IN THE COURT OF APPEALS OF IOWA

No. 6-096 / 04-1755
Filed April 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN ARLO MARLENEE,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

Kevin Marlenee appeals from his conviction and sentence following the entry of his guilty plea to the charge of operating while intoxicated, second offense. **AFFIRMED.**

James V. McKinney of McKinney Law Offices, P.C., Waukee, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Steve Johnson, County Attorney, and Michael K. Jacobson, Assistant County Attorney, for appellee-State.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

Kevin Marlenee appeals from his conviction and sentence following the entry of his guilty plea to the charge of operating while intoxicated, second offense. We now affirm.

I. Background Facts and Proceedings.

On the morning of July 26, 2003, Kevin Marlenee was detained on suspicion of operating his vehicle while intoxicated. Upon approaching Marlenee's vehicle, the detaining officer noticed the odor of alcohol on Marlenee's breath and observed Marlenee's bloodshot eyes and slurred speech. Marlenee failed field sobriety tests and was placed under arrest. Charlotte Peterson was contacted on Marlenee's request to come to the scene of the arrest to retrieve a dog that was in Marlenee's vehicle. Upon her arrival, Peterson informed the arresting officer that Marlenee had been drinking since 6:00 a.m. that morning, and had found his keys despite Peterson's best efforts to hide them. A breath test evidenced Marlenee had a blood alcohol content of .153%.

Marlenee was charged with operating while intoxicated, second offense. Following plea negotiations with the State, Marlenee executed a written guilty plea wherein he (1) acknowledged the trial rights he was waiving, (2) noted he understood the district court retained the discretion to sentence him to the maximum allowable punishment, and (3) admitted a factual basis for the crime charged. The written guilty plea also informed Marlenee of the requirement that a motion in arrest of judgment must be filed no later than five days before sentencing if he wished to preserve any challenge to the plea proceedings.

A plea hearing before the district court was held on September 14, 2004. Marlenee acknowledged he understood (1) the rights he was waiving by choosing to plead guilty, (2) the range of penalties he would face, and (3) the plea agreement was not contingent on the district court's agreement and that the court was free to deviate from the sentence recommended by the parties. Marlenee then established a factual basis for the crime to which he was pleading guilty, and the district court accepted the plea. Marlenee never filed a motion in arrest of judgment.

The matter proceeded to sentencing on October 6, 2004. Pursuant to the plea agreement, the State recommended a thirty-day jail sentence and the minimum fine of $1500. The State also informed the district court of Marlenee's extensive criminal driving record, including six prior drunk driving convictions. The district court rejected the recommendations made by the State and instead sentenced Marlenee to two years imprisonment with all but six months suspended. Marlenee was ordered to complete two years probation and pay the minimum fine of $1500.

Marlenee now appeals contending (1) the district court abused its discretion by rejecting the plea agreement without giving Marlenee the opportunity to withdraw his guilty plea, and (2) his guilty plea was not knowingly and voluntarily entered because the district court failed to engage in a sufficient in-court colloquy. Marlenee also alleges plea counsel was ineffective in (1) failing to object to the district court's deviation from the plea agreement, (2) failing to require a sufficient in-court colloquy, and (3) failing to disclose the details of the plea agreement with Marlenee.

II. Scope and Standard of Review.

Normally, our review of a challenge to the entry of a guilty plea is for corrections of errors at law. *State v. Keene,* 630 N.W.2d 579, 581 (Iowa 2001). However, where the ineffectiveness of counsel is alleged in connection with the entry of the guilty plea, we perform de novo review of the entire record. *Ledezma v. State,* 626 N.W.2d 134, 142 (Iowa 2001). Claims of ineffective assistance of counsel raised on direct appeal are generally preserved for postconviction relief proceedings so that a sufficient record can be developed, and so attorneys whose ineffectiveness is alleged may have an opportunity to defend their actions. *State v. Allen,* 348 N.W.2d 243, 248 (Iowa 1984). We note claims of ineffective assistance of counsel need not be raised on direct appeal to preserve them for postconviction proceedings. Iowa Code § 814.7 (2005). But where such claims are advanced on direct appeal, and the record is adequate to permit our review of them, or where the record permits us to determine whether prejudice resulted from counsel's alleged unprofessional error, we may decide them on direct appeal. *Allen,* 348 N.W.2d at 248.

III. Discussion.

A. Contingent Plea Agreement.

We begin by addressing Marlenee's claim that the district court abused its discretion by sentencing Marlenee to a term of incarceration greater than that which was contemplated by the plea agreement. We find this claim to be completely without merit. Through his written guilty plea, Marlenee acknowledged that "[t]he court does not have to follow any plea bargain. The court may sentence me up to the maximum provided by law." At the plea

hearing, the district court again explained its discretion to reject the sentencing recommendations of the parties at the subsequent sentencing hearing. The district court gave Marlenee the opportunity to withdraw his guilty plea at that time, but Marlenee expressly declined the invitation. As such, we believe the district court fully complied with the requirements of Iowa Rule of Criminal Procedure 2.10(4), and therefore did not commit an abuse of discretion.

B. Knowing and Intelligent Waiver of the Right to Trial.

Moving to Marlenee's second claimed error at law committed by the district court, we do not believe the district court failed to adequately inform Marlenee of the waiver of his trial rights and the other consequences attendant to a guilty plea. Iowa Code section 321J.2(2)(b) (2003) defines the offense of operating while intoxicated, second offense, as an aggravated misdemeanor. With the defendant's approval, the district court may forego a full in-court colloquy where the defendant is pleading guilty to a serious or aggravated misdemeanor. Iowa R. Crim. P. 2.8(2)(*b*)(5). Moreover, where the oral colloquy required by rule 2.8 sufficiently compliments the information contained in the written guilty plea, substantial compliance with rule 2.8 will be found. *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990).

We note that every requirement contained in rule 2.8 was explained to Marlenee and acknowledged by him in the written guilty plea. We further note that Marlenee's understanding of these consequences of his guilty plea was verified by the court during its abbreviated in-court colloquy. The written guilty plea included an explicit reference to the requirement of filing a motion in arrest of judgment in order to preserve any challenge to the guilty plea process, and we

conclude Marlenee was thus made sufficiently aware of this requirement. *See State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002) (stating "defendants charged with serious or aggravated misdemeanors may enter into a valid written waiver of the right to file a motion in arrest of judgment and thus trigger the bar that [Iowa R. Crim. P.] 2.24(3)(*a*) imposes to challenging a guilty plea on appeal").

Marlenee, however, contends that neither the written guilty plea nor any direct question posed by the district court during the colloquy probed whether "defendant's willingness to plead guilty results from prior discussions between the attorney for the state and the defendant or the defendant's attorney." Iowa R. Crim. P. 2.8(2)(*c*). We disagree. The district court was clearly aware that plea negotiations had occurred between the prosecutor and Marlenee. The district court asked the parties whether they had reached a plea agreement, and the prosecutor divulged on the record the details of the State's recommendations for sentence. The district court reviewed Marlenee's written statement indicating that his decision was freely formed. At the plea hearing, the district court probed the voluntariness of Marlenee's decision, and Marlenee indicated that he desired to plead guilty. In short, we believe the contents of the written guilty plea, taken in conjunction with the district court's plea hearing colloquy with Marlenee, demonstrate substantial compliance with the requirements of rule 2.8. *Kirchoff*, 452 N.W.2d at 805. We therefore conclude Marlenee executed a voluntary, knowing, and intelligent waiver of his right to trial.

C. Ineffective Assistance.

Finally, we address Marlenee's claims that plea counsel rendered ineffective assistance. In order to prevail on his claim of ineffective assistance of

counsel, Marlenee must demonstrate plea counsel's failure to perform an essential duty resulted in prejudice. *State v. Miller,* 590 N .W.2d 724, 725 (Iowa 1999). If either prong of an ineffective assistance of counsel claim is not met by the defendant, we may dispose of the claim. *State v. Query,* 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Where counsel's alleged breach of an essential duty calls into question the validity of a guilty plea, the defendant claiming ineffective assistance of counsel must prove that but for counsel's breach, there is a reasonable probability the defendant would not have plead guilty but for counsel's ineffective assistance and would have instead insisted on going to trial. *State v. Myers,* 653 N.W.2d 574, 578-79 (Iowa 2002). Self-serving statements indicating a desire to await trial are alone insufficient to meet this prejudice standard. *Id.* Rather we look for objective evidence of that desire consisting of some showing by Marlenee that he would have been better off to reject the plea offer and proceed to trial, based on either a defense waived or the vulnerability of the State's case against him. *United States v. Gordon,* 156 F.3d 376, 380-81 (2nd Cir. 1998).

Having reviewed the record and the elements of the crime charged, we conclude the evidence that would have been offered at trial in support of Marlenee's guilt is overwhelming. It is undisputed that Marlenee was operating a vehicle on a public highway at the time he was detained. The detaining officer observed the smell of alcohol on Marlenee's breath, and Marlenee failed each field sobriety test administered by the officer. Finally, the results of his breath test showed that he had been operating his vehicle while maintaining a blood alcohol content of over .15%. Thus, we believe Marlenee is unable to show by

objective evidence a reasonable probability he would have chosen to go to trial but for plea counsel's claimed breach of duty, and has thus, in our view, failed to establish the requisite prejudice. We therefore affirm Marlenee's conviction and sentence for the crime of operating while intoxicated, second offense.

AFFIRMED.