

IN THE COURT OF APPEALS OF IOWA

No. 2-1087 / 12-0724
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MYRON TOMAR POWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve (Guilty Plea), Nancy S. Tabor (Motion for Adjudication of Law), Gary D. McKenrick (Motion in Arrest of Judgment, Motion to Dismiss), and Marlita A. Greve (Trial on Habitual Offender Status and Renewed Challenges to Guilty Plea, Sentencing), Judges.

Myron Powell appeals from the judgment and sentence entered following his guilty plea to escape as a habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant County Attorney, Michael J. Walton, County Attorney, and Dion Trowers, Herald Feuerbach, and Amy DeVine, Assistant County Attorneys, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ. Tabor, J., takes no part.

BOWER, J.

Myron Powell appeals from the judgment and sentence entered following his guilty plea to escape from custody, in violation of Iowa Code section 719.4(1) (2009), enhanced as a habitual offender under sections 902.8 and 902.9(3). Powell contends the district court erred in denying his motion in arrest of judgment and renewed challenges to his guilty plea. Upon our review, we find the record contradicts Powell's claim of confusion about the nature of the offense charged and an ample factual basis supports his plea. Accordingly, we affirm.

I. Background Facts and Proceedings.

In August 2009, Myron Powell was residing at the Davenport Residential Correctional Facility as a condition of parole on a 2003 felony conviction.¹ At 7:15 p.m. on August 27, 2009, Powell clocked off work from a Sonic restaurant. At approximately 9:00 p.m., officers from the facility observed Powell driving a motor vehicle. At 10:00 p.m., Powell called the facility and said he was near a Shell gas station. When questioned about the location of the station, Powell became angry. Powell was told to return to the facility, which he did. There, Powell argued with an officer and refused to fully cooperate with two breath tests, which registered the presence of alcohol. Powell became belligerent and refused to go to his room as ordered. Powell then walked out of the facility and did not return. He was arrested more than one week later in Des Moines, driving a stolen vehicle while under the influence of alcohol.

¹ The presentence investigation report indicates Powell was granted work release on two 2003 felony convictions. Powell was also convicted of a felony in 1997.

The State charged Powell with escape from custody, in violation of Iowa Code section 719.4(1), a class “D” felony, enhanced as a habitual offender under sections 902.8 and 902.9(3). The escape charge set forth in the trial information accused Powell of committing:

COUNT 1:

ESCAPE OR ABSENCE FROM CUSTODY (CHARGED W/ FEL)

The said Myron T. Powell on or about the 27th day of August 2009, in the County of Scott, and State of Iowa: did, after being committed to an institution under the control of the Iowa Department of Corrections or a community based correctional facility due to a felony conviction, knowingly and voluntarily absent himself from a place where he is required to be, in violation of section 719.4(1) of the Code of Iowa. (Class D Felony)

Section 719.4 defines the crimes of “escape or absence from custody.”

Although the trial information set forth the proper code subsection for felony escape, the language tracked a combination of the felony and misdemeanor escape statutory provisions. Specifically, subsection one defines felony escape and states it applies to any person who has been convicted of a felony “who intentionally escapes, or attempts to escape, from a detention facility, community-based correctional facility, or institution to which the person has been committed by reason of the conviction.” Iowa Code § 719.4(1); *see also State v. Wagner*, 596 N.W.2d 83, 86 (Iowa 1999). Subsection three defines misdemeanor escape and states it applies to any person “who has been committed to any institution under the control of the Iowa Department of Corrections, to a community-based correctional facility, or to a jail or correctional institution, who knowingly and voluntarily is absent from a place where the person is required to be.” Iowa Code § 719.4(3).

In October 2011, Powell filed a motion for adjudication of law points, challenging his status as a habitual offender. The motion also stated that “the alleged actions of the defendant, if true, would result in a charge of escape constituting a serious misdemeanor.”

In November 2011, Powell appeared before the court and pleaded guilty to escape in violation of section 719.4(1), a class “D” felony charge. At the outset of the plea proceeding, defense counsel acknowledged Powell was charged with “the crime of escape, a Class D felony charge, and the State has also made an allegation asking the Court to consider habitual sentencing.” Powell expressed his dismay that he was not being charged with misdemeanor escape and that he was being charged as a habitual offender. The court explained to Powell that the crime charged “involves prosecutorial discretion” and stated it would allow Powell to confer with defense counsel if needed. Defense counsel further explained Powell’s dismay with the State’s refusal to drop the habitual offender enhancement, and requested to bifurcate the proceedings for a trial on the habitual offender status; the State agreed. However, Powell stated he wanted to go forward with the guilty plea for the felony escape charge.

The district court explained to Powell that he was being charged with escape as a class “D” felony, and recited section 719.4(1). The court then explained to Powell that, as an element to that charge, the State was required to prove Powell “intentionally escaped or attempted to escape” from the work release facility. Powell stated August 27, 2009, was the day “I escaped from the work release center.” Defense counsel questioned Powell whether he voluntarily

made himself absent from the work release facility, to which he answered in the affirmative. The court asked Powell whether he had read the minutes of evidence; Powell responded he had read them and that they were accurate. The court accepted Powell's plea as knowing, voluntary, and supported by a factual basis.

In January 2012, Powell filed a motion in arrest of judgment challenging the voluntariness of his guilty plea, alleging that "[b]ecause Count 1 intermingles language from two distinct and separate statutes, governing two distinct and separate offenses, it does not specify an offense for which a plea of guilty may knowingly and intelligently be entered." In February 2012, Powell filed a pro se motion to dismiss. The district court denied both motions following a hearing, finding in relevant part:

The Court, having reviewed the file, having heard the arguments presented, and being fully advised of the circumstances, finds that the motions must be denied. The Minutes of Evidence filed in connection with this matter fully support the charge of Felony Escape as alleged in the Trial Information in violation of Section 719.4(1), Iowa Code 2011. The transcript of the plea proceeding herein clearly indicates that the defendant knowingly and voluntarily pled guilty to that felony charge of Escape.

Meanwhile, in February 2012, a hearing was held on Powell's motion for adjudication of law points, which the court denied, stating in part:

Although the wording in the body of the indictment uses the terms "knowingly and voluntarily absent" it also contains the language that the defendant was under the control of the Department of Corrections due to a felony conviction. The code section listed correctly identifies the felony level charge and the listed name of the charge (in capital letters) correctly states that this is charged as a felony.

Powell thereafter appeared for a bench trial on the issue of his status as a habitual offender. At trial, Powell also renewed his previous challenges to his guilty plea. The district court found Powell to be a habitual offender. The court denied his renewed challenges to his guilty plea, finding in part:

Defendant also renewed a previous motion in arrest of judgment he filed requesting to withdraw his guilty plea. On February 22, 2012, the court filed a written ruling denying Defendant's motion in arrest of judgment. This court agrees with that ruling, but will further address Defendant's motion in arrest of judgment. In that motion, Defendant raised the issue of whether he pled guilty to a felony Escape under Iowa Code § 719.4(1) on November 16, 2011, or whether he pled guilty to a serious misdemeanor under Iowa Code § 719.4(3). Defendant argues the trial information language cites to Iowa Code § 719.4(1), but used the language from Iowa Code § 719.4(3). Defendant also argues he was out of placement on his assignments from the Work Release Center, which under Iowa Code § 719.4(3) is a serious misdemeanor, not a felony escape. The court was given a copy of the plea transcript to review. In that transcript, the judge explained in detail to Defendant that he was being charged with Escape as a Class D felony. Defendant admitted he understood the punishment associated with a Class D felony escape conviction. In the factual basis section, Defendant admitted he was at the Work Release Center because of a prior felony conviction. He then admitted that he voluntarily made himself absent from that facility.

In the plea transcript, Defendant was also asked if he had read the minutes of testimony and if those were accurate. He said he read them and they were accurate. The minutes indicate Defendant was absent from his required placement, but then did return to the Work Release Center. However, after being accused of alcohol consumption, Defendant became upset and was ordered to go to his room in the Work Release Center. He did not, but instead left the Work Release Center through the front doors and did not return. Those acts meet the elements of felony escape and this court agrees with the prior court's ruling that Defendant's motion in arrest of judgment must be denied.

In March 2012, Powell filed pro se motions for review of the denial of his motion to withdraw his guilty plea and for deficient representation. Also in March 2012, Powell filed a pro se application for discretionary review with the supreme

court; in April 2012, he filed an amended application for discretionary review, which the State resisted. In April 2012, the supreme court denied discretionary review.

At Powell's sentencing hearing, he again renewed his challenges to the voluntariness of his guilty plea. The district court denied Powell's pending motions, reaffirming its prior findings that his plea was knowing and voluntary. The court sentenced Powell to serve up to fifteen years with a mandatory minimum term of three years. Powell now appeals.

II. Standard of Review.

We review a district court's denial of a motion in arrest of judgment for abuse of discretion and will reverse only if the ruling was based on reasons that are clearly unreasonable or untenable. *State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008). A ruling is untenable when the court bases it on an erroneous application of law. *Id.*

III. Discussion.

Powell alleges his guilty plea was not knowing and voluntary because the trial information charged a violation of section 719.4(1), a felony, but included language from section 719.4(1) and section 719.4(3), and the district court failed to clarify his alleged confusion between the charges during the plea colloquy. See Iowa Code §§ 719.4(1) (providing that a person convicted of a felony "who intentionally escapes, or attempts to escape" from a community-based correctional facility "to which the person has been committed by reason of the conviction" commits a class "D" felony); 719.4(3) (providing that a person who

has been committed to a community-based correctional facility “who knowingly and voluntarily is absent from a place where the person is required to be” commits a serious misdemeanor). Powell also challenges the factual basis supporting his plea.

These issues were repeatedly addressed by the district court. The district court found that the record did not show Powell misunderstood the nature of the offense or the applicable penalties. The court further found that Powell’s acts met the elements of escape in violation of section 719.4(1).

We conclude the court properly overruled Powell’s motion for judgment of acquittal. “No indictment is invalid or insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in a matter of form which does not prejudice a substantial right of the defendant.” Iowa R. Crim. P. 2.4(7)(d). We find Powell was not prejudiced by the trial information language tracking a combination of the felony and misdemeanor escape statutory provisions, sections 719.4(1) and 719.4(3).² The information expressly alleges a felony escape charge and sets forth the proper code subsection for felony escape. Moreover, the minutes of testimony and the trial information clearly indicate the State’s intention to seek a conviction for felony escape rather than misdemeanor escape. Thus, there could have been no surprise to Powell or his counsel in preparing for trial. See, e.g., *State v.*

² With this decision, we do not condone sloppy or cavalier preparation of charging documents. We merely conclude that under the specific facts of this case where the proper charge is clear from the text and code section set forth in the trial information and the other documents, Powell suffered no prejudice.

Davison, 245 N.W.2d 321, 324 (Iowa 1976) (noting the purpose of a trial information is to afford the defendant an opportunity to prepare a defense).

Further, at the plea proceeding, the district court explained in detail to Powell that he was being charged with escape as a class “D” felony, and recited section 719.4(1). The court then explained to Powell that, as an element to that charge, the State was required to prove Powell “intentionally escaped or attempted to escape” from the work release facility.

Although Powell was subsequently questioned whether he voluntarily made himself absent from the work release facility, to which he answered in the affirmative, Powell stated August 27, 2009, was the day “I escaped from the work release center.” Powell was asked if he had read the minutes of testimony; Powell responded he had read them and they were accurate. The minutes of testimony indicate Powell was absent from his required placement at the work release facility, but then did return. After being accused of alcohol consumption and ordered to go to his room, however, Powell became upset and belligerent. Then, when an officer “had to use the phone,” Powell left “swiftly” through the front doors of the facility and did not return. These acts support a conviction for felony escape. *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992) (interpreting “physical restraint” under section 719.4(1) to require that an individual knew or should have known he “would be subjected to immediate physical restraint if an attempt to flee from the authorities” at the facility was made); *State v. Burtlow*, 299 N.W.2d 665, 669 (Iowa 1980) (comparing sections

719.4(1) and 719.4(3) and finding 719.4(1) “is intended to apply [to] unauthorized departures from physical restraint”).³

Upon our review, we find the record contradicts Powell’s claim of confusion about the nature of the offense charged. We further find an ample factual basis to support his plea to felony escape. Powell has failed to show that the court’s ruling was based on reasons clearly erroneous or untenable. See Iowa R. Crim. P. 2.8(2)(b) (setting forth the requirements for an in-person guilty plea colloquy in felony cases). We affirm the district court’s denial of Powell’s motion in arrest of judgment and renewed challenges to his guilty plea.

AFFIRMED.

³ Per the corrections continuum set forth in Iowa Code chapter 901B, the Davenport Residential Correctional Facility, a “work release facility,” is part of Level Three “quasi-incarceration,” which is clearly a form of physical restraint. See Iowa Code § 901B.1(1)(c)(3). The residents of the facility do not have permission to leave on their own free will without permission from a facility officer. Powell was in violation of a facility rule when he left the facility “without proper authorization.”