IN THE COURT OF APPEALS OF IOWA

No. 1-557 / 11-0240
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GAILARD LEROY CLARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn, District Associate Judge.

Gailard Clark appeals the district court's order accepting his guilty plea and the court's sentencing decision. **AFFIRMED.**

Robert E. Peterson, Carroll, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Stephen Holmes, County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, J.

TABOR, J.

Gailard Leroy Clark pleaded guilty to second-offense operating while intoxicated (OWI), an aggravated misdemeanor. In his written plea, Clark admitted to having a prior OWI conviction. On appeal, Clark challenges the court's reliance on his admission and argues that the court erred by failing to conduct a personal colloquy and by failing to require the State to provide a certified record of his prior conviction. Clark next contends the court considered impermissible factors in sentencing him to an indeterminate two-year term. He also attacks the performance of his counsel.

Because Clark did not deny he was the person previously convicted, the district court properly accepted his written guilty plea to the enhanced offense without an in-person colloquy or additional documentation. Clark also fails to show that the court considered improper factors in sentencing him. Finally, we preserve some of Clark's claims of ineffective assistance for postconviction proceedings and reject others on this record.

I. Background Facts and Proceedings

In the early morning hours of September 6, 2010, Story County officers followed Clark after hearing him squeal the tires of his Dodge Dakota truck while leaving the Tip Top Lounge on Lincoln Highway. Clark drove erratically and exceeded the speed limit before officers stopped his truck. During the traffic stop, Clark failed field sobriety tests and police noticed an open beer can in his truck's cup holder.

The State filed a trial information on September 23, 2010, charging Clark with four counts: (Count I) OWI, second offense; (Count II) driving while barred; and (Counts III and IV) driving while revoked. The minutes of evidence accompanying the trial information stated that the prosecution expected to call the clerk of court to testify that Clark was previously convicted of OWI, third offense, on January 11, 1999, in Story County.

Pursuant to a plea agreement, on January 13, 2011, Clark filed a written guilty plea to OWI, second offense, in violation of Iowa Code section 321J.2 (2009). The State dismissed the remaining three counts. The court accepted Clark's plea by order and held a sentencing hearing on February 9, 2011. The court sentenced Clark to a term of imprisonment not to exceed two years and ordered him to pay a fine of $1876. Clark now appeals the acceptance of his guilty plea and the court's sentencing decision.

II. Scope and Standards of Review

We review challenges to a guilty plea proceeding for correction of legal error. *See* Iowa R. App. P. 6.907; *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004). Our courts require only substantial compliance with Iowa Rule of Criminal Procedure 2.8(2)(*b*). *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990) (stating a defendant "will not be allowed to plead anew merely because he was informed of the matters listed in rule 8(2)(*b*) in writing instead of orally"); *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995). "Substantial compliance is met unless the court's disregard for the requirements of rule

2.8(2)(*b*) raises doubts as to the voluntariness of the plea." *Yarborough*, 536 N.W.2d at 496.

We likewise review sentencing claims for errors at law. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). We will order resentencing if the defendant "demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the . . . consideration of impermissible factors." *Id.* The use of an impermissible sentencing factor is viewed as an abuse of discretion and requires resentencing. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

We review claims of ineffective assistance de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Analysis

A. Error Preservation

The State claims Clark failed to preserve error because he did not file a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 2.24(3)(*a*). To preserve error, a person wishing to appeal the adequacy of a guilty plea must first move in arrest of judgment. Iowa R. Crim. P. 2.24(3)(*a*) ("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."). But this requirement does not apply if a defendant was not advised that (1) challenges to a guilty plea based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment, and (2) failure to do so precludes the right to assert such challenges on appeal. Iowa R. Crim. P. 2.8(2)(*d*); *Meron*, 675 N.W.2d at 540.

A defendant charged with a serious or aggravated misdemeanor may enter into a valid, written waiver of the right to file a motion in arrest of judgment and thus trigger the rule 2.24(3)(*a*) bar to challenging a guilty plea on appeal. *State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002). A written waiver must properly reflect knowledge of both requirements of rule 2.8(2)(*d*). *See id*. When a written waiver suffices, the court need not conduct an in-court colloquy with the defendant to personally inform the defendant of the motion in arrest of judgment requirements. *Id*.

Although the court did not conduct an in-court colloquy with the defendant, Clark's written guilty plea included a waiver of his right to file a motion in arrest of judgment. We examine Clark's plea to determine if it conformed with the requirements of rule 2.8(2)(*d*) and triggered the rule 2.24(3)(*a*) bar. Clark's guilty plea states

> I have also been informed that I have a right to file a motion in arrest of judgment. I understand that if I want to challenge the validity of my guilty plea I must do so by filing a motion in arrest of judgment not later than 45 days after plea of guilty . . . upon which a judgment of conviction may be rendered, but in any case not later than five days before the date set for pronouncing judgment. With full knowledge of my right to have fifteen days between guilty plea and sentencing and my right to file a motion in arrest of judgment, I waive these rights and request that the Court proceed directly to sentencing upon acceptance of my guilty plea.

Conspicuously missing from Clark's written guilty plea language is the recognition that his failure to file a motion in arrest of judgment will preclude him from challenging his guilty plea on appeal. Because Clark's written waiver did not comply with the second requirement of rule 2.8(2)(*d*), he is not precluded from challenging his guilty plea on appeal. *Meron*, 675 N.W.2d at 541.

B. Acceptance of Guilty Plea

Clark argues on appeal that the district court erred in accepting his guilty plea to OWI, second offense, without conducting a separate colloquy regarding his prior OWI conviction. Clark also asserts the court should have required the State to introduce a certified record of his prior conviction and to establish that Clark was represented by counsel when he was previously convicted.[1] The State counters that because the district court may rely upon a defendant's waiver of an in-court plea colloquy for serious or aggravated misdemeanor offenses under Iowa Rule of Criminal Procedure 2.8(2)(*b*), the court may also rely on a defendant's admission in a written guilty plea that he was previously convicted of OWI.

We find the State's position more persuasive. If a factual basis for the substantive elements of a non-felony offense may be established in a written plea, then the fact of a prior conviction for enhancement purposes may also be established in a written plea. Subparagraph (5) of rule 2.8(2)(*b*) is designed to foster a written plea process in the prosecution of serious and aggravated misdemeanors. *Barnes*, 652 N.W.2d at 468. The more streamlined process allowed for misdemeanor pleas would be unduly restricted if the district court were required to engage in a personal colloquy concerning prior convictions. *Cf.*

[1] For this proposition, Clark relies on *State v. Tovar*, 656 N.W.2d 112 (Iowa 2003), without recognizing that the Iowa Supreme Court's decision was reversed and remanded in *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).

id. (approving written waiver of right to file motion in arrest of judgment in misdemeanor cases).

In this case, Clark filed a written guilty plea that complied with the requirements of 2.8(2)(*b*) and admitted a prior conviction. Clark's guilty plea states, in pertinent part:

> I have been informed by my attorney that there are three elements of the offense of Operating While Intoxicated, 2nd offense, which the State would have to prove by evidence beyond a reasonable doubt: . . . 3. That within the last twelve (12) years I have a previous conviction for OWI in the State of Iowa.
>
> . . . .
>
> I state that on September 6, 2010, in Story County, Iowa, I operated a motor vehicle and that at the time of said operation my blood alcohol level exceeded .08 (wt./vl.) I further state that I have a previous conviction for OWI within the last twelve years.

As permitted by rule 2.8(2)(*b*), subparagraph 5, which states "[t]he court may, in its discretion and with the approval of the defendant, waive the [guilty plea] procedures in a plea of guilty to a serious or aggravated misdemeanor," the court did not conduct a colloquy with Clark.

Clark contends there was "clear confusion" regarding his prior convictions and that this confusion required a colloquy to ensure his plea was voluntary and intelligent. On appeal, Clark asserts: "There was no record of another OWI conviction in the state of Iowa within the past twelve years." Clark's driving record indicates his most recent Iowa OWI conviction occurred on January 11, 1999. Clark filed his guilty plea on January 13, 2011, twelve years and two days after his previous Iowa OWI conviction.

But the pertinent date for determining whether the court may use a prior OWI conviction for enhancement of the current charge is not the date on which a

defendant files a guilty plea. Rather, if a defendant is *arrested* for an OWI offense within twelve years of a prior OWI conviction, the court may use the prior conviction to enhance the current sentence. *State v. Plowman*, 757 N.W.2d 684, 687 (Iowa Ct. App. 2008) (holding that the court could use a defendant's prior conviction on December 7, 1993, for enhancement of the current offense when the defendant was arrested on December 7, 2005). At the time Clark was arrested on September 6, 2010, his prior Iowa conviction from January 11, 1999, had not yet been deleted from his record. The minutes of evidence reflected that the Story County clerk would testify to this fact. A court may ascertain a factual basis for a plea by reference to the minutes of evidence. *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975). Therefore, Clark's guilty plea admission was accurate and the court properly allowed Clark's Iowa conviction to serve as the basis for the enhancement to OWI, second offense.[2]

Clark's argument overlooks the distinction between a guilty plea in which the defendant admits to being the person previously convicted of an offense and a separate trial on prior convictions where the defendant denies being the person previously convicted of an offense alleged for enhancement purposes.

The rule pertaining to prior convictions in the trial context states:

> [T]he offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a

[2] When discussing licensing consequences at the sentencing hearing, the court noted an additional Minnesota OWI conviction from 2008. Because Clark acknowledged the previous Iowa conviction in his guilty plea, and it is within the twelve-year look-back period, we do not need to consider whether the Minnesota statute substantially corresponded to Iowa Code section 321J.2.

> trial before a jury on the issue of the offender's identity with the person previously convicted.

Iowa R. Crim. P. 2.19(9). This rule only requires the introduction of certified records of prior convictions and proof that the defendant was represented by counsel when the offender does not admit to the prior conviction. *See State v. Kukowski*, 704 N.W.2d 687, 691–92 (Iowa 2005) (noting that "if the defendant affirms the validity of the prior convictions, then the case proceeds to sentencing"). But in *Kukowski*, our supreme court cautioned that even a defendant's affirmative response under rule 2.19(9) "does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender." *Id.* at 692. In that context, before sentencing, a court has a duty to conduct a further inquiry—similar to the colloquy required under rule 2.8(2)—to be sure that the affirmation is voluntary and intelligent. *Id*.

In this case, Clark waived his right to appear personally and in open court. Clark's written guilty plea indicated he knew the maximum and mandatory minimum penalties for OWI second. He also acknowledged his right to have a trial. Clark submitted his written guilty plea "with full knowledge" of his rights and did so "freely and voluntarily." Clark could have denied his prior conviction or asserted that he was not represented by counsel, but did not do so.

By waiving his right to an in-court colloquy in his written guilty plea, Clark surrendered his opportunity to have the trial court conduct an inquiry regarding his affirmation of the prior offense. Under rule 2.8(2)(*b*), subparagraph 5, the district court had discretion to forego an in-court colloquy with Clark. Moreover, we see nothing in the record to indicate Clark's admission to his prior conviction

was not voluntary or intelligent. Clark benefitted from a favorable plea agreement; the written plea notes the State's agreement to dismiss the other charges in the trial information in return for his plea to OWI second offense. The court did not err in accepting Clark's written plea as being voluntary and intelligent and with a factual basis.

C. Sentencing

Clark mounts two attacks on the court's sentencing decision. He first claims the court erred in considering "repetitive, inaccurate and irrelevant information." He relies on Iowa Rule of Evidence 5.402, which states "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Clark also cites Iowa Rule of Evidence 5.403, which provides that the court may exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . undue delay, waste of time, or needless presentation of cumulative evidence." Clark objects to the State's introduction of a twenty-two page copy of Clark's criminal history and a sixty-two page copy of Clark's driving record, asserting that the exhibits are duplicative, irrelevant, and too lengthy. But Clark fails to specify what duplications or irrelevant matters are contained in the exhibits.

Clark also takes issue with the county attorney's statements: (1) "it is just purely by the slimmest of chances that Mr. Clark has not been involved in an accident that either injures himself or others or worse," (2) "Mr. Clark has not been lawfully able to drive it would appear to me from probably as far back as 1994," and (3) "Mr. Clark has accumulated a record that really is second to

none." Clark calls these statements prejudicial, misleading, and inaccurate, and raises this issue as ineffective assistance of counsel, because defense counsel did not object to the prosecutor's statements..

As a general proposition, sentencing hearings need not "'conform with all of the requirements'" of a criminal trial. *See State v. Ashley*, 462 N.W.2d 279, 281 (Iowa 1990) (citation omitted); *see also* Iowa R. Evid. 5.1101(*c*)(4) (stating that the rules of evidence, other than the rule with respect to privilege, do not apply to sentencing proceedings). In this case, the sentencing court noted the defendant's objections at the sentencing hearing and assured him: "I don't measure these things by how heavy they are or how many pages they are, but by the relevant number of convictions and citations, so those are the portions that will be considered in terms of sentencing."

At sentencing, the district court may consider the propensity of the offender and his chances of reform. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). In failing to specify any unproven or duplicative charges contained in the State's exhibits, Clark fails to overcome the presumption that the court properly exercised its sentencing discretion. *See State v. Sailer*, 587 N.W.2d 756, 764 (Iowa 1998) (placing "great confidence" in judges to follow the mandate to consider only proven offenses and not assuming a judge failed to do so without clear evidence presented by the defendant).

Clark also contends the district court abused its discretion by mentioning the length of time he would actually serve in prison on an indeterminate two-year sentence. The State asked the court to impose the maximum sentence of not to

exceed two years under Iowa Code section 903.1(2). The defense recommended suspending all but thirty days of the two-year sentence and allowing the defendant to participate in work release. The court explained its sentencing decision as follows:

> I am going to go along with the State's recommendation for a two-year sentence and I'll tell you basically why. First of all, you may be eligible for the OWI offender program which will I think be of the greatest benefit to you. *Secondly, my experience has been with OWIs a two-year sentence is going to end up being much less than that.* First of all, you'll be given credit for any time you've already served, you'll also be given credit for any good time, honors program, what have you.

(Emphasis added.)

Under Iowa's correctional scheme, the parole board possesses the exclusive authority to determine the minimum term of a defendant's incarceration. *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). "The judicial sentencing decision is not an appropriate means for attempting to circumvent this principle." *Id*. Our appellate courts have deemed it improper for district courts to formulate a particular sentence to avoid an early release under the parole system. *Id.*; *State v. Thomas*, 520 N.W.2d 311, 314 (Iowa Ct. App. 1994).

In this case, the district court did not select a sentence with the intent to deprive the parole board of its discretion to determine when an inmate is released. The district court's statement—"a two-year sentence is going to end up being much less than that"—simply explained to Clark the reality of Iowa's indeterminate sentencing system. Sentencing courts are not prohibited from referring to the possible effects of parole practices on the time that a defendant

will actually serve. *See State v. Vanover*, 559 N.W.2d 618, 635 (Iowa 1997). In fact, Iowa's truth-in-sentencing provisions require the court to publicly announce that the defendant's term of incarceration may be reduced by earned time and that the defendant may be eligible for parole before the sentence is discharged. Iowa Code § 901.5(9)(a), (b). The district court believed Clark would benefit from the OWI offender program. We find that a proper reason for the sentence imposed and affirm.

D. Ineffective Assistance of Counsel

Clark asserts his counsel provided ineffective assistance in seven ways: (1) failure to file a motion in arrest of judgment, (2) failure to verify his prior offense, (3) failure to properly inform the defendant regarding his plea, (4) failure to object to the court's consideration of his prior offense, (5) failure to object to certification of exhibits, (6) failure to object to lack of colloquy, and (7) failure to object to the county attorney's statements at sentencing. To establish these claims, Clark must demonstrate that his trial counsel failed to perform an essential duty, and this failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004). Clark must prove both elements by a preponderance of the evidence. *Straw*, 709 N.W.2d at 133.

When, as in this case, ineffective-assistance-of-counsel claims are raised on direct appeal from the criminal proceedings, we may conclude the record is adequate to decide the claim or we may choose to preserve the claim for postconviction proceedings under Iowa Code chapter 822. Iowa Code §

814.7(3). Only in rare cases will the plea record alone be sufficient to resolve the claim on direct appeal. *Straw*, 709 N.W.2d at 133.

Clark's first four allegations of subpar performance center on his counsel's handling of the guilty plea. We preserve these claims for postconviction relief proceedings. We do so because we are unable to determine on this record if counsel breached a material duty in investigating and advising Clark about his prior OWI offenses and their impact on the current plea offer. We also cannot tell without further record whether there existed a reasonable probability that but for counsel's alleged errors, Clark would not have admitted his previous OWI conviction and would have insisted that the State prove the prior offense. *See id.* at 138 (explaining that claims of ineffective assistance of counsel should normally be raised through an application for postconviction relief).

Clark's three remaining allegations address counsel's conduct at the sentencing hearing. We find the record adequate to reject the first two of these claims on direct appeal. *See State v. Boggs*, 741 N.W.2d 492, 508 (Iowa 2007) (finding no prejudice from counsel's performance at sentencing). In our de novo review, we find no breach of duty by counsel or resulting prejudice in connection with certification of the exhibits or the lack of a colloquy. Clark's attorney objected to the admission of the State's exhibits. The court overruled that objection, but clarified that it would only consider the relevant convictions.

Clark's attorney told the sentencing court:

> Your Honor, I realize that Mr. Clark has had many difficulties in his past. Certainly not as many as I think the State wants to imply with the record that they've entered here, but obviously the Court can go through the duplications that are in that record. I'm not trying to

> minimize what's happened to Mr. Clark in the past. There is no question he's had difficulties.

Counsel went on to highlight positive testimony from Clark's employer and emphasized Clark's commitment to dealing with his alcohol problem.[3] Viewing the record in its entirety, we find that Clark is unable to establish he was prejudiced by counsel's handling of the prior convictions at sentencing. We preserve for postconviction relief Clark's remaining claim that his attorney should have objected to the prosecutor's statements concerning Clark's lengthy record and the likelihood he would cause an accident or injury.

AFFIRMED.

[3] During his allocution, Clark echoed the sentiments of the county attorney: "At this point in my life I do know that I have got to do something different or, like Mr. Holmes said, I could hurt somebody and that's the last thing that I want to do personally."