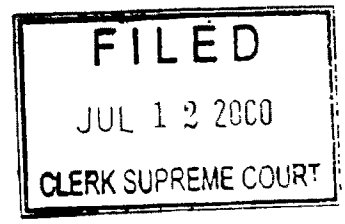
IN THE COURT OF APPEALS OF IOWA

No. 0-334 / 99-1226
Filed July 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

AARON DUDLEY FREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Madison County, Joel Novak, Judge.

Defendant appeals following his conviction for lascivious conduct with a minor in violation of Iowa Code section 709.14 (1999). **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Martin S. Ramsey, County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

Aaron Frey appeals following his conviction for lascivious conduct with a minor in violation of Iowa Code section 709.14 (1999). We affirm.

I. Factual Background and Proceedings. The State charged Frey with two counts of sexual abuse in the third degree in violation of section 709.4(2)(c)(3-4) on March 22, 1999. On July 19, 1999, the State filed an amended trial information lowering the first count of sexual abuse to lascivious conduct with a minor. The State also filed a motion to dismiss the second count of sexual abuse. On the same day, Frey signed a "Stipulation and Waiver of Rights." The stipulation contained a waiver of the right to a jury trial, a stipulation to the admission of the victim's testimony, an acknowledgement of the right to file a motion in arrest of judgment, and a statement of the minimum and maximum penalties. Frey also waived "court reporting or making a record" of the proceeding in the stipulation. On the same date, the district court found Frey guilty of lascivious conduct with a minor in violation of Iowa Code section 709.14 and sentenced him to 364 days in prison, all suspended. The district court also dismissed the second count of sexual abuse.

II. Contentions of the Parties. Frey now characterizes the proceeding before the district court as a guilty plea. He makes three contentions on appeal: (1) the district court failed to comply with the requirements of rule 8(2)(b) or rule 16(2) and therefore, the case should be reversed and remanded; (2) he did not voluntarily and intelligently enter into a guilty plea because the district court failed to inquire into his understanding of the charge, failed to inform him of the penal

consequences of his plea, and failed to inform him of the consequences of failing to file a motion in arrest of judgment; and (3) his trial counsel was ineffective in various respects.

The State contends: (1) Frey stipulated to a bench trial on the minutes of testimony; and (2) Frey has waived any error by failing to file a motion in arrest of judgment and by failing to provide the court a statement of the proceedings in accordance with Iowa Rule of Appellate Procedure 10(c).

III. Standard of Review. A defendant's contention the district court failed to make the necessary inquiry to ensure a guilty plea was voluntary and intelligent is a constitutional claim. *State v. Everett*, 372 N.W.2d 235, 236 (Iowa 1985). "When we consider 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. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997) (quoting *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994)).

IV. Nature of the Proceeding. We must first determine whether the proceeding before the district court was a guilty plea or a bench trial on a stipulation of the minutes of testimony. A bench trial on stipulated evidence is not the same as a guilty plea proceeding, principally because no matter how overwhelming the evidence of guilt, the question of whether to convict or acquit remains with the trier of fact during a bench trial. *State v. Huss*, 430 N.W.2d 621, 624 (Iowa 1988); *Everett*, 372 N.W.2d at 236-37. Frey signed the "Stipulation and Waiver of Rights" which clearly manifests the intent to be tried by the court in

a bench trial on the stipulated minutes of testimony. The stipulation contains the following language: "I understand that if I am tried before the Court, upon only the submission of stipulated evidence. . .;" "if I am found guilty. . .;" and "in the event the Court finds me guilty. . . ." The document also contains Frey's stipulation to testimony of the victim and his waiver of a jury trial.

We also look to the district court's "Judgment and Sentence" order. While the district court clearly used a general judgment entry form containing the statement, "The Defendant having pled guilty. . .," the word "pled" was crossed out and the words "been found" were substituted and initialed by the judge. From the record provided to us on appeal, it is clear that during the proceeding, Frey's guilt was still an issue for the district court to determine. We therefore conclude the proceeding was a bench trial by stipulation rather than a guilty plea.

Frey argues his case is similar to *State v. Sayre*, 566 N.W.2d 193 (Iowa 1997) and *State v. Nikkel*, 597 N.W.2d 486 (Iowa 1999) and pursuant to that line of cases, we should reverse his case for further proceedings. The *Sayre* case involved a defendant who entered into a plea agreement for several charges but did not enter into a plea regarding an additional charge of eluding a law enforcement vehicle. *Sayre*, 566 N.W.2d at 194. However, Sayre agreed to a finding of guilt on the eluding charge. The judgment and sentence order in *Sayre* partially characterized the proceeding as a guilty plea and partially as an adjudication of guilt. On appeal, the Iowa Supreme Court was not able to "clearly ascertain" from the record whether Sayre pled guilty or stipulated to a bench trial on the minutes, and reversed and remanded the case. *Id.* at 196. By contrast, in

the present case the proceeding involved one charge on limited stipulated facts. There is no evidence of confusion of the characterization of the one charge at the proceeding; it is clear Frey was stipulating to a bench trial on the minutes of testimony. In addition, unlike Sayre, Frey never admitted his guilt and the question of whether he was guilty of the charge always remained with the court. While in *Sayre*, the judgment order was unclear whether Sayre had pled guilty or been adjudicated guilty, the judgment order in Frey's case clearly indicates the court found him guilty. We cannot say, pursuant to the record provided to us on appeal, Frey's case contains the same level of confusion found in *Sayre*.

Frey also relies on *State v. Nikkel*. The *Nikkel* case concerned a defendant who signed a "Petition to Stipulate to a Finding of Guilt." *Nikkel,* 597 N.W.2d at 486. The proceeding in the *Nikkel* case involved several defendants in court at the same time entering guilty pleas on unrelated charges. The district court found Nikkel guilty at the proceeding but at his sentencing, stated he had pled guilty. In Frey's case, he was the only defendant at the proceeding and the district court specifically found him guilty on the judgment and sentence order. The district court in the present case never suffered from the same misunderstanding of the nature of the proceedings as the district court did in *Nikkel*. In addition, Nikkel admitted his guilt in his "petition" and at the proceeding. Frey never admitted he was guilty of either sexual abuse or lascivious conduct. *Nikkel* contains a level of confusion that does not exist in the present case. We cannot determine Frey's case is so similar to *Sayre* and *Nikkel* it mandates reversal for further proceedings.

Frey points to two documents to support his claim of confusion. The first document, a "Motion to Dismiss and Order of Dismissal (Count II)" was filed on the same day as the proceeding. On this form, the prosecutor placed an "X" next to the statement, "The Defendant has pled guilty in a related criminal action involving acts committed by the Defendant," and requested the second count of sexual abuse be dismissed. On the same document, the district court signed the order dismissing the second count. Although the motion to dismiss does refer to a guilty plea, this fact is only indicative of careless form practice and does not indicate confusion on the part of the district court as to the nature of the proceeding because the judge merely signed the order dismissing the count.

The second document Frey uses to support his contention is a "Final Disposition Report" sent to the Iowa Division of Criminal Investigation which also indicates Frey plead guilty. This document is dated July 23, 1999, four days after the proceeding took place. The county clerk of court's office generates this report, not the district court judge, the prosecutor, or the defense attorney. Frey's reliance on this document is misplaced because it merely indicates the member of the county clerk of court's office who prepared the document was confused as to the disposition of Frey's case. Following the standard set out in *Sayre*, we are able to "conclusively determine" Frey's conviction resulted from a stipulated bench trial on the minutes of testimony. *See Sayre*, 566 N.W.2d at 196.

V. Compliance With Rule 16(2).[1] Because we have determined Frey stipulated to a bench trial on the minutes, we must address his claim the district court failed to comply with the provisions of rule 16(2). If a defendant stipulates to a bench trial on the minutes, the district court must: (1) verify that the defendant has waived his right to a jury trial in accordance with Iowa Rule of Criminal Procedure 16(1); (2) confirm the extent of the factual record to which the parties are stipulating; and (3) "find the facts specially and on the record," separately state its conclusions of law, and render an appropriate verdict. *Sayre,* 566 N.W.2d at 196. We are unsure whether the district court followed the guidelines of rule 16(2) because the trial was not recorded. However, we do not address this issue because Frey has failed to provide a record on appeal and therefore has waived error on his claim. *See State v. Christianson,* 337 N.W.2d 502, 504 (Iowa 1983). A defendant claiming error has an obligation to provide the court with a record that discloses the error claimed. *State v. Ruiz,* 496 N.W.2d 789, 791 (Iowa App. 1992). Frey voluntarily waived court reporting and the making a record and, on appeal, has not attempted to make a record of the district court proceedings under Iowa Rule of Appellate Procedure 10(c) or by creating a bill of exceptions under Iowa Rule of Criminal Procedure 23. *See State v. Mudra,* 532 N.W.2d 765, 767 (Iowa 1995). Having made no record, we may accept the trial court's findings as being supported by the evidence. *Ruiz,* 496 N.W.2d at 791. We therefore affirm Frey's conviction.

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[1] Having determined Frey did not plead guilty, we need not address whether the district court complied with rule 8(2)(b) or whether his plea was knowing and voluntary.

VI. Ineffective Assistance of Counsel. Frey contends his trial counsel was ineffective in the following respects: (1) for failing to clarify the record as to whether he had entered into a guilty plea or had been found guilty pursuant to a bench trial; (2) for failing to inform Frey he would be required to register as a sex offender; (3) for failing to inform Frey of the consequences of not filing a motion in arrest of judgment; and (4) for failing to insist on the use of a court reporter at the hearing and sentencing proceedings. Ineffective assistance of counsel claims often are not resolved on direct appeal but are preserved for postconviction proceedings to allow the preparation of an adequate record and to allow the attorney charged with ineffective assistance an opportunity to respond to the claim. *State v. Kinkead,* 570 N.W.2d 97, 103 (Iowa 1997). The record in this case is insufficient to resolve Frey's claims on direct appeal. Accordingly, we preserve Frey's allegations of ineffectiveness for possible postconviction relief.

AFFIRMED.