following a guilty plea, for second-degree burglary. We affirm.

Defendant was charged with second-degree burglary for breaking into an occupied home with the intent to commit a theft. He subsequently escaped from the mental health institution in Cherokee where he had been sent to be evaluated for mental problems. He pleaded guilty to the burglary charge in exchange for dismissal of a charge for escape. The district court sentenced him to ten years imprisonment. He did not file a motion in arrest of judgment, but sent three handwritten communications that the district court found to constitute a timely pro se notice of appeal.

The defendant contends that the trial court erred in accepting his guilty plea. He argues that: 1) there was no on-the-record finding of his mental competency after the record clearly put that issue in doubt, and 2) the intent element of burglary was not factually established. Such failures, if shown, would violate Iowa Rule of Criminal Procedure 8(2)(b) and would require reversal of the conviction.

However, before addressing these two issues, we must first determine whether Orth has waived his right to challenge the district court's acceptance of his guilty plea. Defendant urges that his failure to file a motion in

arrest of judgment is attributable to ineffective assistance of counsel.

After Orth pleaded guilty, the district court explained to him that to preserve any procedural irregularities or deficiencies for appeal, Orth must file a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a)-(b). The court warned of the time limitations and that failure to file would result in waiver of any defects or errors for future appeal. The court was assured by defendant's counsel that the manner and nature of this motion would be fully explained to Orth.

Defendant filed no motion in arrest of judgment. We therefore may not consider the other issues unless Orth's failure to file resulted from ineffective assistance of counsel. State v. Hildebrant, 405 N.W.2d 839, 840 (Iowa 1987). Orth has asserted this claim on appeal.

Generally the court is hesitant to address such claims on direct appeal. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). We must determine whether the issue should be disposed of on direct appeal or should be decided in postconviction proceedings. Hildebrant, 405 N.W.2d at 841. We consider the record in this case adequate to consider Orth's claim of ineffective counsel.

To prove the claim of ineffective assistance of counsel, defendant has the burden to prove by a preponderance of the evidence that: 1) counsel failed to

perform an essential duty; and 2) that prejudice resulted therefrom. Id. To prove the first prong of this test, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). To show prejudice, Orth must prove there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

Defendant claims that his counsel permitted him to plead guilty without an on-the-record finding of competency to a crime for which a factual basis did not exist. Also, that counsel failed to perform an essential duty by failing to file a motion in arrest of judgment. The prejudice alleged is that defendant pleaded guilty to a Class "C" felony for which he could not have been convicted due to the lack of a factual basis. Also, because he pleaded guilty under circumstances that left serious doubt as to his mental capacity, defendant was denied due process.

At the plea hearing, the district court thoroughly explored Orth's understanding of the effects of pleading guilty including the plea bargain which resulted in dropping his escape charge. The court also established a

factual basis for the charge by questioning the defendant about his reasons for entering the home that night. Defendant said he believed in his mind that he had done some things for which he should enter a guilty plea. Counsel for defendant indicated he had a "lengthy" conference with Orth and that Orth understood he was entering his plea voluntarily and acting with an understanding of the rights and benefits. Counsel also told the court that in his mind a factual basis for the entry of the plea of guilty existed.

Prior to his plea hearing, defendant underwent psychiatric assessment. The confidential report dated May 6, 1987, found Orth competent to participate in the judicial proceedings and indicated that defendant had no mental condition preventing him from understanding the charges or proceedings. The fact that the record does not disclose a determination of defendant's competency to enter a guilty plea alone will not raise a reasonable doubt as to his competency. State v. Johnson, 234 N.W.2d 878, 880 (Iowa 1975).

It was reasonable for counsel to believe that defendant was competent to enter a plea. Counsel stated he believed there to be a factual basis for the plea. Not filing a motion in arrest of judgment was reasonable under the circumstances.

We have examined the record and based on the totality of the circumstances, we find that counsel's performance was within the range of normal competency. Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980). "While counsel should always protect a defendant's rights diligently and uncompromisingly, counsel is under no obligation to engage in an obviously useless act." Hildebrant, 405 N.W.2d at 841.

We therefore reject Orth's claim of ineffective assistance of counsel. Consequently, we cannot address the other issues as they were not raised by a motion in arrest of judgment and are therefore barred. Id. Judgment of the district court is affirmed.

AFFIRMED.