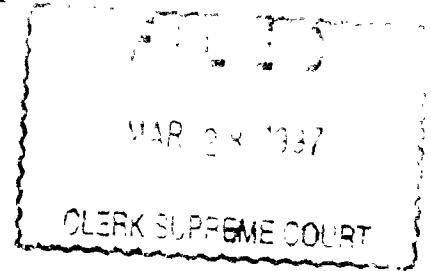


IN THE COURT OF APPEALS OF IOWA

No. 6-776 / 95-2110



STATE OF IOWA,

Plaintiff-Appellee,

vs.

JEFFREY G. MALLINGER,

Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Fredrick E. Breen,
District Associate Judge.

Defendant appeals from the judgments and sentences entered upon his pleas
of guilty to escape, driving under suspension, false imprisonment, domestic assault,
and two counts of eluding. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, James J. Koll, County Attorney, and Rebecca J. Hanson, Assistant County
Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ. Habhab, C.J., takes no
part.

HUITINK, J.

Jeffrey G. Mallinger appeals his convictions of escape, two counts of eluding, false imprisonment, domestic assault, and driving under suspension in violation of Iowa Code sections 719.4(2), 321.279, 710.7, 708.2A(2)(a) and 321A.32(1) (1995).

I. Background Facts and Proceedings.

Mallinger agreed to plead guilty to the foregoing misdemeanors in exchange for the State's promise to dismiss other charges and "remain silent as to sentencing recommendations." This plea agreement and Mallinger's separate written guilty pleas to each offense were presented to the court at a "plea hearing" on November 15, 1995. After personally addressing Mallinger, the court accepted Mallinger's guilty pleas. Mallinger was also informed that any challenge to his guilty pleas required filing of a motion in arrest of judgment. The court also informed Mallinger of the consequences of his failure to file a motion in arrest of judgment.

Mallinger requested immediate sentencing. The court, after informing Mallinger of the consequences of proceeding to immediate sentencing, imposed sentences of incarceration, fines, and costs on each count.

On appeal, Mallinger challenges the validity of his guilty pleas. He cites the court's reliance on his written guilty pleas and the court's failure to comply with Iowa R. Crim. P. 8(2)(b) in the absence of his express waiver of the rule's specified

procedures. As a result, Mallinger claims his plea was not knowingly and voluntarily entered. He requests that we set his guilty pleas aside and remand the case for trial.

The State contends Mallinger has failed to preserve error by filing the required motion in arrest of judgment. The State alternatively argues the record indicates the court substantially complied with Iowa R. Crim. P. 8(2)(b).

II. Error Preservation.

Mallinger concedes he failed to preserve error by filing the required motion in arrest of judgment. Ordinarily, failure to file a timely motion in arrest of judgment bars a defendant from challenging the validity of a guilty plea. Iowa R. Crim. P. 23(3)(a); *see, e.g., State v. Glenn*, 505 N.W.2d 818, 819 (Iowa App. 1993). However, if failure to file a motion in arrest of judgment results from ineffective assistance of counsel, we will entertain a defendant's challenge to the validity of a guilty plea. *State v. Hildebrant*, 405 N.W.2d 839, 840 (Iowa 1987). Mallinger relies on this exception arguing he was denied effective assistance of counsel because his attorney failed to file a motion in arrest of judgment challenging the validity of his guilty pleas. The resolution of this issue is an essential predicate to consideration of the merits of Mallinger's attack on his guilty pleas.

Established principles govern our review of appellant's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged."

Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984). In deciding this, we must consider whether “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93. “In examining counsel’s conduct we review de novo the totality of relevant circumstances.” *State v. Risdal*, 404 N.W.2d 130,131 (Iowa 1987) (citations omitted). “Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.” *Id.* at 131-32.

In proving the first prong of this test, Mallinger must overcome the strong presumption counsel’s actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test, Mallinger must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Mallinger’s success on this claim requires more than a general allegation his lawyer’s performance was deficient. He must specify how competent representation would have changed the outcome in this case.

Our review of the record indicates Mallinger has failed to meet his burden of proof on this issue. Counsel has no duty to file a meritless motion. *State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994); *Schertz v. State*, 380 N.W.2d 404, 409 (Iowa 1985). It is well established that substantial rather than literal compliance with the procedures specified in Iowa R. Crim. P. 8(2)(b) is sufficient to accomplish the purpose of this rule. *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994)(citations omitted). Here the court convened a plea hearing at which the court personally addressed Mallinger concerning his guilty pleas. The record also indicates the court inquired about Mallinger's familiarity with his constitutional rights enumerated in his written pleas and whether he understood them.¹ Under these circumstances, the court's reliance on the written guilty pleas *and* Mallinger's responses was sufficient to satisfy the substantial compliance standard. We also explicitly reject any notion that a defendant's express waiver of rule 8(2)(b) procedures is required when a plea hearing is convened to facilitate or augment the court's consideration of a written guilty plea to a misdemeanor offense.

We hold Mallinger has failed to establish his plea counsel was ineffective for failing to file a motion in arrest of judgment. Accordingly, Mallinger has failed to preserve any error for appeal and he is bound by his guilty pleas.

AFFIRMED.

¹ A review of defendant's written guilty plea confirms each of the procedural requirements of Iowa R. Crim. P. 8(2)(b) are set forth.