

IN THE COURT OF APPEALS OF IOWA

No. 1-949 / 11-1048
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NANCY MICHELLE BOND,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis (trial) and Robert B. Hanson (post-trial motion and sentencing), Judges.

Defendant appeals her convictions on three counts of possession of a controlled substance, third offense, as an habitual offender. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John Sarcone, County Attorney, and Joe Crisp, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

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

MILLER, S.J.**I. Background Facts and Proceedings**

On November 9, 2010, an officer stopped a vehicle in Des Moines due to an inoperable brake light. The driver stated she was giving the passenger, Nancy Bond, a ride so that Bond could get some drugs. Bond consented to the officer looking in her purse, where some oxycodone pills were found. Also, another officer saw Bond stuffing something in her pants. On request, Bond took the items out and handed the officer a small rock of cocaine and a drug pipe. Additionally, one Ritalin pill was found in her pants pocket.

Bond was charged with possession of a controlled substance (cocaine), possession of a controlled substance (oxycodone), and possession of a controlled substance (Ritalin), all in violation of Iowa Code section 124.401(5) (2009). Bond had two previous convictions under chapter 124, so these offenses were charged as third offenses. Furthermore, the State alleged Bond was an habitual offender.

The order of pretrial conference, dated February 10, 2011, states there was a plea offer, "Plead to Count I, II, and III, and agree to prison for 7 seven years or Plead as charged and argue." Bond did not accept this offer. Defense counsel later stated Bond would not agree to an offer that included a requirement that she go to prison.

On April 4, 2011, Bond appeared in court for the purpose of entering a guilty plea to the three charges. The prosecutor stated that under a plea agreement the State would recommend a ten-year period of incarceration and

would agree to dismiss a different case against Bond. Bond, however, was unable to establish a factual basis for the guilty plea because she was unwilling to admit to a knowing possession of the controlled substances.

Bond signed a written waiver of a jury trial. On May 2, 2011, a hearing was held in which Bond reiterated her desire to waive a jury trial. She stipulated to a trial based on the trial information and the minutes of evidence encompassed in the trial information. The prosecutor noted there was an agreement that if the court were to find Bond guilty of the three counts, then at the time of sentencing the State would recommend a fifteen-year term of incarceration. Additionally, at the time of sentencing the State would dismiss charges on a separate offense.

The court found the defendant guilty beyond a reasonable doubt as to the three counts of possession of a controlled substance. At the end of the hearing, the court advised Bond that she could challenge the court's ruling by filing a timely motion in arrest of judgment.

On June 10, 2011, Bond filed a pro se motion to withdraw her plea, stating she did not agree with the plea agreement and she would like to be granted a plea conference. She also requested a new attorney and asked to continue the sentencing hearing. These matters were all considered at a hearing which was held on June 20, 2011.

The district court denied the motion to continue the sentencing hearing. The court also denied Bond's request for a new attorney. The court considered the motion to withdraw plea as a motion in arrest of judgment. The court

determined that Bond had not entered a guilty plea, and therefore there was no plea for her to withdraw. The court noted Bond had been found guilty, not based on her plea, but based on a determination by the court based on the minutes of evidence. The court denied the motion to withdraw plea.

Bond was sentenced to a term of imprisonment not to exceed fifteen years on each of the three counts, to be served concurrently. The court noted that pursuant to the agreement the separate charge against Bond was dismissed. Bond appeals her convictions.

II. Pro Se Motions

Bond raises this issue on appeal, “The trial court erred in not allowing the defendant to withdraw her plea of guilty and to appoint alternative counsel to represent her.”

A. We first address Bond’s claim that the district court should have granted her request for substitute counsel prior to the sentencing hearing. The district court has substantial discretion in ruling on a request for substitute counsel. *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995). A defendant must show sufficient cause for the appointment of substitute counsel, such as “a conflict of interest, irreconcilable conflict with the client, or a complete breakdown in communications between the attorney and the client.” *Id.* We will find an abuse of discretion only when the district court’s discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997).

Bond sought new counsel, stating, “I feel that even though I was in agreement for the things that happened during our court hearings, it seemed to me like every time I come in here, things were said to me differently than the way I took them.” Defense counsel argued that substitute counsel was not necessary. The district court ruled that there was not any supportable reason for appointing new counsel, stating, “I don’t see the asserted basis that things have been misrepresented to you as being established.”

We conclude the district court did not abuse its discretion in denying Bond’s request for substitute counsel. At the trial on the minutes, Bond was asked twice whether she was satisfied with the services of her attorney, and she replied both times, “Yes, ma’am.”

B. Bond contends the district court should have granted her motion to withdraw plea. We review a district court’s ruling on a motion to withdraw a plea for an abuse of discretion. *State v. Malone*, 511 N.W.2d 423, 424 (Iowa Ct. App. 1993). A motion in arrest of judgment is also reviewed for an abuse of discretion. *State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008). We will find an abuse of discretion only where the court’s discretion was exercised on clearly untenable or unreasonable grounds. *Id.*

Bond argues that in essence, her stipulation to a trial on the minutes of evidence was in fact a guilty plea. She claims the court should have treated her stipulation as a guilty plea for purposes of ruling on her motion to withdraw plea. Bond contends that she should have been able to withdraw her agreement to the trial on the minutes of evidence because she was misadvised by her attorney as

to what the State's recommendation for sentencing would be. She asserts she believed the State would be recommending a seven-year prison sentence, instead of the fifteen years the State recommended.

The plea offer of a guilty plea in exchange for a prison term of seven years was not accepted by Bond. By the time of her attempted guilty plea on April 4, 2011, the plea offer had changed; the State agreed to recommend a ten-year period of incarceration and the dismissal of another case in exchange for Bond's guilty plea. Bond was clearly aware that the guilty plea did not occur due to her failure to establish a factual basis. She stated at the sentencing hearing, "I could not sit here and say I knew that the pills were in my purse. You could not do it that way." She stated she did not plead guilty because she did not feel she was guilty.

Bond's statements at the sentencing hearing also show she was aware that because she could not establish a factual basis for the guilty plea, she agreed to a trial on the minutes. ("[B]ecause I did not agree upon knowing the items were in my purse, we ended up doing it for the Minutes of Testimony.") At the trial on the minutes, the court informed Bond that by giving up her right to a jury trial the judge alone would decide whether she was guilty or not. Bond was aware she was not pleading guilty at that time.

Furthermore, it is clear from the transcript of the hearing from the trial on the minutes of evidence, that Bond was aware what the State's sentencing recommendation was going to be. At the beginning of the proceedings on May 2, 2011, the prosecutor stated that if the court found Bond guilty of the three counts,

“the State would recommend a fifteen-year indeterminate term of incarceration.”

The State also agreed to dismiss another charge against Bond if she was found guilty.

At the sentencing hearing, the court found, “It was evident to the Court all the way along the decisions you made—choices you have made here were informed, knowingly, and intelligently—knowing, intelligently, and voluntarily made.” The court also pointed out to Bond that she did not plead guilty, stating, “[t]here was no admission on your part that you were guilty.” The court stated that the court had made the determination of whether or not Bond was guilty and for that reason her motion was denied.¹

We conclude that whether we consider the motion as a motion to withdraw plea or as a motion in arrest of judgment, the district court did not abuse its discretion in denying the motion. The transcript shows Bond knew she was not pleading guilty at the time she stipulated to a trial on the minutes of evidence. Also, she was clearly informed at the trial on the minutes of evidence that the State would be making a recommendation of fifteen-years imprisonment. There is no evidence to support Bond’s claim of a misstatement or misunderstanding.

III. Ineffective Assistance

In her appellate brief, Bond claims, “[t]he defendant’s conviction and sentence was not valid because her agreement to a trial to the court on the

¹ The prosecutor and defense counsel both told the court that a motion in arrest of judgment was not available to Bond because judgment had been entered at the time the court found her guilty. It is clear under Iowa Rule of Criminal Procedure 2.23(1), however, that a verdict of guilty is separate from a judgment of conviction. In this case there had been a guilty verdict, and therefore, a motion in arrest of judgment should have been available to Bond. The district court did not rely upon the representations of the prosecutor and defense counsel, but instead ruled on Bond’s motion on the merits.

stipulated record was not knowingly, voluntarily, and intelligently entered into as she received ineffective assistance of counsel.” She asserts that defense counsel did not adequately explain things to her prior to the trial on the minutes of evidence. She asserts she should have been allowed to challenge the procedure by which she was tried to the court on a stipulated record.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). Absent evidence to the contrary, we assume that the attorney’s conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Bond did challenge the procedure by which she was tried on the stipulated record provided by the minutes. The district court considered her motion on the merits. Additionally, the evidence does not support Bond’s claim that her attorney did not adequately explain things to her prior to the trial on the minutes. At the trial on the minutes, in response to questions from the court, Bond assured the court that she had no questions about her waiver of a jury trial, had no trouble understanding the proceeding, and had no need for additional time to discuss the case with her attorney. She also twice stated she was satisfied with the services of her attorney.

The record does not support Bond's assertion that she was inadequately informed or was misinformed when she agreed to waive her right to a jury trial and to have the court decide the case based on the minutes of evidence. In fact the record directly contradicts Bond's assertions, and despite a hearing in the district court on her motion in arrest of judgment, Bond has made no showing that the record is inaccurate.

We conclude Bond has not shown she received ineffective assistance of counsel.

We affirm defendant's convictions on three counts of possession of a controlled substance, third offenses, as an habitual offender.

AFFIRMED.