IN THE COURT OF APPEALS OF IOWA

No. 0-113 / 99-0979
Filed April 28, 2000

FILED
APR 2 8 2000
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

NICOLAS ADAM LESSNER,

Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, William L. Dowell, Judge.

Defendant appeals from the district court judgment and sentence imposed following his guilty plea to assault with intent to commit sexual abuse. **AFFIRMED.**

Steven E. Ort of Bell, Ort & Cornell, P.C., New London, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Michael A. Riepe, County Attorney, for appellee.

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

HUITINK, J.

I. Background Facts and Proceedings.

Lessner was charged with third-degree sexual abuse and assault with intent to commit sexual abuse causing bodily injury based on allegations he forced a fifteen-year-old female to engage in a sex act with him. On March 29, 1999, Lessner entered an *Alford* plea[1] to the lesser offense of assault with intent to commit sexual abuse without resulting injury. The district court sentenced Lessner to a two-year term of incarceration and imposed a fine plus other statutorily mandated penalties on April 26, 1999.

In a May 24, 1999, motion in arrest of judgment, Lessner sought to have his *Alford* plea and resulting judgment of conviction set aside. Lessner alleged plea counsel was ineffective in a number of particulars, including allowing him to plead guilty in the absence of a supporting factual basis and failing to disclose exculpatory evidence in response to the court's specific inquiry during the plea proceedings. In addition, Lessner directly challenged the validity of his plea, citing the lack of a factual basis for his plea and prosecutorial misconduct inducing his guilty plea. Lessner's motion also alleged that he was denied due process of law "as a result of actions by the State of Iowa and others to interfere with and prevent Defendant [Lessner] from conducting any investigation or discovering facts that would tend to exonerate Defendant." The district court

---

[1] An *Alford* plea allows a defendant to plead guilty without admitting the elements of the offense. In such a plea the defendant acknowledges the evidence strongly negates the defendant's claim of innocence and enters the plea to avoid a harsher sentence. *Committee on Professional Ethics and Conduct v. Sturgeon*, 487 N.W.2d 338, 340 (Iowa 1992).

declined to hear evidence supporting Lessner's allegations and denied his motion in arrest of judgment after determining it was not timely filed.

On appeal Lessner contends the district court erroneously denied his motion in arrest of judgment. He directly challenges the validity of his guilty plea, citing the absence of a supporting factual basis and prosecutorial misconduct inducing his plea. Lessner also contends he was denied due process of law based on prosecutorial misconduct. Additionally, Lessner argues plea counsel was ineffective for allowing him to plead guilty in the absence of a factual basis for his plea and failing to disclose exculpatory evidence to the court during the plea proceedings.

II. Motion in Arrest of Judgment.

We review a trial court's decision to grant or deny a request to withdraw a guilty plea for abuse of discretion. *State v. Hightower*, 587 N.W.2d 611, 612 (Iowa App. 1998). We do not find an abuse of discretion unless the defendant shows it was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

A motion in arrest of judgment must be filed within forty-five days after a guilty plea, but in any event no less than five days before the date set for sentencing. Iowa R. Crim. P. 23(3)(b). Failure to file a motion in arrest of judgment precludes a challenge to the validity of a guilty plea on appeal. Iowa R. Crim. P. 23(3)(a). However, failure to timely file a motion in arrest does not preclude a challenge to a guilty plea if failure to file such a motion resulted from

ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996) (citing *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982)).

As noted earlier, Lessner's motion in arrest of judgment was not filed until May 26, 1999, *after* sentencing and judgment of conviction were entered on April 26, 1999. The district court did not abuse its discretion by denying the relief sought after concluding Lessner's motion was not timely filed.

We also agree with the district court's conclusion that Lessner's claims concerning the validity of his *Alford* plea and ineffective assistance of counsel are appropriately the subject of appellate review and postconviction relief rather than an untimely motion in arrest of judgment filed after judgment and sentence are entered.

III. Prosecutorial Misconduct.

Lessner's prosecutorial misconduct theory is stated in the following terms:

> The state in this case made it a condition of its plea proposal that no discovery be undertaken. It persisted in this position even after questions of police integrity and witness tampering had been raised by Nicolas Lessner. The state's proposal in effect assured that Nicolas Lessner could not get effective assistance of counsel. The public defender was placed in a "box." If he took the depositions necessary to properly advise his client, the state would add still more charges. The prosecutor forced defense counsel into a position where he could not "counsel" his client without exposing his client to still more accusations by the state. This was pure, unadulterated abuse of power. The county attorney's conduct displays a complete, total and wanton disregard for truth or justice. The consummation of this ill-gotten conviction required a direct misstatement to the Court about whether there were additional matters which would make the record "more accurate or more complete." The prejudice from the county attorney's misstatement of Nicolas are apparent: He was convicted on an inadequate and misleading record.

To the extent Lessner's allegations of prosecutorial misconduct implicate something more than ineffectiveness of plea counsel, any resulting due process claims have been waived by Lessner's failure to timely raise this issue below. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) (issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal). As hereinafter noted, Lessner's claims of ineffective assistance of counsel premised on plea counsel's failure to raise this issue, are preserved for postconviction relief.

IV. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test, he must show that, but for counsel's error, the result of the proceedings would

have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Lessner's convictions on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

As noted earlier, Lessner's failure to timely file a motion in arrest of judgment precludes a challenge to the validity of his plea unless failure to file such a motion resulted from ineffective assistance of counsel. *Brooks*, 555 N.W.2d at 448. If Lessner carries his burden to show plea counsel was ineffective in any particular claim, the plea and resulting judgment entered below must be set aside even in the absence of a timely motion in arrest of judgment asserting these claims. *Id.*

We initially note that the record is inadequate to address all but Lessner's claim that the record fails to show a sufficient factual basis for his plea. We accordingly limit our consideration to this issue.

In *State v. Brooks*, the court said:

> We will find counsel failed to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea.

Id. (citations omitted). If there is no factual basis for the relevant charge, the prejudice prong of an ineffective assistance of counsel claim is presumptively established. *State v. Shminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

The elements of the assault with intent to commit sexual abuse are (1) an assault, (2) with the intent to commit a sex act, and (3) by force or against the will of the victim. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). In determining whether there is a factual basis for Lessner's plea, we consider the entire record before the district court, including the trial information and minutes of testimony. *Brooks*, 555 N.W.2d at 448-49. Our review of the minutes of testimony indicates the complaining witness would have testified that Lessner asked her to perform oral sex and she refused. These minutes also indicate that Lessner then forced her to the ground and tried to place his penis in her mouth. The complaining witness, according to these minutes, would have also testified that Lessner bit her and continued to otherwise assault her until she performed a sex act on him.

Contrary to Lessner's claim, we find within the confines of the minutes of testimony sufficient facts supporting his plea. We accordingly determine counsel was not ineffective for allowing Lessner to plead based on these facts. Because the record is insufficient to address the remainder of Lessner's ineffective assistance of counsel claims, they are preserved for postconviction relief.

AFFIRMED.

000285