IN THE COURT OF APPEALS OF IOWA

No. 0-145 / 98-2183
Filed April 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY SYKES,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Margaret L. Lingreen, Judge.

Defendant appeals following resentencing on his guilty plea to numerous offenses contending the court erred in the sentencing. **AFFIRMED.**

Harold K. Widdison of Richard Rhinehart & Associates, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Between March 5, 1993 and February 25, 1994, the State filed seven trial informations charging Bobby Sykes with five counts of possession of a controlled substance (marijuana) with intent to deliver, five counts of failure to affix a drug tax stamp, two counts of delivery of a controlled substance, and one count each of manufacturing a controlled substance, fraudulent practices, and tampering with a witness. The State sought enhanced sentences for eleven of the counts based on habitual offender status. Sykes pled guilty to thirteen counts. He received a combination of concurrent and consecutive sentences totaling sixty years.

Sykes did not file a direct appeal. In 1995 he filed an application for postconviction relief seeking to have his sentence vacated. The district court dismissed the application and Sykes appealed. In an unpublished opinion filed on March 27, 1998, our court concluded Sykes's trial counsel was ineffective in failing to object to the district court's decision to enhance punishment under the habitual offender statute. We reversed and remanded for resentencing on the eleven counts for which Sykes received enhanced sentences.

On remand, the district court again sentenced Sykes to a total of sixty years in prison. In this second appeal, Sykes contends (1) the district court erred in overruling his motion in arrest of judgment and (2) the court's resentence was illegal or characterized by an abuse of discretion. We affirm.

I. Motion in Arrest of Judgment

After a procedendo issued in his first appeal, Sykes filed a motion in arrest of judgment challenging his guilty plea. The district court overruled the motion on

the ground it was untimely. Sykes renewed the motion, maintaining his trial counsel was ineffective in failing to file his motion sooner. The court rejected his assertion and concluded Sykes was really seeking postconviction relief in the guise of a motion in arrest of judgment. Sykes again renewed his motion at the sentencing proceeding and the court again denied the motion as untimely.

On appeal, Sykes contends the ineffectiveness of his trial attorney tolled the period for filing his motion until after procedendo issued in his first appeal. Essentially, this argument boils down to a request to bypass accepted avenues of error preservation. Sykes further maintains Iowa Rule of Criminal Procedure 23(3)(b) authorizes a defendant to file a motion in arrest of judgment up to five days prior to sentencing or resentencing.

A. Waiver of Error. We are faced with two error preservation concepts. First, a defendant wishing to raise defects in a guilty plea must do so by filing a motion in arrest of judgment. Iowa R. Crim. P. 8(2)(d). Failure to file a motion will generally preclude a defendant from raising the asserted defects on appeal, unless the omission was due to ineffective assistance of counsel. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999); *see also State v. Carter*, 582 N.W.2d 164, 165 (Iowa 1998). Second, Iowa Code section 822.8 (1993) requires a postconviction relief applicant to raise all grounds for relief available to the applicant in the original, supplemental or amended application "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." Ineffective assistance of original trial or appellate counsel, or postconviction trial or appellate counsel may constitute sufficient reason for failing to raise an issue

in the original proceeding. *Berryhill v. State*, 603 N.W.2d 243, 246 (Iowa 1999); *Collins v. State*, 588 N.W.2d 399, 402-03 (Iowa 1998); *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

As noted, Sykes did not file a motion in arrest of judgment following his plea and did not file a direct appeal. Instead, he waited to challenge the plea until nearly four years after the plea proceeding, and did so by filing a motion in arrest of judgment on May 28, 1998. The motion raises challenges to the plea proceedings not previously raised in his original, supplemental, or amended application for post-conviction relief or on appeal of the district court order dismissing the application. Neither Sykes's May 28 motion in arrest of judgment nor his renewed motions assert his postconviction trial or appellate attorneys were ineffective in failing to earlier raise the issues contained in his motions. Additionally, our court's prior opinion only found original trial counsel ineffective in failing to challenge Sykes's habitual offender sentences. Sykes did not raise, and, therefore, we did not address the issue of whether original trial counsel was ineffective in the plea proceedings.

Whether construed as a motion in arrest of judgment or as a post-conviction relief application in the guise of a motion in arrest of judgment, we find no basis for circumventing the error preservation rules.[1] Sykes had four opportunities to raise the issues he raised for the first time in his belated motion in arrest of judgment. He could have: (1) filed a timely motion in arrest of judgment; (2) filed a direct appeal asserting trial counsel was ineffective in failing

[1] The State also correctly points out that, if viewed as a postconviction relief application, the application would be subject to dismissal on statute of limitations grounds. Iowa Code § 822.3.

to file a motion in arrest of judgment; (3) raised the issues in his postconviction relief application; or (4) raised the issues on appeal of the order dismissing his postconviction relief action, by asserting postconviction trial counsel was ineffective in failing to include these issues. He pursued none of these avenues and gave no "sufficient reason" for failing to do so. Accordingly, we conclude Sykes waived error.

B. Rule 23(3)(b). Sykes next reads Iowa Rule of Criminal Procedure 23(3)(b) to authorize the filing of a motion in arrest of judgment any time up to five days prior to sentencing or resentencing. The district court categorically rejected this contention and so do we.

We review the district court's interpretation of a rule of criminal procedure for errors of law. *See State v. Schuessler*, 561 N.W.2d 40, 41 (Iowa 1997). In this case, the district court did not need to interpret the rule because it is unambiguous. *See State v. Malloy*, 453 N.W.2d 243, 245 (Iowa App. 1990). Rule 23(3)(b) provides:

> [a motion in arrest of judgment] . . . must be made not later than forty-five days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case not later than five days before the day set for sentencing.

The rule plainly requires a motion to be filed no later than forty-five days after the plea. As the district court correctly noted, "the only exception is that it may have to be filed in less than 45 days after a plea of guilty because it must also be filed at least five days before the date set for pronouncing judgment." The five day period, therefore, is not a means of extending the time for filing a motion but a basis for shortening it. Sykes pled guilty in 1994. He filed his motion in arrest of

judgment in 1998. Accordingly, the district court did not err in overruling his motion as untimely.

II. Asserted Sentencing Errors

A. Accommodation Offenses. Sykes contends the amount of marijuana involved in his case was less than one ounce. On the basis of this assertion, he maintains the five counts of possession of marijuana with intent to deliver were "accommodation offenses" entitling him to reduced sentences. We review challenges to the district court's application of a sentencing statute for errors of law. *State v. Edgington*, 601 N.W.2d 31, 32 (Iowa 1999).

A defendant is guilty of an accommodation offense if the prosecution proves that the defendant delivered or possessed with intent to deliver one ounce or less of marijuana, in violation of Iowa Code section 124.401(1). Iowa Code § 124.410. "[A]n accommodation offense occurs if the State fails to prove that the defendant intended to or did make a profit from the illegal drug transaction." *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990). The penalty for an accommodation offense is less severe than it is for the crime of possession with intent to deliver. *Id.*

During the plea proceeding, Sykes admitted he possessed at least one and one-half ounces of marijuana on each occasion giving rise to the drug tax stamp charge. We agree with the State that he therefore must be deemed to have admitted he possessed the same amount for purposes of the paired possession with intent to deliver charges. Accordingly, his offenses are not accommodation offenses and the district court did not err in declining to order reduced sentences.

B. Second Offender Status. Iowa Code section 124.411 authorizes enhanced sentences for persons convicted of second drug offenses. The provision does not apply to persons sentenced under Iowa Code section 124.401(3). Sykes contends the district court erred in sentencing him as a second offender because he committed accommodation offenses, subject to sentencing under Iowa Code section 124.401(3). Our conclusion that Sykes did not commit accommodation offenses disposes of this issue. The district court did not err in sentencing Sykes as a second offender.

C. Reasons for Sentencing. Sykes next contends the district court did not adequately explain how his sentencing investigation report influenced the court to select the sentence it did. We review this type of challenge to a sentencing decision for abuse of discretion. *State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998).

Iowa Rule of Criminal Procedure 22(3)(d) requires a district court to state on the record its reasons for selecting a particular sentence. The explanation need not be detailed, but must be sufficient to permit appellate review. *Id.* A district court should weigh all pertinent matters, including "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances [for] reform." *State v. Cooley*, 587 N.W.2d 752, 754-55 (Iowa 1998) (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)).

In support of its sixty year resentence, the district court stated,

> [t]he Court continues to consider the nature of the crimes that have been committed. I also consider defendant's past record as reflected within the presentence investigation, the recommendations contained within the presentence investigation, and I continue to consider the repetitive nature of these crimes as defendant was awaiting trial on the earlier crimes.

Although this statement is brief, we deem the reasons sufficient to comply with the mandate of rule 22(3)(d). We also note the judge who presided over the original sentencing proceeding also presided over the resentencing proceeding. On resentencing, the court essentially reiterated its stated reasons in support of the original sentence, albeit in more abbreviated form. As our original opinion did not express any reservations about the court's reasons for imposing the original sentence, and the court on remand imposed a virtually identical sentence, we conclude under the particular circumstances of this case, we may also examine the district court's stated reasons for the original sentence.

The court there summarized Sykes's extensive criminal history and his almost immediate resumption of criminal behavior after being released from the criminal justice system. The court stated Sykes chose to engage in criminal conduct at the expense of potential "emotional and financial havoc in the lives of individuals and in the lives of families." The court concluded, "[y]ou have made choices in your life, and now you must live with the consequences of those choices; and that consequence is going to be imprisonment in a state penitentiary for a significant period of time." We conclude the district court's sentencing reasons did not amount to an abuse of discretion.

D. Measure of Punishment. Sykes next maintains the jail time, fines, and surcharges are "clearly excessive" and contrary to "cited statutory and case law." We disagree. The measure of punishment selected by the district court rests within the court's sentencing discretion. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997). The fines and sentences imposed by the district court do not exceed the statutory maximum. *See State v. Turk*, 595 N.W.2d 819, 822 (Iowa

App. 1999). Indeed, the fines are less than authorized. *See* Iowa Code §§ 124.401(1)(d); 124.411(1). The district court cited as grounds for imposing the sentences Sykes's extensive criminal history and his tendency to repeat crimes. We conclude neither the length of the sentences nor the amounts of the fines and surcharges reflect an abuse of discretion.

We need not consider Sykes's remaining contentions because they were not preserved or were waived, unsupported by the record, or unnecessary to resolve.

We affirm Sykes's resentencing.

AFFIRMED.