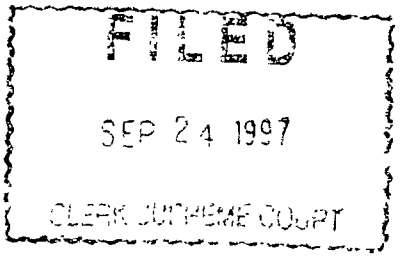
IN THE COURT OF APPEALS OF IOWA 000525

No. 7-416 / 96-1500
Filed September 24, 1997



STATE OF IOWA,
Appellee,

vs.

THOMAS H. WINSLOW,
Appellant.

Appeal from the Iowa District Court for Scott County, Gary McKenrick, Judge.

Thomas Winslow appeals his sentence following his guilty plea to fourth-degree criminal mischief in violation of Iowa Code sections 716.6 and 716.1. **AFFIRMED.**

Donna M. Humpal of M.W. Liebbe Law Office, Davenport, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, William E. Davis, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Winslow contends he is entitled to challenge his guilty plea on appeal despite the fact he did not file a motion in arrest of judgment. He contends his plea challenge is not barred because he was not adequately informed of the motion requirement. Winslow's written plea stated the requirement, but the court did not engage him in a personal colloquy. He also contends the court abused its discretion in imposing his sentence and that his counsel was ineffective. We affirm. Winslow may not challenge his guilty plea on appeal. His ineffective counsel claim is preserved for later proceedings.

I. Background Facts & Proceedings.

Defendant Thomas Winslow rammed his ex-girlfriend's car twice when she was stopped at an intersection. Winslow was charged with criminal mischief in the third degree and domestic assault. The county attorney moved for dismissal and the court dismissed the charge of domestic assault.

Winslow plead guilty to fourth-degree criminal mischief by a written guilty plea filed with the court. The court sentenced Winslow to 180 days in jail, with all but ninety days suspended, ordered a fine of $350, and placed him on a one-year probation term. Winslow appeals.

II. Written Guilty Plea.

This court reviews plea proceedings for correction of errors at law. Iowa R. App. P. 4. In considering a challenge to a guilty plea proceeding involving

constitutional safeguards, we make an independent evaluation of the circumstances as shown by the entire record which we review de novo. *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

The adequacy of the plea proceeding is determined under Iowa Rule of Criminal Procedure 8(2)(b). Winslow contends his plea was not made voluntarily and intelligently because the district court did not engage in colloquy with him before sentencing to ensure his plea was made voluntarily and intelligently.

Iowa Rule of Criminal Procedure 23(3)(a) requires a defendant challenge alleged defects in a guilty plea proceeding by a motion in arrest of judgment. If the motion is not filed, the defendant is barred from challenging the plea on appeal. Winslow did not file a motion in arrest of judgment, yet he seeks on appeal to challenge his guilty plea.

Winslow signed a written guilty plea which explained the motion requirement.[1] He contends the court should have orally advised him of the motion requirement and because it did not, his challenge is not barred on appeal. The adequacy of informing a defendant of the procedures in rule 8(2)(b) by written guilty plea was ruled on by the supreme court in *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). In

[1] The guilty plea reads: "10. If I claim there are any irregularities or errors in this guilty plea, I must file a motion of judgment not later than 45 days after this plea of guilty or in any case, not later than five days before the day of sentencing. Failure to do so will preclude my right to assert any defects in this plea in any appeal to the Iowa Supreme Court."

Kirchoff, the defendant was not allowed to plead anew because he was informed of the matters listed in rule 8(2)(b) in writing instead of orally. *Id.* at 805.[2]

The court can consider a written plea explaining the matters in rule 8(2)(b) as adequate when: (1) the court is satisfied the plea is entered voluntarily and has a factual basis; (2) the court is satisfied the defendant understood the matters listed in rule 8(2)(b); and (3) the defendant is represented by an attorney throughout the proceedings. *See Kirchoff*, 452 N.W.2d at 805. After the court's holding in *Kirchoff,* rule 8(2)(b) was amended to allow the court, in its discretion, and with the approval of the defendant, to waive the procedures in rule 8(2(b)(1)-(4) if the guilty plea is to a serious or aggravated misdemeanor. Iowa R. Crim. P. 8(2)(b) (West 1997).

A plea of guilty, waiving the rights under rule 8(2)(b), was signed by Winslow and his attorney. His attorney stated he advised Winslow of his legal rights and obligations; that Winslow's plea was knowingly, voluntarily and intelligently made; and there was a factual basis for the charge. Under such circumstances, there is no reason to believe Winslow's understanding of his plea was undermined by the written rather than oral explanation. *See Kirchoff*, 452 N.W.2d at 805. Because Winslow did not file a motion in arrest of judgment after being advised he must do so to challenge his plea, his challenge on appeal is barred.

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[2] This holding overruled the court's decision in *State v. Fluhr,* 287 N.W.2d 857 (Iowa 1980). In a 5-3 decision the Iowa supreme court held that informing a defendant of Rule 8(2)(b) procedures in writing under no circumstances satisfied the rule and was grounds for reversal.

III. Sentencing.

Winslow was sentenced to 180 days in the Scott County Jail, with ninety of the days suspended, and a fine of $350. Winslow alleges the court's sentence should be reversed for three reasons.

Our standard of review on this issue is for abuse of discretion. "To show an abuse of discretion, the defendant must demonstrate the court's sentencing decision was based on clearly untenable grounds or reasons, or the court exercised its discretion to an extent clearly unreasonable." *State v. Adams*, 554 N.W.2d 686, 693 (Iowa 1996).

First, Winslow claims the sentencing court considered the more serious, original charge when sentencing him. This is unsupported by any evidence. The court gave no indication its sentence was influenced by the higher, original charge of third-degree criminal mischief.

Next, as Winslow complains, the court did not state the code section under which the sentence was imposed, pursuant to Iowa Rule of Criminal Procedure 22(3)(d). The supreme court has held that this portion of rule 22(3)(d) is only directory and noncompliance by the court is not reversible error. *State v. Victor*, 310 N.W.2d 201, 205 (Iowa 1981). In accordance with *Victor*, we will not reverse on this ground.

Last, Winslow claims the court abused its discretion. Winslow does not point to sufficient evidence to prove an abuse. Winslow's guilty plea informed him that for

commission of a serious misdemeanor the court could sentence him to jail for up to one year and a fine between $250 and $1500. His ultimate sentence was well within these guidelines. A trial court must state on the record its reasons for selecting the particular sentence. Iowa R. Crim. P. 23(3)(d); *State v. Johnson*, 445 N.W.2d 337, 342-43 (Iowa 1989). The trial court stated on the record it was imposing the sentence after observation of and testimony from the victim and the defendant. After reviewing the nature and circumstances of the offense, the court believed the defendant posed a significant threat to the victim and other members of society. Because of this threat, the court believed a "minimum fine"[3] and "suspended jail sentence" were inappropriate. The court's statements on the record are enough to determine it acted within its discretion. *See State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App. 1994). We affirm defendant's sentence.

IV. Ineffective Assistance of Counsel.

Winslow claims his counsel was ineffective for failing to adequately advise him of his right to file a motion in arrest of judgment and for failing to investigate his mental status at the time of the incident.

In order to prevail on such a claim, appellant bears the burden of proving by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *See Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In proving the first prong of this test, appellant must overcome the strong

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[3] We interpet this to mean "small."

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, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to decide whether counsel was ineffective for not inquiring into Winslow's mental status at the time of the incident. This issue is preserved for a postconviction proceeding.

AFFIRMED.