IN THE COURT OF APPEALS OF IOWA

No. 1-150 / 10-0638
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELISA MARIE MONTGOMERY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Appeal from the denial of a motion in arrest of judgment and from sentences imposed following *Alford* pleas to eleven charges. **AFFIRMED.**

Matthew T. Early of Fitzgibbons Law Firm, Estherville, for appellant

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

Defendant-appellant, Elisa Montgomery, appeals from the denial of her motion in arrest of judgment and the sentences imposed after her *Alford*[1] pleas to eleven prescription-medication related charges. She contends the court erred in accepting her pleas and in denying her motion in arrest of judgment. She also contends counsel was ineffective in not seeking a competency determination. She further contends the court abused its discretion in sentencing. We affirm.

I. Background.

In December of 2008 Montgomery was charged by trial information with one count of ongoing criminal conduct, five counts of prohibited acts, and five counts of possession and/or conspiracy to possess Hydrocodone with intent to deliver.

Montgomery entered an *Alford* plea on July 8, 2009, before the Honorable Jon Fister. She filed a motion in arrest of judgment, contending the factual basis for the plea was legally insufficient and did not support a judgment against her and her plea should be withdrawn. The motion was amended on August 9, 2009, wherein Montgomery contended her plea was not entered knowingly because she was under the influence of prescription medication at the time and did not understand the proceedings.

The motion came before the Honorable Richard D. Stochl, who denied the motion finding:

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[1] *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970) (holding an accused may consent to the imposition of a sentence even if unwilling or unable to admit participation in the acts constituting the crime charged).

> The court has reviewed the transcript of the guilty plea taken before the Honorable Jon Fister and the colloquy that exists between the court and the defendant as to a factual basis for the underlying charges. The defendant readily admits that the court could rely upon the minutes of testimony as being true and accurate in order to form a factual basis. She further admits on the record that there is sufficient evidence in the minutes of testimony upon which a jury could find her guilty of each of the individual offenses. Based on that colloquy between the court and the defendant, her motion for arrest of judgment is DENIED.
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> Defendant further alleges that she was under the influence of prescription medications at the time of her *Alford* plea and therefore did not understand the proceedings. The Court asked her the following question during its colloquy:
>
> > And I understand that you take medication and that you have some counseling issues and so forth, *but are any of the medications you're taking or mental issues that you have got you so confused that you don't understand what we're doing here today?*
> >
> > ANSWER: *Not today, no.*
>
> This plea was entered shortly before a jury was [to be] selected for trial on the underlying counts. It was entered pursuant to a plea agreement with the County Attorney's office. It is clear from the transcript that defendant had a sufficient understanding of the proceedings to merit the court's finding that she fully understood her rights and that she was entering an *Alford* plea to the charges. Accordingly, the court finds that she was not so influenced by prescription medications that she could not understand the proceedings.

(Emphasis added.)

At the sentencing hearing, the court noted defendant had filed a motion for a new lawyer and a motion for Judge Fister's recusal earlier that day, alleging a conflict of interest. The pro se recusal motion also sought the judge's recusal "due to filing of judicial qualifications" against him. Judge Fister observed his only involvement with the case to that point was accepting defendant's plea, because Judge Stochl had ruled on the motion in arrest of judgment.

The court reviewed the presentence investigation, heard the testimony of Dr. Mohammad Afridi, a psychiatrist who had seen defendant four or five times

over an eight-month period and was managing her medication, heard defendant's statements and the statements of counsel. The State recommended sentences totaling fifty-five[2] years based on defendant's extensive record, her lengthy involvement in the crimes charged, and her involving family members in the crimes.

The court stated its reasons for the sentences:

> Based on your history, Miss Montgomery, for whatever reasons, you've determined your own fate by your own behavior. It's nothing I've done or nothing Mr. Walz has done, nothing the police have done. You're responsible for what you do and you're accountable for what you do and you've made your bed and now you're going to have to [lie] in it. You are incorrigible. It is not safe to have you out in the community because you continue to return to the same patterns of behavior in the past where you've broken the law and enlisted other people, including family members, to help you with that. Because of the circumstances of these charges, because of your prior record, for community protection and for, if at all possible, your rehabilitation in a controlled environment where you can be monitored and supervised, I am going to . . . .

At that point defendant asked permission to speak, which the court granted. She proceeded to question the judge's statements and argue with him. After several exchanges, the court finally stopped defendant:

> Well ma'am, we're done. You had a chance to talk and now you have to be quiet and I get to sentence you and we're going to do that and you're going to file an appeal and we'll see what happens. Okay? Good.

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[2] The State recommended twenty-five years for ongoing criminal conduct, ten years each on the five prohibited acts, to be concurrent with each other, but consecutive to the ongoing criminal conduct, ten years each on the five possession charges, to be concurrent with each other, but consecutive to the other sentences, and the probation revocation would require imposition of the original ten-year sentence, to be served consecutively to the other sentences.

The court misunderstood the State's recommendation concerning the interplay of consecutive and concurrent sentences on the multiple charges and began to impose consecutive sentences that would have totaled 125 years. The State noted it was asking that the ten-year sentences be concurrent with each other. The court agreed and restated the sentences to follow the State's recommendation. When the court stated it could not find any basis that defendant was not a danger to the community and thus would not be released on bond, defendant again challenged and began to argue, seeking to be released for a day to get her affairs in order. In denying her request, the following dialogue occurred:

> COURT: Well I wish you had made some arrangements for it, ma'am. I'm sorry for it. DEFENDANT: But you're not sorry for me because of me filing the motion with the . . . ethics board or whatever and I know this has a part in it.
>
> COURT: No, it doesn't. You have a perfect right to use every avenue you have to get the best result for you that you can. DEFENDANT: Right. Exactly.
>
> COURT: But I can't guarantee you will be successful. DEFENDANT: I'm not going to say that I'm going to be successful, but there will still be a conflict of interest there regardless with me doing this and you knowing now that I did this, there is a conflict of interest there.
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> COURT: In your opinion. DEFENDANT: That's—Yeah and that's true. That's what – that's what it is. Because I'm not going—My mother is sick. I'm not going to go anywhere. I'm just asking the court for one day to make sure my family is [taken] care of and turn myself in. If you want me to turn myself in at 6:00 in the morning, at least I can have some time to get my house together and make arrangements for my kids.
>
> COURT: You've had much time, ma'am. We'll close the hearing. Good luck to you.

Within two weeks of sentencing, defendant filed motions for correction of an illegal sentence, for reconsideration of sentence, and for reduction of appeal bond. In denying the motion for correction of an illegal sentence, the court noted:

> Defendant's motion for correction of an illegal sentence does not state any way in which the sentence imposed on her is not authorized by Iowa law. Her complaints of diminished capacity, poor assistance of counsel, recusal issues and bias issues, are all issues for direct appeal or postconviction relief. They do not go to the legality of her sentence.

The court denied the motion for reduction of appeal bond, finding correctional facilities had mental health programs available to defendant, so she did not need to be out of prison for out-patient treatment.

Concerning the motion for reconsideration of sentence, the court made no decision on the merits, but directed defendant's counselor to prepare a report and recommendation for the court. The subsequent report and recommendation were for defendant's continued incarceration. In denying the motion, the court summarized the counselor's recommendation:

> Defendant's counselor does not feel that defendant should be released from prison until she has completed her treatment programming because of her lengthy criminal history and because her only focus since her arrival at Mitchellville has been the appeal of her case or a reconsideration of her sentence. She is on the waiting list to begin substance abuse treatment and on the waiting list for life skills class. She has received disciplinary notices for exaggerating her medical condition and for obstructive/disruptive conduct.
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> Defendant appeals.

II. Scope of Review.

Generally our review of a challenge to the entry of a guilty plea is for correction of errors at law. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). To the extent defendant is claiming a constitutional violation because of her alleged incompetence, our review is de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601,

606 (Iowa 2001); *State v. Kempf*, 282 N.W.2d 704, 707 (Iowa 1979). Defendant's claim her plea resulted from ineffective trial counsel is a claim with constitutional dimensions; our review is de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). We review a district court's grant or denial of a motion in arrest of judgment or a motion to withdraw a plea for an abuse of discretion. *State v. Myers*, 653 N.W.2d 574, 581 (Iowa 2002) (motion in arrest of judgment); *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997) (motion to withdraw plea). An abuse of discretion will only be found where the court's discretion was exercised on clearly untenable or unreasonable grounds. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). Our review of a sentence imposed in a criminal case is for correction of errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Our analysis of a challenge to a sentence begins with the observation that the decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or consideration of inappropriate matters. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

III. Merits.

A. Plea. Although defendant raises her challenges to the plea and the motion in arrest of judgment in one claim, we separate them for purposes of analysis. Concerning her plea, she contends the court erred in accepting her guilty plea and counsel was ineffective in not securing a psychiatric evaluation for her because she was not mentally competent to make a knowing and voluntary plea. She argues both the judge and her attorney were aware of her condition,

that she was on a variety of medications, she had a note from a doctor indicating she should not participate in legal proceedings, and she complained to the court she was "just not mentally stable to go through this right now." She also complained of problems remembering.

A person who is mentally incompetent cannot enter a knowing and voluntary guilty plea. *See State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). There is a presumption of competency that a defendant bears the burden to overcome. *See State v. Pederson*, 309 N.W.2d 490, 496 (Iowa 1981). The statutory test is whether a "defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3 (2009). In determining whether due process requires an inquiry into the mental competency of a defendant, the "critical question is 'whether [the defendant] has sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [she] has a rational as well as factual understanding of the proceedings against [her].'" *Lucas*, 323 N.W.2d at 232-33 (citation omitted).

The record before us shows a defendant who was able to consult with her attorney (even though they disagreed), had an appreciation of the charges against her, had a rational and factual understanding of the proceedings, and who actively participated in her own defense. It also shows a defendant who had repeatedly delayed the proceedings, but whose co-defendant daughter had just pleaded guilty, and who faced trial that day. In the dialogue with the court,

defendant stated she understood the charges and possible penalties. She asked about the schedule for sentencing depending on whether she proceeded to trial or pleaded guilty. When told about the time period between pleading and sentencing, she asked if that would give her an opportunity to get a doctor's statement. She recognized the time period before sentencing encompassed a scheduled probation revocation hearing and asked, "I have a probation hearing on the 23rd. How does this work with all this?" She showed she understood the nature of an *Alford* plea as distinguished from a guilty plea when she agreed a jury would find her guilty, if the jury believed the State's witnesses. Her answers during the plea colloquy were clear and relevant. If the court mentioned something she did not understand, she made the court aware and asked for explanation. When the court asked if the medications she was taking or her mental health issues "have got you so confused that you don't understand what we're doing here today," she replied, "Not today, no."

We conclude the district court did not err in accepting defendant's pleas and in not ordering a competency examination sua sponte.

Concerning defense counsel's "failure" to request a competency hearing, it is "well-established that the mere presence of mental illness does not equate to incompetency." *Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991). Relevant factors in determining whether due process requires investigation of a defendant's competency include (1) defendant's irrational behavior, (2) demeanor at trial, and (3) any prior medical opinion on competence to stand trial. *Lucas*, 323 N.W.2d at 232. Here, defendant's behavior and demeanor belied her

assertions she was not able to go through proceedings. We conclude defense counsel did not render ineffective assistance in not requesting a competency examination under the circumstances of this case. We affirm on this issue.

B. Arrest of Judgment. Defendant contends the district court erred in denying her motions in arrest of judgment that claimed her pleas were not knowing and voluntary because of her mental incompetency. As quoted above, the court focused on defendant's clear response to the court's question concerning any possible effect of medications or mental health issues on defendant's ability to understand the plea proceeding—that there was no effect. The court had before it the transcript of the plea proceeding. As we have already determined the court did not err in accepting defendant's pleas and not ordering a competency examination, it follows that the court did not abuse its discretion in denying defendant's motions in arrest of judgment that raised the same issues concerning competency. We affirm on this issue.

C. Excessive Sentences. Defendant contends the court "abused its discretion in rendering the excessive sentence." Citing to *Blum v. State*, 510 N.W.2d 175, 179-80 (Iowa Ct. App. 1993), defendant argues an "abuse of discretion may be determined by statements made by the presiding judge suggesting that personal feelings created a hostile atmosphere so as to prevent a defendant from receiving a fair hearing." The situation before us is not at all like that in *Blum*. In *Blum* the defendant's motions to withdraw his guilty plea and in arrest of judgment were based on allegations of juror misconduct and judicial misconduct. *Blum*, 510 N.W.2d at 178. In particular, he complained the judge

taking the guilty plea advised him to take a plea bargain and also told Blum he would not allow Blum to enter a plea after the jury was sworn. *Id.* At the hearing on the motions, the presiding judge insisted that Blum's defense attorney make a professional statement concerning Blum's allegations. *Id.* The judge also made statements concerning his recollection of events that contradicted Blum's allegations. *Id.* At the hearing, the judge said to Blum:

> Having had a chance to observe your traits and character I feel safe in telling you that you're easily one of the most manipulative and downright deceitful people I've ever had the misfortune to encounter . . . . As far as I'm concerned you've done nothing but repeatedly lie this morning; and if this were not a forcible felony, which it most definitely is, I would not hesitate to send you to prison. My only regret is I can't give you more time than I am going to give you.

Id. at 179. We determined the judge's statements "suggest he allowed his personal feelings and interests to create a palpable atmosphere of hostility." *Id.* We held the judge should have recused himself because of the allegation of judicial intimidation and the judge's personal knowledge concerning Blum's claims of juror and judicial misconduct. *Id.* at 180.

Defendant here points to Judge Fister's remarks such as, "you have made your bed and now you are going to have to [lie] in it. You are incorrigible" as evidence the judge was biased against her. She also claims her filing of a complaint against the judge should be a basis for him to recuse himself. She points to the judge beginning to impose sentences totaling 125 years, more than twice what the State was recommending, as evidence of bias.

A judge is disqualified from acting in a proceeding if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed

evidentiary facts concerning the proceeding." Iowa Code § 602.1606(1). A judge should recuse himself if the judge's impartiality might reasonably be questioned because of such bias or extrajudicial knowledge. *State v. Rhode*, 503 N.W.2d 27, 36 (Iowa Ct. App. 1993). The test is whether a reasonable person with knowledge of the facts would question a judge's impartiality. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). A judge has an obligation not to recuse himself "when there is no occasion for him to do so." *State v. Mann*, 512 N.W .2d 528, 532 (Iowa 1994).

When defendant asked the judge to recuse himself because she had filed a complaint of a conflict of interest[3] against him, he denied the request noting , "I have no idea what the conflict of interest might be. The only involvement I know that I've had in the case is taking her guilty plea and accepting it as she offered it." The fact defendant filed a complaint against the judge does not automatically require recusal. *See State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

Concerning her allegations of partiality or bias based on the judge's comments at sentencing, it is clear the judge at times was short with defendant—generally when she continued to dispute what the judge said or to argue with him. We don't view the remarks such as "You are incorrigible" as suggesting the judge allowed personal feelings to create a palpable atmosphere of hostility during the sentencing hearing. *See Blum*, 510 N.W.2d at 179. Having reviewed defendant's prior record and lengthy history of recidivism, we see the judge's comments as an acknowledgment defendant has not demonstrated an ability to

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[3] The record does not reflect what the alleged conflict of interest was.

obey the law. An attitude of mind resulting from the facts learned by a judge from the judge's participation in the case is not a disqualifying factor. *See State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). The judge repeatedly allowed defendant to speak, but would stop her when she started becoming argumentative or wandered off topic. We don't believe a reasonable person with knowledge of the facts would question the judge's impartiality at the hearing. *See Mann*, 512 N.W.2d at 532.

Concerning defendant's complaints about the length of the sentences imposed, they are well within the statutory limits and adequately supported by defendant's history, the need to protect society from defendant, and defendant's need for rehabilitation. Defendant has not overcome the strong presumption of the validity of the sentences. *See State v. Cheatheam*, 569 N.W.2d 820, 821 (Iowa 1997).

We affirm the court's decision on recusal and the sentences imposed.

AFFIRMED.