IN THE COURT OF APPEALS OF IOWA

No. 3-518 / 12-1692
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEAN MARTIN LOEW,
Defendant-Appellant.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

A defendant appeals his conviction for two counts of possession of a controlled substance. **AFFIRMED.**

Eric D. Puryear and Eric S. Mail of Puryear Law, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, and John C. Werden Jr., County Attorney, for appellee.

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

VOGEL, P.J.

The defendant, Dean Loew, appeals his conviction for two counts of possession of a controlled substance (second offense) in violation of Iowa Code section 124.401(5) (2011). He argues trial counsel was ineffective in failing to file a motion in arrest of judgment, allowing him to involuntarily plead guilty, and failing to cross-examine the four corners of the application for the search warrant and failing to object to its adequacy under Iowa Code section 808.3. Because we find Loew knowingly and intelligently pleaded guilty, we deny the claims related to his guilty plea. We also find the magistrate complied with Iowa Code section 808.3 in explaining why it found the informant was reliable. However, we find the record is insufficient to determine whether trial counsel sufficiently cross-examined the officer regarding the credibility of the informant, and we preserve that issue for possible postconviction relief.

I. Background Facts and Proceedings

Loew was arrested and charged by trial information on August 19, 2011, with one count of possessing methamphetamine and one count of possessing marijuana—both second offenses—after a search warrant was executed at his residence. After a November 2, 2011 contested hearing on a motion to suppress specifically regarding the identity and credibility of the confidential informant who provided information for the warrant, the district court denied Loew's motion. Loew filed another motion to suppress on April 23, 2012, arguing the City of Carroll officer who applied for the warrant exceeded his jurisdiction because Loew's home was in Carroll County but outside of the City of Carroll. This motion was also overruled. On August 3, 2012, a pretrial conference was held to

discuss multiple motions in limine. After the denial of many of Loew's motions, the court took a recess. Upon reconvening, the parties notified the court they had reached a plea agreement and Loew wanted to change his plea to guilty.

Loew submitted two written pleas of guilty, one for each count, and after a colloquy with the court ensuring the pleas were knowing and voluntary, the district court accepted the pleas. Lowe first informed the court he wished to be sentenced immediately and waive the fifteen-day waiting period and his right to file a motion in arrest of judgment. However, after a discussion with his attorney, he decided not to waive the waiting period and his right to move in arrest of judgment

On August 27, the court sentenced Loew in accordance with the plea agreement: an indeterminate term not to exceed two years in prison for each count, the terms to run consecutive, with all but two days suspended. On August 30, Loew's attorney filed a motion to appoint the State Appellate Defender as appellate counsel stating, "That immediately before the sentencing hearing convened, the Defendant expressed to the undersigned to appeal all aspects of the instant case." Loew appeals.

II. Standard of Review and Ineffective Assistance Principles

We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

Generally, failing to file a motion in arrest of judgment bars a direct appeal of a conviction. Iowa R. Crim. P. 2.24(3)(a). This failure will 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. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

A successful ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Bearse*, 748 N.W.2d at 214-15. In analyzing the first prong of the test, we presume counsel acted competently. *Id.* at 215. If a defendant wishes to have an ineffective-assistance claim resolved on direct appeal, the defendant will be required to establish an adequate record to allow the appellate court to address the issue. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If, however, the court determines the claim cannot be addressed on direct appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court's view of the potential viability of the claim. *Id.*

III. Guilty Plea

Loew argues he did not knowingly and voluntarily plead guilty because he was coerced into accepting a plea deal and he did not understand he would be forfeiting his right to appeal. The State argues Loew either failed to preserve his claim of a faulty plea by failing to file a motion in arrest of judgment, or waived the issue as framed as an ineffective-assistance-of-counsel claim because he failed to brief the issue. Reading Loew's brief in its entirety, it is clear Loew is challenging the effectiveness of his counsel at the plea proceeding. We will therefore address whether, on this record, Loew's plea was knowing and voluntary.

"If a plea is not intelligently and voluntarily made, the failure by counsel to file a motion in arrest of judgment to challenge the plea constitutes a breach of

an essential duty." *State v*. *Philo*, 697 N.W.2d 481, 488 (Iowa 2005). They very function of a plea colloquy is to determine whether the giving up of constitutional rights inherent in a plea is voluntary and intelligent. *See State v*. *Liddell*, 672 N.W.2d 805, 813 (Iowa 2003) (finding an in-court colloquy for waiving a jury trial is to be conducted to determine whether the waiver is knowing, voluntary, and intelligent). In order to ensure a guilty plea is voluntarily and intelligently made, the court must articulate the consequences of the plea to the defendant. *State v*. *Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

It is important to note Loew pleaded guilty to two aggravated misdemeanors, which have different requirements than felony pleas under Iowa Rule of Criminal Procedure 2.8(2)(d). *See State v*. *Meron*, 675 N.W.2d 537, 541 (Iowa 2004). In *State v*. *Barnes*, 652 N.W.2d 466, 468 (Iowa 2002), our supreme court determined it was unnecessary in misdemeanor cases for the trial court to actually engage in an in-court colloquy with a defendant so as to personally inform the defendant of the motion in arrest of judgment requirements. Instead, the court found a written waiver filed by a defendant that properly reflected knowledge of the requirements of rule 2.8(2)(d) was sufficient. *Barnes*, 652 N.W.2d at 468. However, two years later the court in *Meron* was clear to note while written forms are permissible in misdemeanor cases they do not diminish the necessity of some type of colloquy with the court, to ensure the integrity of the plea. *Meron*, 675 N.W.2d at 543.

First, Loew argues his plea was not voluntary because he was coerced by his attorney into accepting the plea agreement rather than going to trial. He claims he had a conversation with his attorney and his attorney allegedly told him

he had no strategy for commencing trial the next week and Loew had no choice but to plead guilty. It is this conversation Loew claims rendered his plea coerced and involuntary. The State suggests this issue cannot be addressed on direct appeal. We disagree.

The voluntary nature of the plea must be determined on the record by the trial court. *State v. Schultz*, 245 N.W.2d 316, 317 (Iowa 1976). Loew signed a detailed written waiver of rights and plea of guilty for each charge, specifically stating, "I understand my rights as explained above; I understand the consequences of my plea of guilty; I freely and voluntarily plead guilty to the crime charges; and authorize my attorney to present this written waiver of rights and guilty plea to the court." At the hearing the court inquired

> THE COURT: Did you sign each of those for the purpose of voluntarily entering a plea of guilty to counts I and II?
> LOEW: Yes, I did.
> THE COURT: These documents set forth the rights that you give up by pleading guilty. These are all the rights that you would have if you went to trial, did you understand all of the rights that you are giving up by pleading guilty?
> LOEW: Yes, I do.
> THE COURT: These documents also set forth the potential consequences of your plea or pleas, did you understand when you signed these all of those potential consequences of your pleas?
> LOEW: Yes, I do.
> THE COURT: Do you have any questions regarding your rights or the consequences of your pleas?
> LOEW: No, sir.
> THE COURT: There—and is it still your desire to plead guilty to Counts I and II of the trial information? Is it still your desire to plead guilty?
> LOEW: Yes, sir.

The record is clear Loew knowingly and voluntarily pleaded guilty. He had the opportunity when signing the written guilty pleas and when being questioned by the court to come forward with any alleged coercion. There is no indication of

coercion. To the contrary, the record supports Loew entered his pleas, as confirmed by the district court, both knowingly and voluntarily. His trial counsel was not ineffective.

IV. Application for Search Warrant

Loew next argues his attorney was ineffective for failing to cross-examine the four corners of the application for a search warrant and for failing to file a motion for interlocutory appeal after the motion to suppress was denied. His argument is only centered on the first motion to suppress regarding the confidential informant rather than the second jurisdictional motion. While we find Loew's brief not wholly in compliance with our rules of appellate procedure due to a lack of clear and concise arguments, we find these issues minimally presented for our review and will address them in turn.

A guilty plea waives all defenses and objections that are not intrinsic to the plea. *State v*. *Utter*, 803 N.W.2d 647, 651 (Iowa 2011).

> This means "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea . . . ."

Id. (quoting *Tollett v*. *Henderson*, 411 U.S. 258, 267 (1973)). "One way a defendant can intrinsically challenge the voluntary and intelligent nature of his or her guilty plea is to prove 'the advice he [or she] received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases.'" *Id.* (quoting *State v*. *Carroll*, 767 N.W.2d 638, 642 (Iowa 2009)).

While Loew does not continue his "knowing and voluntary argument" into this section of his brief, and he admitted "this appeal brief is constrained by the fact that Loew entered a guilty plea," he does argue had counsel adequately argued the motion to suppress and had it been sustained or filed an interlocutory appeal to the same end, he would not have entered his guilty pleas. Our supreme court has found this argument is "inherent" when a defendant alleges counsel was ineffective in failing to perform some action prior to the guilty plea. *Id.* at 652. We will therefore address its merits.

Regarding the first of these arguments, Loew claims trial counsel was ineffective by attacking the credibility of the informant rather than attacking the application itself. Specifically he argues the application is not in compliance with Iowa Code section 808.3. Because counsel has no duty to raise a meritless claim, we will dispose of this argument by addressing the merits of Loew's claim the "four corners of the application" were not in compliance with section 808.3, which provides in part:

> If the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given. The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant. The magistrate may in the magistrate's discretion require that a witness upon whom the applicant relies for information appear personally and be examined concerning the information.

Pursuant to Iowa Code section 808.3, a magistrate issuing a search warrant based on information provided by a confidential informant must make specific findings that the confidential informant is credible based on one of the following grounds: "(1) the informant has provided reliable information on previous

occasions; or (2) the informant or information appears credible for reasons specified by the magistrate." *State v*. *Myers*, 570 N.W.2d 70, 73 (Iowa 1997). "If the magistrate's findings fail to satisfy that requirement, the probable cause determination must be evaluated without reference to the information obtained from the confidential informant." *Id.* Our supreme court has found a lack of compliance with the statute where the magistrate failed in the endorsement to check either of the reasons for finding credibility or to give a narrative account regarding credibility. *State v*. *Iowa Dist. Ct*., 472 N.W.2d 621, 624-25 (Iowa 1991). The court has also held a magistrate sufficiently complied with the statute when it referenced an affidavit and its attachments as reasons for finding credibility. *State v*. *Swaim*, 412 N.W.2d 568, 574 (Iowa 1987). Here, the following reasons supporting the reliability of the informant were checked: the informant "is a mature individual," the informant "has no motivation to falsify information," the informant "has otherwise demonstrated truthfulness," and "the information provided is against the penal interest of the informant." This, in connection with the incorporation of the narrative provided by the officer, is sufficient compliance with section 808.3. Therefore, any challenge to the "four corners of the application" would have been without merit, rendering any claim counsel was ineffective for not raising such an argument also without merit.

The next argument Loew makes is that counsel did not adequately question the officer at the motion to suppress hearing. He argues "despite the glaring absence of corroborative information, Loew's attorney failed to ask any questions related to the veracity of information." We must preserve this issue for possible postconviction relief as the record before us is insufficient to determine

whether any further questioning would change the outcome. *See Straw*, 709 N.W.2d at 133. Regarding his claim trial counsel was ineffective for failing to file a motion for interlocutory appeal, we reject the argument to the extent it is based on the compliance with section 808.3 and preserve it to the extent it encapsulates the sufficiency of the cross-examination of the credibility of the informant.

V. Conclusion

Because we find Loew's guilty pleas were knowingly and voluntarily made, we deny his claims related to the guilty pleas. We also find the magistrate complied with Iowa Code section 808.3 in explaining why it found the informant was reliable. However, we find the record is insufficient to determine whether trial counsel sufficiently cross-examined the officer regarding the credibility of the informant, and we preserve that issue for possible postconviction relief.

AFFIRMED.