IN THE COURT OF APPEALS OF IOWA

No. 2-406 / 11-2013
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD LEE HARRINGTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

A defendant appeals from the judgment and sentence entered following his guilty plea for possession of methamphetamine. **AFFIRMED.**

Todd N. Klapatauskas of Reynolds & Kenline, L.L.P., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attoney General, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant County Attorney, for appellee.

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

TABOR, J.

Having entered a guilty plea admitting he knowingly possessed methamphetamine, Donald Lee Harrington now contests the district court's denial of both his attorney's motion to withdraw and his motion in arrest of judgment. He also contends his counsel was ineffective in advising him to plead guilty despite "serious deficiencies in the lab reports" and in failing to timely file a motion in arrest of judgment.

The record shows that before he entered his guilty plea, Harrington received police reports and the state crime lab report—the documents which formed the basis for his motion in arrest of judgment. Although the written plea and the plea-taking court apprised him of the need to file a motion in arrest of judgment to challenge his plea, he failed to do so within the forty-five day deadline. At the hearing on the motion in arrest of judgment, Harrington expressed dissatisfaction with his attorney, but did not prove counsel could not adequately represent him. Accordingly, the court had no cause to substitute counsel. In addition, Harrington is unable to show he was prejudiced by any failure of counsel to investigate chain-of-custody issues regarding the drugs seized during the stop. Accordingly, we affirm.

I. Background Facts and Proceedings

On September 17, 2010, Harrington was a passenger in a vehicle driven by Charles Swender when Waterloo police pulled him over for a traffic violation. Swender consented to a search of both the vehicle and his person. Harrington also consented to a search of his person. During the vehicle search, police

located a baggie containing what appeared to be methamphetamine under the driver's seat cover. Police also found a hypodermic needle in Harrington's sock; when asked what was in the needle, Harrington replied that it was mostly water, though there was probably "some left over 'dope' inside."

A police incident report attached to the minutes of testimony assigns numbers to the following items recovered from the scene: (1) "baggie meth"; (2) "hypodermic needle"; (3) "contents of needle"; (4) "photo by CSI"; and (5) a gray 1987 Chevy S10. Under the section of the report labeled "property disposition," the officer wrote: "1, 3) lab 2) disposed of 4) kept by lab 5) parked at scene"—indicating that the officers sent the baggie of methamphetamine and the contents of the hypodermic needle to the lab for testing, while they disposed of the needle itself.

On November 15, 2010, the crime lab issued a drug chemistry report, which was also attached to the minutes of testimony. The report labels one item as Lab #1 and Agency #001—"Powder Substance described as Plastic baggie with suspected methamphetamine." The other item is labeled as Lab #2 and Agency #002 and is described as, "Powder Substance described as Suspected methamphetamine." The results of the examination state:

ITEM	DESCRIPTION	NET WEIGHT	FINDINGS
1	white crystalline substance	0.63 grams	methamphetamine
2	white residue		methamphetamine

On January 19, 2011, the State filed a trial information charging Harrington with possession of methamphetamine, in violation of Iowa Code 124.401(5). Attached to it was Officer Zubak's investigative report, which states:

"On this date Officer Bose retrieved a hypodermic needle from Harrington's right sock during a consent search of his person. The contents of that needle was [sic] sent to the state crime lab for testing."

On May 3, 2011, Harrington signed a written guilty plea prepared by his attorney. It states Harrington received a copy of the trial information and that he read it and familiarized himself with the contents. It also states,

> I further understand that if I wish to challenge this plea, I must have my attorney prepare a motion in arrest of judgment within forty-five (45) days of the entry of this plea and at least five (5) days prior to time for sentencing. My attorney has fully explained to me the significance of the motion in arrest of judgment.

On the same day, the district court held a guilty plea hearing. The court asked Harrington at the hearing if his attorney had explained to him his right to file a motion in arrest of judgment. His attorney, Mark Milder, stated, "We did not go over that part, Your Honor. I will go over that with him to make sure he's aware of it." The court then informed Harrington he had a right to file a motion in arrest of judgment "that would challenge the plea-taking procedures," and that such a motion "must be filed no later than 45 days from today's date or in any event not less than five days before the date set for sentencing, whichever time period would be shorter." The court advised Harrington that he could not appeal from any defects in the plea-taking procedures unless he first filed the motion in arrest of judgment.

On June 27, 2011, the date set for sentencing, Harrington questioned whether the chemical test results accurately depicted the substance found on his person. The court continued the sentencing hearing and directed the State to

procure further reports. On August 16, 2011, Harrington filed a motion in arrest of judgment, stating his attorney was ineffective in advising him to plead guilty given the status of the crime lab report.

At the October 24, 2011, hearing on the motion in arrest of judgment, attorney Milder moved to withdraw. He explained his client was "extremely upset with my representation and does not want me to represent him any longer. I don't feel like it would be appropriate for me to continue to represent him under the circumstances." Milder called the situation: a "serious breakdown" in the attorney-client relationship. When the court asked Harrington why he believed Mr. Milder should no longer represent him, Harrington explained:

> I don't feel like I've been represented to the extent because he keeps telling me that I pled guilty to what this lab work said. I didn't plead guilty to what was in there. I did have a syringe on me. I told him that, and they are trying to say that I pled guilty to what was in the bag and stuff, but it wasn't me.

Counsel then told the court that a co-defendant possessed the baggie and Harrington possessed the syringe. After further discussion concerning the lab report, the court again asked Harrington why he did not feel that Milder should continue representing him. Harrington replied: "I don't feel like he has been representing me to the State. I really don't know." The district court denied the motion to withdraw, finding Harrington had not given any reason to discharge his attorney.

With regard to the motion in arrest of judgment, Harrington articulated to the court his belief that the crime lab testing was only on the substances contained in the baggie—which belonged to the driver—and made no reference

to the syringe, which Harrington had on his person. Harrington's counsel argued on his client's behalf, asserting Harrington would not have entered a guilty plea if he had realized the lab report did not accurately indicate what substance was being tested. The prosecutor responded that the motion in arrest of judgment was untimely and that Harrington admitted possessing methamphetamine as part of the plea proceeding.

In denying the motion, the district court stated:

> Well, I at this point in time I am going to deny the defendant's motion in arrest of judgment. First, it is untimely. And even if were not untimely, I find there is no basis. The laboratory report was presented to the defendant. He had more than sufficient time to review the lab report. He did appear in open court and admit to the elements of the offense of possession of methamphetamine.

The court sentenced Harrington to 365 days in jail with all but ten of those days suspended. The court also placed him on probation for twelve months and ordered him to pay the fine, surcharge, court costs, and attorney fees. Finally, the court required Harrington to obtain a substance abuse evaluation and abide by the recommendations made in that evaluation.

II. Scope and Standard of Review

The district court has discretion in ruling on motions for withdrawal of counsel, *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995), and motions in arrest of judgment. *State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008). An abuse of discretion occurs when the court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). Where the district court's ruling

implicates a defendant's constitutional rights, our review is de novo. *State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

III. Motion to Withdraw

Harrington first contends the district court should have allowed his attorney to withdraw because their disagreement over the lab report resulted in a breakdown in the attorney-client relationship.

While a defendant has a right to counsel at all critical stages of the criminal process, no defendant has an absolute right to be represented by a particular counsel. *State v. Mott*, 759 N.W.2d 140, 148 (Iowa Ct. App. 2008). To justify appointment of substitute counsel, a defendant must show a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the defendant and counsel. *Id*. It is the court's job to balance the defendant's right to counsel of his or her choice and the public's interest in the prompt and efficient administration of justice. *Id*. When a court receives a request for substitution of counsel based on an alleged breakdown in communication, it has a duty to inquire into the situation. *Id*. at 149. A defendant's general frustration and dissatisfaction with counsel "does not alone render counsel unable to perform as a zealous and effective advocate." *State v. Boggs*, 741 N.W.2d 492, 506 (Iowa 2007).

Harrington's attorney moved to withdraw at the start of the hearing on the motion in arrest of judgment, alleging his client was "extremely upset" with him and that there had been "a serious breakdown in the relationship between the attorney and client." The court carried out its duty of inquiry, asking Harrington

why he no longer wanted attorney Milder to represent him. Harrington explained that he was upset with his attorney's interpretation of the lab report and because Harrington believed he pled guilty to possessing the contents of the baggie, which was not his intent.

Harrington's regret about pleading guilty falls short of a "complete breakdown" in communication justifying substitution of counsel. Our supreme court has said that "the focus is not on the defendant's relationship with his or her attorney," but "the adequacy of counsel in the adversarial process." *Id.* at 506-07 (finding not all criticism lodged by a defendant requires withdrawal and appointment of new counsel). Attorney Milder was prepared to represent Harrington at the hearing on his motion in arrest of judgment and at sentencing—and did so. Balancing Harrington's reason for wanting substitute counsel against the public interest in resolution of the matter, we conclude the district court properly denied the motion to withdraw.

On appeal, Harrington argues the court should have granted the motion to withdraw because Milder "faced an inherent conflict of interest" in continuing to represent him—given that the motion in arrest of judgment was untimely. This claim was not raised in the district court before its ruling on the motion to withdraw. Although Milder noted the existence of a question of ineffective assistance of counsel related to the belated filing during his argument on the motion in arrest of judgment, that reference came after the court ruled on the motion to withdraw. Generally, we will only review on appeal those issues first

presented to and ruled on by the district court. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008).

Even if Harrington preserved error on the conflict ground, we find no merit. Attorney Milder could not file a timely motion in arrest of judgment where Harrington failed to inform counsel of his desire to withdraw his guilty plea within the forty-five-day window. And, as outlined in the following section, the court informed Harrington he could not challenge his plea without filing a motion in arrest of judgment during the designated time frame.

IV. Motion in Arrest of Judgment.

Harrington next contends the district court erred in denying his motion in arrest of judgment. He disputes the court's determination the motion was untimely, alleging that (1) he was not fully informed of the need to file a motion in arrest of judgment and (2) the court knew of his concerns regarding the factual basis for his plea in June 2011 because the court continued the June 27, 2011 sentencing hearing to address an alleged discrepancy in the lab report.

Neither of Harrington's allegations withstands scrutiny. First, the record disproves Harrington's claim he lacked adequate notice of his obligation to file a timely motion in arrest of judgment. In addition to the requirement being outlined in the written guilty plea, the plea-taking court informed Harrington of the need to file such a motion as a prerequisite to challenging his plea on appeal. Second, Harrington did not bring his concern about the lab report to the court's attention until the hearing date of June 27, which was five days late. *See* Iowa R. Crim. P. 2.24(3)(b) (setting deadline of "not later than five days before date set for

pronouncing judgment"). Moreover, the actual motion in arrest was not filed until August 16, which was 105 days after he entered his guilty plea.

Even assuming the motion was timely, the court properly rejected it on the merits. Harrington contends a discrepancy exists in the lab report concerning what substances were seized at the scene and found to contain methamphetamine. The prosecution attached the lab report to the minutes of testimony filed with the trial information. The State provided these documents to Harrington before he entered his guilty plea. His written guilty plea acknowledged he read and familiarized himself with the contents of the trial information. Harrington had ample opportunity to detect and object to any discrepancy in the lab report before entering his guilty plea. But instead, Harrington signed the guilty plea which provided the following factual basis for his offense: "On or about September 17, 2010, in Black Hawk County, Iowa; I was knowingly in possession of methamphetamine." The court had no ground to grant Harrington's request to arrest judgment.

V. Ineffective Assistance of Counsel.

Finally, Harrington alleges his counsel was ineffective in advising him to plead guilty and failing to file a timely motion in arrest of judgment. To prove this Sixth Amendment violation, Harrington must show by a preponderance of the evidence that (1) his attorney breached an essential duty and (2) prejudice resulted. *See State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009). Under the first prong, the attorney's representation is measured "against the standard of a reasonably competent practitioner with the presumption that the

attorney performed his duties in a competent manner." *Id*. at 602-03. For the prejudice prong, Harrington must show a reasonable probability that, but for counsel's error, he would not have entered a guilty plea, but would have insisted on going to trial. *Id.* at 606 (citing *Hill v. Lockhart,* 474 U.S. 52, 59 (1985)).

Harrington argues his counsel breached a material duty by advising him to plead guilty "even though there were serious discrepancies in the lab reports." His argument is premised on the fact that an investigative report attached to the minutes stated the officer emptied the contents from the hypodermic needle retrieved from Harrington's sock and sent them to the state crime lab for testing. These contents were designated as item number three on the incident report, also attached to the minutes. The lab report verifies the receipt and testing of two items: a baggie of suspected methamphetamine and a second item described as "white residue." Harrington argues the provenance of the second item is unclear. We disagree. Police sent two items to the lab: the baggie and the syringe contents. The criminalists tested two items: the baggie containing .63 grams of crystalline methamphetamine and a white residue of methamphetamine. While the lab report does not specify where police found the white residue, the only reasonable conclusion is that it was the contents of the syringe.

Harrington speculates regarding "numerous potential chain of custody and contamination issues" regarding how the syringe contents were evacuated and transferred. The record does not show the lengths of counsel's investigation, but it does show counsel was faced with Harrington's admission to having a syringe

with “some dope” left inside. We are not persuaded by Harrington’s claim that he would not have “pled in the first place” if he had understood the deficiency in the lab report. Because we see no deficiency in the lab report, and view Harrington’s plea as supported by a factual basis, we conclude Harrington is unable to satisfy the prejudice prong of the ineffective assistance of counsel test.

We likewise reject Harrington’s claim that counsel was ineffective in not filing a timely motion in arrest of judgment. Even if counsel had filed the motion in arrest of judgment within the deadline provided by rule, the court would not have allowed Harrington to withdraw his voluntary, knowing, and intelligent guilty plea. Harrington cannot show he was prejudiced by counsel’s performance.

AFFIRMED.