IN THE COURT OF APPEALS OF IOWA

No. 8-350 / 06-1680
Filed May 29, 2008

MORRIS D. BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Applicant appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Michael E. Motto of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews and Mary Tabor, Assistant Attorneys General, and Michael J. Walton, County Attorney, for appellee State.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Morris Brown appeals following the district court's denial of his application for postconviction relief. He claims his guilty plea was procured by undue influence and coercion due to the State's conditional plea agreement. He further claims his trial counsel provided ineffective assistance in not filing a motion in arrest of judgment and in coercing him to plead guilty despite his declarations of innocence. We affirm the judgment of the district court.

In September 2002 Brown and six other individuals were charged in a joint trial information with first-degree murder in violation of Iowa Code section 707.2(1), (2), and (5) (2001); willful injury in violation of section 708.4(1); and terrorism with intent in violation of section 708.6 for the July 21, 2002 death of nine-year-old Deanna Shipp. The trial information alleged that the seven defendants, traveling in two different cars, fired gun shots into a crowd of people at a wedding reception in an attempt to kill Albert Miller. The shooting instead resulted in the death of Shipp.

Brown and two other defendants, Jamail Jalloh and Gary Marshall, were given a trial separate from the remaining defendants, Bryan Shuford, Demont Moore, Montez Lewis, and Merrill Howard. After a lengthy period of discovery, Brown's attorney, along with counsel for Jalloh and Marshall, proposed a plea agreement to the State whereby those three defendants would plead guilty to attempted murder in violation of section 707.11, and the State would dismiss the remaining charges against them. The State agreed to counsels' proposal, but informed them that "if he was going to have a trial, he was going to try it for all

three [defendants], or all three would have to take the deal." Brown, Jalloh, and Marshall agreed to the terms of the plea offer.

Brown pled guilty to attempted murder on January 14, 2003. The trial court accepted his guilty plea after conducting an in-court colloquy with him pursuant to Iowa Rule of Criminal Procedure 2.8(2)(*b*) and (*c*). The court also informed Brown that a motion in arrest of judgment must be timely filed in order to challenge the plea proceedings. Brown did not file a motion in arrest of judgment, and he was sentenced to twenty-five years in prison. He filed a direct appeal, which he later voluntarily dismissed.

Brown then filed an application for postconviction relief, which was amended to allege that trial counsel was ineffective in not filing a motion in arrest of judgment "in the face of [Brown's] assertion of innocence" and in coercing him to plead guilty. Following a hearing, the district court entered a ruling denying the application for postconviction relief. Brown appeals.

Postconviction proceedings are generally reviewed for correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises issues of constitutional dimension, such as ineffective assistance of counsel, our review is de novo. *Id.*

Brown's first claim on appeal is that his guilty plea was not voluntary because of the "all or nothing" plea agreement. The crux of his argument is that a plea agreement that was contingent upon some of his codefendants accepting the same agreement placed undue influence on him to plead guilty.[1] We agree

[1] Brown, Marshall, Jalloh, Moore, and Lewis each pled guilty to the attempted murder of Miller, and they were each sentenced to twenty-five years in prison. Howard pled guilty

with the State that error has not been preserved on this issue. After Brown pled guilty, he did not file a motion in arrest of judgment, and he voluntarily withdrew his direct appeal. In addition, it does not appear that this claim was briefed or ruled upon by the district court in the postconviction relief proceedings, and Brown did not ask the postconviction court to enlarge or expand its findings and rulings following trial. "Our error preservation rule 'requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.'" *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (citation omitted). We therefore need not and do not address this claim on appeal.

Brown next claims his trial counsel was ineffective in not filing a motion in arrest of judgment "in the face of [his] assertion of innocence" and in coercing him to plead guilty. In order to challenge a guilty-plea proceeding on appeal, a defendant must file a motion in arrest of judgment. Iowa R. Crim. P. 2.24(3)(*a*); *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001). Brown did not file a motion in arrest of judgment challenging the adequacy of his plea proceeding. However, a defendant's failure to file a motion in arrest of judgment does not bar a challenge to the guilty plea if, as here, the defendant alleges the failure resulted from ineffective assistance of counsel. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

In order to succeed on his ineffective-assistance-of-counsel claims, Brown must prove by a preponderance of evidence that: (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S.

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to the second-degree murder of Shipp and was sentenced to fifty years in prison. Shuford was found guilty by a jury of second-degree murder, willful injury, and intimidation with a dangerous weapon and sentenced to a total of sixty years in prison.

668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d at 142.

In support of his first ineffective-assistance-of-counsel claim, Brown argues his trial counsel should have filed a motion in arrest of judgment or motion to withdraw his guilty plea because he "had always maintained his innocence"; thus, his counsel allowed him to "plead guilty to a charge when [he] knew that no factual basis existed for such a plea." In Iowa, a defendant may not plead guilty to a crime he did not commit. *See Straw*, 709 N.W.2d at 137 n.4. Therefore, a factual basis for the crime to which the defendant is pleading guilty must always be demonstrated by the record, which includes the minutes of testimony, statements by the defendant and the prosecutor at the plea proceeding, and the presentence investigation report. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). Where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Prior to entering his guilty plea to the crime of attempted murder, Brown filed an affidavit setting forth the factual basis for his plea.[2] *See State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005) (stating defendant's admission on record of fact supporting an element of an offense is sufficient to provide a factual basis for that element). The court confirmed those facts with Brown during the plea proceeding and determined "based on the minutes of evidence, the statements of the defendant, and statements of counsel, that there is a factual basis to support"

[2] He admitted in the affidavit that "Albert Earl Miller was the intended victim of the assault. It was the joint intent of all the participants in both cars to assault [him]."

the plea.[3] We likewise find the record reveals a factual basis for Brown's plea despite his self-serving testimony at the postconviction hearing that he did not commit the crime to which he pled guilty. *See Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991) (stating a postconviction court is not required to believe recantation testimony, which "is looked upon with the utmost suspicion"). We therefore conclude counsel did not breach a duty owed to Brown by not filing a motion in arrest of judgment. *Keene*, 630 N.W.2d at 583.

We also reject Brown's claim that his counsel coerced him into pleading guilty to a crime he did not commit, thereby rendering his plea involuntary. We find no evidence of coercion upon our de novo review of the record. In the affidavit Brown filed prior to pleading guilty, he stated he was entering into the plea "by my own free will and not b[y] coercion by my attorney or anyone else." At the plea proceeding, the trial court asked Brown, "Have there been any threats or promises made to get you to plead guilty other than what's contained in the plea agreement?" Brown answered, "No." Trial counsel also asked him, "And is it also true that it's your decision here by your own free will that you're pleading

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[3] The court examined the affidavit at the plea proceeding and questioned Brown as to whether it was true that

> on July 21, 2002, you and the codefendants got together and got in a couple of cars, that a number of those individuals had firearms, and that it was the intent of one or more of those individuals to kill Mr. Miller. . . . Ultimately you did find Mr. Miller . . . in a crowd of people . . . and one or more of you ended up discharging those firearms at Mr. Miller, and all that resulted in the death of Deanna Shipp.

Brown stated the court's version of events was true. The presentence investigation report contained the same factual basis outlined in Brown's affidavit and by the court at the plea proceeding. In addition, the minutes of testimony revealed that Brown's codefendants and independent witnesses would implicate him in the search for Miller and subsequent shooting. *See State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004) (setting forth elements required to prove defendant guilty of attempted murder); *see also State v. Smith*, 739 N.W.2d 289, 293-94 (Iowa 2007) (defining theories of aiding and abetting and joint criminal conduct).

guilty . . . , and that neither I nor the County Attorney has forced you to do this under coercion or duress?" Brown answered, "Yes, that is true." Based on this record, we find Brown did not establish that his attorney provided ineffective assistance by coercing him to plead guilty. *See State v. Speed*, 573 N.W.2d 594, 596-97 (Iowa 1998) (rejecting claim of attorney coercion based on record made at plea proceeding).

We conclude Brown did not preserve error on the claim that his guilty plea was not voluntary because the "all or nothing" conditional plea agreement placed undue influence on him to plead guilty. We further conclude Brown's ineffective-assistance-of-counsel claims are without merit. The judgment of the district court is accordingly affirmed.

AFFIRMED.