IN THE COURT OF APPEALS OF IOWA

No. 2-306 / 11-1523
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYRONE DESHAWN BULLOCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick (plea) and Marlita A. Greve (sentencing), Judges.

In a challenge to his conviction for delivery of crack cocaine, Tyron Bullock alleges he received ineffective assistance of counsel during his guilty plea hearing. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Calynn M. Walters, Legal Intern, Michael J. Walton, County Attorney, Joseph Grubusich and Melisa Zaehringer, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Four days after walking away from a residential correctional facility, Tyrone Bullock sold crack cocaine at a Davenport city park, resulting in his arrest and conviction for delivery of a controlled substance as a habitual offender. On appeal, Bullock contends his counsel was ineffective for failing to ensure his guilty plea was voluntary and intelligent.

We find the district court conducted the required colloquy, ensured that Bullock understood the consequences of his guilty plea, and established a factual basis for the offense. Bullock's responses to the court's inquiries during the plea proceeding indicated that he comprehended the possible penalties he faced by pleading guilty. Accordingly, counsel had no duty to challenge the plea through a motion in arrest of judgment.

I. Background Facts and Proceedings

Bullock was serving a ten-year sentence for possession with intent to deliver a controlled substance, when, on May 4, 2011, he left a Davenport work release center without authorization. On May 8, 2011, Davenport Police Detective Brandon Koepke was conducting surveillance in Fejervary Park, when he saw Bullock briefly enter and exit several different vehicles through the course of the afternoon. Detective Koepke notified Sergeant Smull of the suspicious activity. When officers Wayland and Babcock pulled over one of the vehicles

approached by Bullock, the passenger admitted to purchasing crack cocaine from Bullock.[1]

The officers took Bullock to the Davenport Police Department, where he initially gave officers a fake name. He eventually admitted, "okay fine, you got me. I'm Tyrone Bullock," explaining he created the alias because of an existing warrant for his arrest relating to a previous drug charge.

On June 1, the State filed a trial information accusing Bullock of delivering crack cocaine, in violation of Iowa Code sections 124.401(1)(c)(3), 124.206(2)(d), and 703.1 (2011). Because of his two prior felony convictions, the State alleged Bullock to be a habitual offender under sections 124.411 and 902.8. Attorney James Clements represented Bullock, and appeared on his behalf during the plea hearing.

The Honorable Gary D. McKenrick presided at Bullock's August 17, 2011 plea hearing. The court stated at the outset that in return for Bullock's guilty plea, the State agreed to forego the section 124.411 sentencing enhancement, which could have tripled Bullock's prison term, but otherwise was free to make any sentencing recommendation. After ensuring Bullock shared that interpretation of the plea agreement, the court explained the elements of the crime, the mandatory minimum and maximum possible penalties involved, and the nature of the rights he was waiving. During the hearing, the following exchange took place:

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[1] The substance confiscated from the passenger tested positive for cocaine. The officers also determined the passenger had used his cell phone to call Bullock's number.

> [THE COURT:] The State claims that back on May 8th of this year here in Scott County you had some crack cocaine and you delivered that crack cocaine to at least one other person. Are those allegations true?
>
> THE DEFENDANT: Didn't have nothing on me. In my possession, no.
>
> MR. CLEMENTS: May I have a moment with my client?
>
> THE COURT: Sure.
>
> (At this time a discussion was held off the record.)
>
> THE DEFENDANT: About the misunderstanding, yes, to the question.
>
> THE COURT: Why don't you go ahead and tell me what happened that makes you believe—
>
> THE DEFENDANT: It was mine and I'm—I'm agreeing with the question, yes. It was mine.
>
> THE COURT: You did have some crack cocaine and you gave it to someone else?
>
> THE DEFENDANT: Yes.

Bullock, who was twenty eight years old, stated that he understood the court's explanation of the elements of the crime, the possible penalties, and the rights he was giving up by entering his guilty plea. Notably, Bullock answered "yes" when the court asked whether he understood that "[u]nder section 124.413, the mandatory minimum period of incarceration is one-third of the maximum sentence, which means that you could be facing a minimum sentence of up to five years in prison." The court also advised him of his right to challenge the plea by filing a motion in arrest of judgment.

The Honorable Marlita A. Greve presided at Bullock's September 21, 2011 sentencing hearing. Because attorney Clements had a health issue, Bullock was represented by different counsel at the sentencing hearing. The court sentenced Bullock to an indeterminate fifteen-year sentence, and imposed the mandatory

minimum of one-third under section 124.413 to his prison term.[2] At that time, counsel asked: "Pardon me. I'm sorry, Your Honor. Mr. Bullock was curious. Does the one-third mandatory apply to the basic ten-year sentence or to the enhanced fifteen-year sentence?" The court replied:

> That's a question that will have to be answered by the Department of Corrections. I can't answer that question. I really don't know. And I think that plays right into what I'm telling you now. Once I impose my sentence, it's basically all up to the Department of Corrections at that point. So certainly that's something that I'm sure they will advise you of from here on out, but I can't answer that question.

Bullock filed his notice of appeal on September 22, 2011.

II. Scope and Standard of Review

We review claims of ineffective assistance of counsel[3] de novo. *State v.* Straw, 709 N.W.2d 128, 133 (Iowa 2006).

III. Ineffective Assistance of Counsel

Bullock bases his challenge on the United States and Iowa constitutions, both of which guarantee his right to counsel. *See* U.S. Const. amend. VI; Iowa Const. art. I § 10. We generally preserve ineffective-assistance claims for postconviction relief proceedings. But because the record before us is adequate, we will consider this claim on direct appeal. *See State v. Fannon*, 799 N.W.2d

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[2]A defendant convicted of violating section 124.401(1)(c)(3) faces up to ten years imprisonment under section 902.9(4). Section 902.8 defines a habitual offender, and also prohibits parole eligibility until the individual has been confined for at least three years. Habitual offenders are subject to section 902.9(3), authorizing confinement "for no more than fifteen years." Section 124.413 imposes a mandatory minimum for persons convicted of section 124.401(c) for "one-third of the maximum indeterminate sentence prescribed by law."

[3] Because Bullock did not file a motion in arrest of judgment, he must challenge his guilty plea by alleging ineffective assistance of counsel. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

515, 519–20 (Iowa 2011); Iowa Code § 814.7(3) (permitting court to decide record is adequate to address an ineffective-assistance claim on direct appeal).

A defendant must show two elements by a preponderance of the evidence to succeed in a claim for ineffective assistance of counsel: (1) counsel failed to perform an essential duty; and (2) such failure resulted in prejudice to the defendant. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A presumption exists that counsel's performance falls "within a range of reasonable assistance." *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006). But if a defendant's plea is not made intelligently and voluntarily, counsel's failure to file a motion in arrest of judgment is considered a breach of an essential duty. *Straw*, 709 N.W.2d at 133; *see also State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009) (recognizing counsel's duty to correct any omission by the court during plea proceedings so that the defendant may be fully informed when entering a guilty plea). To show counsel was ineffective in the context of a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

IV. Guilty Plea Colloquy

Bullock charges his counsel failed to ensure his guilty plea was entered intelligently and voluntarily. Specifically, he contends his question for the sentencing court about the mandatory minimum term of incarceration revealed that he did not really understand the "complete consequences" of his guilty plea.

Because a guilty plea waives constitutional trial rights, for the plea to be valid, a defendant must make an intentional relinquishment of known rights. *State v. Philo*, 697 N.W.2d 481, 488 (Iowa 2005). A guilty plea is not voluntary and intelligent unless the defendant understands the full consequences of waiving those rights. *Id*.

The plea-taking court must inform the defendant of the following:

> (1) The nature of the charge to which the plea is offered.
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
> (4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(b). If the court substantially complies with rule 2.8(2)(b), it will have provided the defendant with adequate due process. *State v. Meron*, 675 N.W.2d 537, 542 (Iowa 2004).

At the plea hearing, the court described the following penalties:

> THE COURT: The charge of delivery of crack cocaine is normally a class "C" felony. As an habitual offender, it's punishable by up to 15 years in prison. The habitual offender statute carries a mandatory minimum of three years incarceration. Under section 124.413, the mandatory minimum period of incarceration is one-third of the maximum sentence, which means that you could be facing a minimum sentence of up to five years in prison. Additionally, the charge carries a six-month driver's license revocation.

> Do you understand all those penalties?
> THE DEFENDANT: Yes.

But during sentencing, Bullock asked whether the mandatory minimum applied to the ten-year class "C" felony sentence, or the fifteen-year habitual offender sentence.[4] Bullock argues this question shows his plea is invalid, reasoning: "Obviously, since the court had informed him that with the mandatory minimum, he was facing a minimum of sentence of five years, this question had already been answered. His answer that he understood is clearly not correct."

Bullock's argument concedes that the plea-taking court properly informed him of the mandatory minimum and maximum punishment he faced. The record further shows the court communicated the nature of the charges, the plea offer, as well as Bullock's rights he would be waiving by entering his guilty plea. *See* Iowa R. Crim. P. 2.8(2)(b). Because the court adequately transmitted the information constitutionally and procedurally required, we examine whether counsel should have argued the plea was not voluntary or intelligent based on Bullock's responses during the plea hearing, which signaled his ability to comprehend the court's statements.

We are not convinced that a defendant's requested clarification during sentencing forces the conclusion he did not understand the possible penalty explained to him at the plea hearing. The relevant period during which the court

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[4] The sentencing court provided an inaccurate answer to the question relayed by Bullock's counsel. The court has the "express power to determine the application of section 124.413." *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001). The court's imposition of the one-third mandatory minimum in section 124.413 applied to the maximum indeterminate fifteen-year sentence under section 902.9(3), resulting in a mandatory minimum term of five years before Bullock is eligible for parole. Bullock, however, does not raise a claim concerning his sentencing.

must ascertain whether a guilty plea is entered intelligently and voluntarily is at the time or before the defendant actually pleads. *See Philo*, 697 N.W.2d at 485. In turn, counsel only has a duty to move in arrest of judgment if a defect exists in the plea proceeding. We accordingly focus our attention on the plea hearing itself.

After reciting the plea offered by the State and confirming Bullock's agreement, the district court explained that before accepting Bullock's guilty plea, it must be certain Bullock understood the rights he was giving up and the nature of the charge and potential punishment imposed. The court continued:

> I'm going to ask you a number of questions. I need to have you answer the questions out loud so the court reporter can take down your answers. If at any time during this process you don't understand my questions or simply want to take time to talk with your lawyer about the proceedings, let me know and we'll give you the opportunity to do that. You'll be able to talk with your lawyer privately if you want.
>
> Do you understand all that, sir?

Bullock responded "yes." The presentence investigation report shows Bullock dropped out of school in tenth grade and that he has a learning disability.[5] Bullock suggests these circumstances limited his capacity to understand the proceedings.

A defendant's experience and education can impact whether his waiver is valid. *Hoskins v. State*, 246 N.W.2d 266, 268 (Iowa 1976) (holding defendant,

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[5] Bullock notes that at the time of his plea hearing, he had been incarcerated for three months, and concludes "[h]is incarceration at the time of the plea accounts for his willingness just to agree with the court." Because he offers no reason why imprisonment would impair his ability to enter a voluntary and intelligent guilty plea, we do not accept his bare assertion to prove a lack of capacity to waive his rights. *See State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997) (refusing to find stress and pressure from defendant's long confinement in jail prevented his entering a voluntary and intelligent plea).

whose education terminated in ninth grade, had no prior conviction, and was charged with a complex offense, did not enter valid plea when court failed to mention elements to petitioner). A district court may determine a defendant's understanding of the law in relation to the facts by "an inquiry in which the judge relates the elements of the charge to basic acts required to constitute the offense." *Brainard v. State*, 222 N.W.2d 711, 714 (Iowa 1974). A more careful determination is required when a court fails to communicate substantial elements of an offense. *See State v. Buhr*, 243 N.W.2d 546, 550 (Iowa 1976) (reversing guilty plea when trial court omitted essential element of crime charged, even though defendant "had an eleventh grade education, was 37 years old, had an extensive criminal record, and was represented by counsel"). Bullock does not allege the plea-taking court omitted any essential information.

The district court asked Bullock's age and his progression in school. When the court asked whether Bullock had any trouble reading, writing, or understanding English, Bullock answered "No." The court ensured he was not under the influence of alcohol, medication, or a controlled substance, and that he was not seeing any doctor or psychologist at the time of the hearing. It inquired as to every element for his delivery charge, as well as the elements constituting the habitual offender statute.

The court's thorough inquiry and explanation overcomes any concern that Bullock was unable to understand the proceedings, even considering his learning disability and minimal education. *See State v. Hightower*, 587 N.W.2d 611, 613–14 (Iowa Ct. App. 1998) (affirming guilty plea when district court engaged

defendant in question and answer regarding enhancement statute to ensure he understood the penalty). Without more, a request to clarify his mandatory minimum term at sentencing does not unravel the meticulous work of the district court at the plea hearing, especially when the court encouraged Bullock to ask questions of the court or his counsel. No evidence suggests Bullock's inability to voice such a request.

Bullock also argues his initial denial that he possessed crack cocaine demonstrates his deficient understanding of the plea hearing. He concludes his subsequent admission that the crack cocaine belonged to him was "just him agreeing with the court." The State contends Bullock's initial denial was a misunderstanding of the elements of a crime, which was clarified by the court's follow-up questions.[6]

We do not find the exchange over the factual basis exposes Bullock's inability to comprehend the plea proceedings. The district court asked for Bullock's own version of the events, and Bullock's responses established a factual basis as required by rule 2.8(2)(b).

This case does not present a situation in which Bullock's attorney held a duty to correct an omission of the court. *Cf. Hallock*, 765 N.W.2d at 605–06 (holding counsel failed to perform an essential duty by not correcting district court's omission of ten-year parole following imprisonment, or filing motion in arrest of judgment). Because the court included all required information and inquiry necessary before accepting a valid guilty plea, the question here is

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[6] Notably, possession is not a necessary element of the crime of delivery. *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1974).

whether Bullock understood the proceedings. Similar to the district court, we see nothing to suggest Bullock entered his plea without sufficient understanding of the consequences. Bullock entered his guilty plea voluntarily and intelligently. Accordingly, counsel did not breach an essential duty by failing to file a motion in arrest of judgment.

Because we hold counsel's failure to file a motion in arrest of judgment was not a breach of an essential duty, we need not address the prejudice prong of Bullock's ineffective assistance of counsel claim.[7] *See State v. Williams*, 695 N.W.2d 23, 30 (Iowa 2005). Bullock's constitutional challenge therefore fails, and his conviction and sentence remain intact.

AFFIRMED.

[7] Bullock asks us to presume he was prejudiced if we find counsel breached a material duty by declining to file a motion in arrest of judgment to challenge the plea as not knowing and intelligent. Given our supreme court's rejection of a similar argument in *Straw*, 709 N.W.2d at 137, we doubt whether we could adopt a per se prejudice rule without running afoul of that precedent.