**IN THE COURT OF APPEALS OF IOWA**

No. 6-310 / 95-944

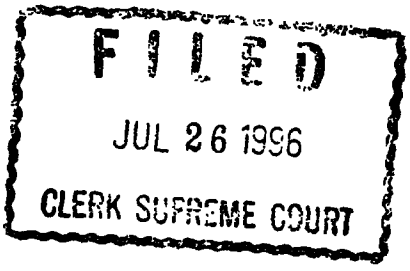
**STATE OF IOWA,**

Appellee,

**vs.**

**HOWARD PHAMS,**

Appellant.




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Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Howard Phams appeals from his conviction, following a guilty plea, for first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1993). **AFFIRMED.**

Ta-Yu Yang of Smith, Phillips, Phillips & Yang, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Pete Newell, Assistant County Attorney, for appellee.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

**CADY, P. J.**

Howard Phams appeals his conviction, following an Alfred plea, for first-degree robbery. On our review, we affirm.

The State charged Phams with first-degree robbery and possession of a firearm. The case proceeded to trial but, after the State's first witness testified, Phams agreed to enter an Alfred plea for first-degree robbery. In return, the State agreed to dismiss the firearm's charge, recommend the sentencing court impose no more than a two-year mandatory minimum sentence rather than a five-year minimum, and not file any habitual offender charges.

Subsequent to his plea, Phams filed two motions in arrest of judgment, one by his first attorney David Mason, and one by a newly appointed attorney after Mason was allowed to withdraw. In both motions, he alleged his guilty plea was a product of coercion, undue duress, and was not rendered in a knowing, intelligent, voluntary manner due to the ineffectiveness of Mason and judicial bias. Phams also filed a separate motion to withdraw his guilty plea and a motion to recuse the district court judge who presided over the plea proceedings.

At the hearing for the motion in arrest of judgment, Phams testified Mason advised him to plead guilty and failed to explain the habitual offender provisions. Mason also testified, stating he deposed five witnesses, investigated the case adequately, was prepared to go through trial, did not force Phams into pleading guilty, discussed plea agreements with Phams on several occasions, discussed the potential

application of the habitual offender statute, and fully explained the nature of the plea agreement entered.

Phams' motions in arrest of judgment were denied. The district court found Phams was advised and aware of the consequences of his plea and the rights available to him and willingly chose to plead guilty.

Phams appeals. He contends the district court abused its discretion in failing to sustain his motions in arrest of judgment. Phams claims he was pressured, influenced and coerced into pleading guilty due to the cumulative affect of the following: (1) he was denied a change of the court-appointed counsel, Mason, during trial; (2) Mason's counsel rendered ineffective assistance in failing to cross-examine the State's first witness concerning the witness's previous criminal history and a another deposed witness's description of Phams' clothing; (3) the plea proceeding judge did not recuse himself; (4) the judge's potential bias; (5) the striking of two African-Americans from the jury; (6) the State threatened to file an habitual offender charge; and (7) he did not clearly understand the plea.

**I. Standard of Review**

We review the district court's denial of a motion in arrest of judgment for correction of errors at law. Iowa R. App. P. 4. A motion in arrest of judgment is an application by the defendant that no judgment may be rendered on a finding, plea, or verdict of guilty. Iowa R. Crim. P. 23(3)(a); *State v. Oldfather*, 306 N.W.2d 760, 762

(Iowa 1981). A motion in arrest of judgment can only be granted when, upon the whole record, no legal judgment can be pronounced. *Id.*

**II. Change in Court Appointed Counsel**

Phams claims the trial court's denial of his request for a new court appointed attorney pressured him into accepting the guilty plea. No evidence exists to indicate the trial court abused its discretion in denying Phams' request for new counsel. The request was made on the date the trial was to commence, and the trial court waited to impanel the jury until the following day to allow Phams more time to discuss the case with his counsel. Moreover, Phams has failed to show specifically how the trial court's denial of his request for a court appointed counsel coerced or pressured him into accepting the guilty plea.

**III. Ineffectiveness of Counsel**

Phams contends his trial counsel's ineffective cross-examination of the State's first witness influenced his decision to accept the guilty plea. His claims his counsel failed to cross-examine the State's witness about his past criminal history and another eye-witness' description of clothing.

The credibility of a witness may be impeached if the witness has been convicted of a crime involving dishonesty or false statement only of the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year. Iowa R. Evid. 609. The State's witness admitted in a deposition he had been incarcerated in Florida for a parole violation dealing with

a previous possession of a controlled substance conviction. No evidence in the record indicated the potential length of incarceration for this parole violation. Moreover, neither the parole violation, nor the underlying offense, involved dishonesty or false statement. Phams' counsel did not breach any duty in failing to cross-examine the State's witness about his previous criminal history. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987) (for ineffective assistance of counsel claims 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).

More importantly, Phams does not show how the failure of his trial counsel to cross-examined the State's witness about his previous criminal history, as well as about other descriptions from potential witnesses about the clothing Phams was wearing and whether it really could conceal a weapon, coerced him into accepting a guilty plea. Phams did not assert in his motions in arrest of judgment the ineffectiveness of his trial counsel to cross-examine the State's witness concerning these issues, and generally asserted the representation was directed solely for the purpose of coercing a plea agreement. At the hearing for the motion in arrest of judgment, Phams focused on the lack of preparation done by Mason, Phams' trial attorney, and did not mention the testimony of the State's witness and its coercive effect on his decision to enter into a guilty plea. Mason's testimony at the hearing also indicated Phams was fully aware of the plea agreement and the nature of his

case, appeared normal in thinking and rationalization, and was not under any undue pressure from him.

**IV. Change of Judge and Judicial Bias**

Phams argues the trial court judge's failure to recuse himself influenced his decision to plead guilty. Phams moved to have the judge who presided over his trial and plea proceedings recused after one month had passed since he entered his guilty plea. He claimed the judge had prosecuted his brother fourteen or fifteen years ago for first-degree murder, and should have been aware his impartiality might be called into question.

The Canons of Judicial Conduct provide "a judge should disqualify himself in proceedings in which his impartiality might reasonably be questioned." *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976); Iowa Code of Judicial Conduct Canon 3(D)(1)(a). These circumstances include when a judge has served as a lawyer in the matter, in controversy, a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge becomes a material witness to the case. Iowa Code of Judicial Conduct Canon 3(D)(1)(b).

Here, the record is unclear as to whether the trial court judge actually did prosecute Phams' brother. Nevertheless, there is no indication the judge's participation in the previous prosecution had any effect on his decision making or attitude toward Phams during the trial, or the plea proceedings. The judge's prosecution of Pham's brother over a decade prior to the trial, is not a basis for which

a judge's impartiality could reasonably be questioned. Moreover, Phams again has failed to show specifically how the presence of the trial court judge unduly forced him to enter into the guilty plea.

**V. Striking of Two African-American Jurors**

Phams contends the challenge and removal of two potential jurors of his own racial background added to his perceived hopelessness of the trial.

We can find no evidence, and Phams has failed to show any evidence, in the record mentioning the striking of two African-American jurors. *See State v. Ruiz*, 496 N.W.2d 789, 791 (Iowa App. 1991) (defendant's burden to provide record on alleged errors); Iowa R. App. P. 14(g) (appellate briefs must contain appropriate references to the pages of the record and appendix). Moreover, no evidence shows how the alleged striking of the jurors affected Phams' decision to plead guilty.

**VI. Habitual Offender Charge**

Phams contends the threat of the filing of a habitual offender's charge pressured him into accepting the plea agreement.

The possibility that a habitual offender's charge will be filed against a defendant if he insists "in pleading not guilty does not constitute coercion." *State v. Lampson*, 260 Iowa 806, 816-17, 149 N.W.2d 116, 122 (Iowa 1967). Accordingly, we conclude the threat of an additional criminal charge is insufficient to find Phams' guilty plea was the product of coercion.

**VII. Phams' understanding of the Plea Agreement**

Phams contends the few conferences he had with his trial counsel, the trial court's description of the plea as "truncated," his motion for arrest of judgment, and his appeal reveal his lack of understanding of the ramifications of his plea agreement.

Iowa Rule of Criminal Procedure 8(2)(b) requires a trial court to determine whether a guilty plea is voluntarily and intelligently made prior to accepting it. *See State v. Everett*, 372 N.W.2d 235, 236 (Iowa 1985). The court must examine all of the circumstances surrounding the case in making this determination. *Brainard v. State*, 222 N.W.2d 711, 714 (Iowa 1974).

Here, the trial court initiated an inquiry as to the terms of the plea agreement. In response to the court's questioning, Phams informed the court he understood the plea agreement and its ramifications, understood the English language, was not under the influence of any drugs or alcohol, and was aware of his rights to a trial which would be waived with a guilty plea. He also acknowledged his plea was voluntarily made and he was not threatened or coerced into pleading guilty. The trial court fully explained the charges and the plea agreement, the mandatory minimum sentence and fines, and the potential incarceration terms. Moreover, at the hearing for the motion in arrest of judgment, Phams' trial counsel indicated Phams was not forced into the guilty plea and was aware of the nature of the plea agreement.

**VIII. Cumulative Effect**

Phams also contends, while each of these factors taken by themselves may not prove coercion, taken together they show the guilty plea was not entered into

voluntarily. We disagree, and can find no evidence of undue coercion forcing Phams to accept his guilty plea. At trial Phams did not contest he committed the robbery, but argued he did not possess a firearm during the felony. In exchange for a guilty plea, the State agreed to dismiss the firearms charge, not to file an additional habitual offender's charge, along with other favorable sentencing concessions. He also testified he was not threatened or forced into accepting the plea agreement. We find the advantageous plea agreement Phams entered into was entered into voluntarily and intelligently. As such, we affirm the denial of the motion for arrest of judgment.

**AFFIRMED.**