IN THE COURT OF APPEALS OF IOWA

No. 9-1040 / 09-0138
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TODD EVERETTE JENKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt, District Associate Judge.

Todd Everette Jenkins appeals his conviction and sentence entered on a plea of guilty to operating while intoxicated, second offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Matthew McKinney, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Todd Everette Jenkins appeals his conviction and sentence entered on a guilty plea for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2007). Jenkins contends his plea proceeding was defective because the district court failed to inquire into the possible existence and terms of a plea agreement and because his plea lacked a factual basis. For the reasons set forth herein, we affirm.

I. Background Facts and Proceedings.

According to the minutes of testimony, early on the evening of May 6, 2008, Des Moines Police Officer J. Walburn saw a Chevrolet Suburban pass him on the right going at a high rate of speed. Walburn saw Jenkins make several improper lane changes, forcing another driver to brake abruptly in order to avoid being hit. Walburn also saw Jenkins run a red light. As Jenkins was being pulled over, his car struck and went over the street curb. Jenkins seemed disoriented. Jenkins then falsely identified himself as "Joseph" Jenkins, gave a false birth date, and claimed he had no identification. Walburn could smell the odor of an alcoholic beverage, noticed Jenkins had bloodshot and watery eyes, and also observed an open container of beer. Jenkins admitted to having consumed three quarts of beer that day. Another officer administered field sobriety tests that Jenkins failed. Jenkins was arrested. After making several phone calls from jail, Jenkins ultimately refused the chemical test. Jenkins, who had prior OWIs in 1994 and 1998 (twice), was charged with operating while intoxicated, third offense.

On June 2, 2008, Jenkins received a formal written offer to plead to the OWI third offense charge. The offer stated that it was deemed rejected if not accepted by the first pretrial conference. At the July 24, 2008 pretrial conference, the parties indicated that plea avenues had been exhausted. Thus, a prior August 18, 2008 trial date was reaffirmed. Jenkins failed to appear on August 18, a warrant was issued for his arrest, and the court date was continued to August 25.

On August 25, Jenkins filed a petition to plead guilty to OWI, second offense. In his signed petition, he wrote, "I drove a vehicle in Polk County while under the influence of alcohol. I had a prior in 2/1998." A plea hearing was held, but it was not reported because Jenkins waived this right in writing. At the hearing, the district court accepted Jenkins's plea. Subsequently, Jenkins was sentenced to a term of imprisonment not to exceed two years. Jenkins appeals. He contends his guilty plea should be set aside because (1) the district court failed to inquire as to the existence and terms of a plea agreement and (2) his plea lacked a factual basis.

II. Standard of Review.

Our review of a claim of error in a guilty plea proceeding is at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004).

III. Analysis.

Jenkins's first argument is that the district court failed to comply with Iowa Rule of Criminal Procedure 2.8(2)(*c*), which provides:

> *Inquiry regarding plea agreement.* The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the attorney for the state and the

> defendant or the defendant's attorney. The terms of any plea agreement shall be disclosed of record as provided in rule 2.10(2).

Jenkins concedes that only substantial compliance with rule 2.8(2)(*c*) is required, *see State v. Myers*, 653 N.W.2d 574, 577-78 (Iowa 2002) (discussing substantial compliance standard for rule 2.8(2)(*b*)), but argues that this case involves a total lack of compliance. The State, however, points out that there is no transcript of the guilty plea colloquy because Jenkins waived the presence of a court reporter. Thus, we do not know whether the court inquired into plea discussions or not. The State urges us to follow cases like *State v. Alloway*, 707 N.W.2d 582, 586 (Iowa 2006), where the supreme court held that a criminal defendant who waives transcription of the proceedings must utilize another method of producing a record to the extent one is available. As the court put it, "[W]e will not permit a defendant to raise an issue without attempting to give us a record upon which we can decide the issue." *Id*.

We agree with the State's position. Under Iowa Rule of Appellate Procedure 6.806, Jenkins could have prepared a statement of the proceedings. He did not. Thus, in our view, he has waived the right to complain about the adequacy of the guilty plea colloquy. Jenkins responds that *Alloway* was a sentencing case and that a different rule should apply to guilty plea proceedings. However, we do not read *Alloway* so narrowly. In our view, its guiding rationale, i.e., that a defendant cannot "raise an issue without attempting to give us a record upon which we can decide the issue," applies equally to guilty plea proceedings. Rule 6.806 does not contain an exclusion for guilty plea

proceedings, and it is not apparent to us why it should be inapplicable when a defendant challenges his or her guilty plea on appeal.

Jenkins, in effect, wants us to adopt a blanket rule that transcription of a guilty plea hearing cannot be waived. We decline Jenkins's invitation in the absence of some legal authority or other compelling reason to accept it. In short, we hold Jenkins's failure to provide a record to us precludes him from challenging his guilty plea on direct appeal for an alleged noncompliance with rule 2.8(2)(*c*). To the extent Jenkins wants to attack his guilty plea on this basis, he will have to do so in a postconviction relief proceeding.[1]

Jenkins's second argument is that his plea to OWI second lacked a factual basis. *See* Iowa R. Crim. P. 2.8(2)(*b*) ("The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.") Given the incomplete record that we have already noted, we could find this issue waived for direct appeal purposes. However, we elect instead to reach this issue because a factual basis for the plea is apparent even on this limited record. The record shows Jenkins was driving dangerously and erratically, tried to conceal his identity when stopped, had an open container in his car, admitted to having

[1] It should also be noted that Jenkins failed to file a motion in arrest of judgment. This would ordinarily preclude any challenge to his guilty plea, except on a claim of ineffective assistance of counsel. However, in *Meron*, 675 N.W.2d at 541, our supreme court reiterated that where a defendant was not informed (1) that any challenges to the guilty plea must be raised in a motion in arrest of judgment, and (2) that failure to so raise such challenges shall preclude the right to raise them on appeal, this procedural bar would be eliminated. Jenkins correctly points out that the written plea form he signed did not contain these precise disclosures. But again, there is no transcript of the guilty plea colloquy. In any event, since we determine that Jenkins's failure to provide a record for us to review prevents him from raising the district court's alleged noncompliance with rule 2.8(2)(*c*) on direct appeal, we need not go any further in analyzing the significance of his failure to file a motion in arrest of judgment.

consumed substantial quantities of beer earlier in the day, had watery and bloodshot eyes, was disoriented, and later signed a statement that he had been driving under the influence of alcohol. This is more than enough to conclude that the plea had a sufficient factual basis. *See State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (holding that the district court "must only be satisfied that the facts support the crime, 'not necessarily that the defendant is guilty'") (quoting 1A Charles Alan Wright, *Federal Practice and Procedure* § 174, at 199 (1999)).

For the foregoing reasons, we affirm Jenkins's conviction and sentence.

AFFIRMED.