IN THE COURT OF APPEALS OF IOWA

No. 2-678 / 11-1826
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN JEFFERSON III,
Defendant-Appellant.

Appeal from the Iowa District Court for Fayette County, Andrea J. Dryer (guilty plea) and John J. Bauercamper (sentencing), Judges.

A defendant appeals his guilty plea and sentence for the charge of distribution of a schedule I substance to a person under eighteen years of age. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Benjamin Jefferson III, Coralville, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, W. Wayne Saur, County Attorney, J.D. Villont, Assistant County Attorney, and Mary Triick, Student Legal Intern, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Defendant Benjamin Jefferson III, appeals from the guilty plea and sentencing to the charge of distribution of a schedule I substance to a person under eighteen years of age in violation of section 124.406(1)(a) (2011), a class B felony. A sentence not to exceed twenty-five years was imposed, but the mandatory minimum before parole eligibility was waived. Jefferson appeals.

I. Background Facts and Proceedings

R.S., age seventeen, and K.D, age sixteen, purchased marijuana from Jefferson and Jefferson's wife on June 28, 2011. After their disappointment with the quality of "the high" the marijuana produced, the teens attempted to return their purchase and get a refund the following day. A disagreement ensued and the police arrived after there was a report of a disturbance. R.S. fled the scene, throwing a baggy in the process. R.S. was apprehended and confirmed that the bag contained the bad marijuana he had purchased from Jefferson and his wife. The officers subsequently field tested the leafy substances in the bag and it field tested positive for containing marijuana. Jefferson and his wife were arrested.

On July 8, 2011, Jefferson was charged with two counts of distribution of a schedule I substance to a person under eighteen years of age in violation of Iowa Code sections 124.406(1)(a) and 124.406(3). Under a plea agreement, Jefferson pleaded guilty to one count of distributing to a minor. On October 17, 2011, the district court imposed a sentence not to exceed twenty-five years confinement with no mandatory minimum. The State dismissed the second count as well as the possible enhancement for being within one-thousand feet of park. Jefferson appeals.

II. Issue Preservation

"Generally our review of a challenge to the entry of a guilty plea is for correction of errors at law." *State v*. *Tate*, 710 N.W.2d 237, 239 (Iowa 2006) (citing *State v*. *Keene*, 630 N.W.2d 579, 581 (Iowa 2001)).

Iowa Rule of Criminal Procedure 2.8(2) governs pleas to the indictment or information, providing in pertinent part: "The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal." Iowa R. Crim. P. 2.8(2)(d). This rule is to be read in tandem with rule 2.24(3)(a) providing that "[a] defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal." Iowa R. Crim. P. 2.24(3)(a).

In determining whether the trial court has met the requirements of rule 2.8(2)(d) in guilty plea proceedings, we apply the standard of substantial compliance. *State v*. *Taylor*, 301 N.W.2d 692, 693 (Iowa 1981), (*citing State v*. *Fluhr*, 287 N.W.2d 857, 864 (Iowa 1980)). The determinative issue here is whether the court adequately informed defendant of the consequences of failing to timely file a motion in arrest of judgment. *State v*. *Burden*, 445 N.W.2d 395, 397 (Iowa Ct. App. 1989). We find the trial court substantially complied with rule 2.8(2)(d) and adequately informed defendant of the consequence of failing to challenge acceptance of his guilty plea. Consequently, defendant is barred under rule 2.24(3)(a) from attacking the trial court's acceptance of his guilty plea.

The following exchange took place at Jefferson's plea:

> THE COURT: . . . The most important thing that I need to tell you about is your right to file what's called a motion in arrest of judgment. That motion is a motion that you have to file within certain time guidelines if you want to attack the guilty plea that you entered here this morning. If you feel that I failed to advise you of something that I should have during the plea proceeding and that I did not, or that you did not understand something that happened during this plea proceeding, and you want to take back or withdraw your guilty plea, you have to do that by filing the motion in arrest of judgment.
>
> You must file that motion within forty-five days of today's date, but you also have to file it at least five days before your sentencing hearing if you want to attack the guilty plea that you entered here today. Do you understand the deadlines for filing that motion?
>
> THE DEFENDANT: Yes, ma'am.

From this exchange we find the district court substantially complied with the rule as the above colloquy is more akin to colloquies that have been accepted as compliant rather than those which have not. *Compare State v. Burden*, 445 N.W.2d 395, 397 (Iowa Ct. App. 1989)[1] (finding the colloquy sufficient) *with State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994)[2] (finding the colloquy insufficient). The district court informed Jefferson of his right to file a motion in arrest of

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[1] "THE COURT: Mr. Burden, I'm required by law to advise you that you have a right to file what is known as a motion in arrest of judgment, something in writing prepared by yourself or your attorney addressed to me as judge requesting that I set aside or invalidate your plea of guilty, asserting or alleging that you've been denied some statutory or constitutional right. Important to you is this. If you intend to file such a motion or have one filed for you, you must do so within five days prior to the date I set for sentencing or it is presumed in the law that you have waived that right. Do you understand that?" *State v. Burden*, 445 N.W.2d 395, 397 (Iowa Ct. App. 1989)

[2] "THE COURT: Sir, you have a right to file what's called a motion in arrest of judgment. That is, if you claim that these plea proceedings are illegal and that I have no right to sentence you, you can file what's called a motion in arrest of judgment, and, if granted, it would be ... as though no plea had been held or any-as if no proceedings had been held. If you wish to file a motion in arrest of judgment, it must be filed within forty-five days after this date or at least five days before the time set for sentencing... ."*State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994)

judgment, the timeframe in which it must be filed, and of the consequences of not filing. While the district court did not use the word "appeal" in its explanation, we find it sufficient that Jefferson was told in lay terminology and should have understood what he "[had] to file. . . if [he] want[ed] to attack the guilty plea. . . ." Therefore, Jefferson is precluded from challenging the proceeding on appeal. *State v*. *Worley*, 297 N.W.2d 368, 370 (Iowa 1980).

III. Ineffective Assistance

While a challenge to a guilty plea is normally reviewed for corrections of errors at law, when the challenge arises in the context of an ineffective-assistance claim, our standard of review is de novo. *State v*. *Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

Jefferson argues that his trial counsel was ineffective for failing to file a motion in arrest of judgment due to an alleged lack of factual basis for his guilty plea. Failure to file a motion in arrest of judgment does not bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *State v*. *Bearse*, 748 N.W.2d 211, 217 (Iowa 2008).

In order to succeed on a claim of ineffective assistance of counsel, Jefferson must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal. *State v*. *Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge. *Id.*

However, we depart from this preference in cases where the record is adequate to evaluate the appellant's claim. *Id.*

Jefferson claims the flaw in his guilty plea is that he pleaded guilty to distribution of a schedule I substance under Iowa Code section 124.406(1)(a) rather than section 124.406(2)(a) governing distribution of a "counterfeit substance" or a "simulated controlled substance represented to be a substance" classified in schedule I. The only difference between these two crimes is that with subsection (1)(a) (marijuana), there is a minimum term of confinement of five years, whereas with subsection (2)(a) ("counterfeit substance") there is no five year minimum. Iowa Code § 124.406(1)(a)-(2)(a).

Jefferson claims the record does not disclose a factual basis for a guilty plea for the marijuana subsection that was pleaded to, but rather the "counterfeit substance" subsection. If the defendant enters a guilty plea and the record fails to disclose a factual basis, defense counsel fails to provide effective assistance. *Keene*, 630 N.W.2d at 581. The record must disclose the factual basis relied upon but "the trial court may ascertain that a factual basis for a guilty plea exists by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony." *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975) (citations omitted). In determining the factual basis at the plea hearing, the following colloquy took place:

> THE COURT: Have you had a chance to review the minutes of testimony or the police reports that were attached to the trial information in this case?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And while you may not agree with every statement in those report or minuets of testimony, do you agree that for the most part they are accurate?

> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you have any objection to the court incorporating the minutes of testimony as part of the record of your plea to establish that there's a factual basis for your guilty plea?
>
> THE DEFENDANT: No, ma'am.
>
> ….
>
> THE COURT: On that date did you distribute some type of controlled substance to someone who was under the age of eighteen?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: What was that controlled substance?
>
> THE DEFENDANT: Marijuana?
>
> ….
>
> THE COURT: Does either counsel require additional factual basis for the guilty plea?
>
> COUNSEL FOR THE STATE: No, Your Honor.
>
> COUNSEL FOR THE DEFENDANT: No, Your Honor.

Jefferson now claims it was not marijuana he distributed, but rather "fake weed" and there therefore is no factual basis for the guilty plea. We disagree.

Schedule I substances include "any material, compound, mixture, or preparation, which contains any quantity of" marijuana. Iowa Code § 124.204(4)(m). Jefferson himself admitted in the colloquy with the court that the substance was marijuana. The minutes of testimony, which were incorporated to prove the factual basis, state that three law enforcement officers would testify that the substance in question was marijuana, including the officer who conducted NIK field identification tests on the substance, which gave a positive indication for the presence of marijuana. During the arrest, Jefferson also stated that the "weed was his wife's not his."

To support his contention that there was no factual basis, Jefferson claims the minutes of testimony reveal the substance distributed was actually simulated marijuana. To do so Jefferson cherry-picks testimony from the juveniles, particularly their claims that they were returning the substances because it was

"fake weed ('K2')," "shit weed," "possibly bad K2 because it did not get him high." It was not until the sentencing hearing in which the argument that it was simulated marijuana was raised to the court. This argument is contrary to the evidence from the minutes of testimony—that marijuana was found in the baggie sold to the minors—and the statements of Jefferson himself, admitting to having sold marijuana.

To establish a factual basis for a guilty plea to the charge of distribution of a schedule I substance to a person under eighteen years of age it must be established that (1) defendant was over the age of eighteen, (2) that he distributed or intended to distribute marijuana, and (3) that this distribution was to a person under the age of eighteen. Iowa Code § 124.406(1)(a). Facts supporting these three elements were made part of the record, through the direct words of the defendant as well as the minutes of testimony. There was no breach of duty nor deficient performance showing that "counsel's representation fell below an objective standard of reasonableness," and therefore we find no ineffective assistance of counsel. *Strickland*, 466 U.S.at 687. We therefore affirm.

AFFIRMED.