IN THE COURT OF APPEALS OF IOWA

No. 1-584 / 11-0065
Filed October 5, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAREN MARIE ATKINSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee, District Associate Judge.

Karen Atkinson appeals from the judgment entered on her written guilty plea to possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Andrea Diaz and Joseph D. Crisp, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Karen Atkinson appeals from the judgment entered on her written guilty plea to possession of marijuana, a serious misdemeanor. She alleges her attorney was ineffective for not moving to dismiss based on a speedy indictment claim under Iowa Rule of Criminal Procedure 2.33(2)(*a*). Because the question whether a person was "arrested" under that rule is determined on a case-by-case basis and our existing record does not disclose sufficient facts to reach that determination, we decline to decide on direct appeal if counsel could have successfully moved to dismiss. We preserve Atkinson's ineffective-assistance-of-counsel claim for postconviction relief proceedings.

I. Background Facts and Procedures

Officer Anthony Ballantini was conducting surveillance at a suspected drug dealer's house on Southeast Leland in Des Moines at just after 8 p.m. on March 3, 2010, when he spied a woman leaving the address in a green Ford Thunderbird.[1] The officer followed the Thunderbird and noticed its brake lights were faulty. He radioed to patrol officers, who stopped the car. The driver, Karen Atkinson, pulled into a driveway on Southwest Watrous Avenue.

The patrol officers told Atkinson to stay in her car, but she stepped out anyway. She then locked her keys and purse inside, telling the officers that she did so accidentally. The officers wrote in their report that they took Atkinson into custody "pending investigation for disobeying orders to stay in car." The officers handcuffed Atkinson and placed her in the backseat of their squad car. During

[1] We find these facts in the police reports attached to the minutes of evidence filed in support of the trial information.

their conversation with Atkinson, the officers noticed her pupils were "extremely constricted," she was "very fidgety," and she was "evasive [with] answers to simple questions [regarding] the traffic stop." Atkinson revealed to the officers that she had purposely locked her purse inside her car so they would not find the marijuana she had just purchased from "Mike" on Leland Street. The officers gave Atkinson a choice of talking to a narcotics officer and paying for a service to unlock her car or having her car impounded and being arrested for the "law violations." Atkinson agreed to have her car unlocked and searched. The officers found forty-two grams of marijuana in Atkinson's purse.

When Officer Ballantini arrived at the scene of the stop, he told Atkinson he worked in the vice and narcotics section. He advised her that she was not under arrest and asked whether she wanted to speak to him about the traffic stop and marijuana in her car. She agreed to do so. He read her Miranda rights at 8:44 p.m. The officer asked about her willingness to work with law enforcement "in consideration for her charges." Atkinson told the officer she was "interested in helping herself out" by working with the police department. Officer Ballantini then took control of the marijuana and released Atkinson.

Officer Ballantini filed a preliminary complaint against Atkinson on July 23, 2010, and a warrant issued for her arrest that day. Atkinson alleges in her pro se notice of appeal that the warrant issued for her arrest because she "was not able to set up a drug deal for the police." Police arrested Atkinson on August 25, 2010.

On September 30, 2010, the county attorney filed a trial information charging Atkinson with possession of marijuana, a serious misdemeanor in violation of Iowa Code section 124.401(5) (2009). With the filing of the trial information, the State extended a plea offer to Atkinson, agreeing to recommend a suspended sentence with no jail time in return for her plea to the crime charged. The offer noted that it expired upon the filing of any motions by the defendant.

On December 2, 2010, Atkinson entered a written plea of guilty to the possession charge and sought immediate sentencing. The court imposed a six-month sentence, suspended the jail time, and placed Atkinson on probation for one year. She filed a notice of appeal on January 3, 2011, alleging counsel was ineffective for not moving to dismiss based on the forty-five day requirement for filing charges.

II. Preservation of Error/Scope of Review

When a defendant enters a plea of guilty and waives the opportunity to file a motion in arrest of judgment, she can still "challenge the validity of a guilty plea by proving the advice [she] received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases." *State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009).

We generally review a defendant's challenge to a guilty plea for correction of errors at law. *State v. Ortiz,* 789 N.W.2d 761, 764 (Iowa 2010). But because Atkinson must show her plea resulted from trial counsel's ineffective assistance,

a Sixth Amendment claim, our review is de novo. *See State v. Utter*, ___ N.W.2d ___, ___ (Iowa 2011).

A defendant alleging ineffective assistance of counsel must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). Prejudice means a reasonable probability exists that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. In criminal matters, a competent practitioner must be aware of and vigilantly protect his or her client's speedy trial rights. *See Utter*, ___ N.W.2d at ___.

We will decide claims of ineffective assistance of counsel on direct appeal only if development of an additional factual record would not be helpful and the *Strickland* standard may be applied as a matter of law. *See State v. Tesch,* 704 N.W.2d 440, 450 (Iowa 2005).

III. Analysis

The speedy indictment rule provides, in pertinent part:

> It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissals under this rule may be made by the prosecuting attorney or the defendant or by the court on its own motion.
>
> a. When an adult is arrested for the commission of a public offense, . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.

Iowa R. Crim. P. 2.33(2)(*a*).

Atkinson contends her trial attorney breached a material duty by not filing a motion to dismiss her drug possession charge based on a violation of rule 2.33(2)(*a*). The success of her ineffective-assistance-of-counsel claim rises or falls on whether the record shows that she was "arrested" when she was stopped by Des Moines police on March 3, 2010.[2] If she was arrested that day, the trial information was filed outside the forty-five day speedy indictment deadline, trial counsel was ineffective for not filing a motion to dismiss,[3] and her guilty plea must be vacated. If her encounter with police did not amount to an arrest, then the prosecutor timely filed the trial information, defense counsel had no duty to file a meritless motion to dismiss, *See Carroll*, 767 N.W.2d at 645, and her guilty plea must stand.

Our courts determine whether a person is arrested for speedy indictment purposes on a case-by-case basis without the assistance of any bright-line rule or test. *State v. Wing,* 791 N.W.2d 243, 248 (Iowa 2010) (citing *State v. Dennison,* 571 N.W.2d 492, 495 (Iowa 1997)). In *Wing*, the supreme court set out the language of Iowa Code section 804.5, defining arrest as "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." *Id*. at 247. The decision also quoted the notification requirements in Iowa Code section 804.14:

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[2] This case differs from *State v. Utter*, ___ N.W.2d ___, ___, (Iowa 2011) where the officer issued the defendant a citation and complaint for the offense on appeal, leaving no question as to when the speedy indictment clock started to run.

[3] The State conceded at oral argument that if the record shows police arrested Atkinson for marijuana possession on March 3, 2010, no strategic reason existed for defense counsel to refrain from filing a motion to dismiss on speedy indictment grounds.

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so . . . .

Id.

The *Wing* court went on to say that despite what appear to be "rigid" notification requirements in section 804.14, "not all seizures by law enforcement officers must meet such strict conditions to constitute an arrest." *Id.* at 247-48. The court acknowledged several non-determinative factors to consider when deciding if police have arrested a suspect, including what the suspect is told about his or her arrest status and whether a person has been handcuffed or booked. *Id*. at 248. The court clarified that "mere submission to authority" does not result in an arrest, and the question whether an arrest has occurred does not turn solely on whether a reasonable person would have felt free to leave the encounter. *Id*.

The court discussed its earlier pronouncement in *State v. Johnson-Hugi,* 484 N.W.2d 599, 601(Iowa 1992) that "an assertion of authority *and purpose to arrest* followed by submission of the arrestee constitutes an arrest." *Wing*, 791 N.W.2d at 248 (emphasis in original). The court cautioned that the italicized phrase should not be read as "grafting an additional requirement" onto sections 804.5 and 804.14 that an officer must possess a subjective intent to arrest. *Id*. In *Wing*, the court decided that where an arresting officer does not follow the section 804.14 protocol for making an arrest, "the soundest approach is to

determine whether a reasonable person in the defendant's position would have believed an arrest occurred, including whether the arresting officer manifested a purpose to arrest." *Id*. at 249.

Atkinson argues she was "arrested" for the commission of possession of marijuana on March 3, 2010, when patrol officers stopped her Ford Thunderbird for a brake light violation. She points to facts set forth in the police reports that she was handcuffed and placed in a patrol car until Officer Ballantini arrived. Atkinson also finds it significant that the narcotics officer read her Miranda rights and "interrogated her about the crime." She contends a reasonable person in her position would have believed an arrest occurred. She compares her situation to the police encounter analyzed in *Wing*. Atkinson argues that we can decide her ineffectiveness claim on direct appeal because "[t]he minutes of testimony contain detailed facts as to the circumstances surrounding defendant's initial encounter with law enforcement." She notes that the officer's subjective intent to arrest and her subjective belief regarding her arrest status are "not the focus of the analysis."

The State submits that the present record is inadequate to determine whether Atkinson was formally arrested following the traffic stop or whether she entered into a cooperation agreement with the police in lieu of arrest. The State suggests that we preserve the claim for "full development of the record concerning the circumstances of her detention and agreement to cooperate."

Both parties recognize that *Carroll* provides guidance on the question whether development of the record is necessary in the context of an ineffective

assistance claim raised following a plea of guilty. In *Carroll*, the court preserved a claim that counsel should have filed a motion to suppress to challenge the warrantless search of a barn at which the defendant was attending a party. 767 N.W.2d at 645-46. The court held that the record there was "inadequate in several particulars" to determine if Carroll had an expectation of privacy in the place searched. *Id.* at 645. The court found the record did not disclose the nature of the place to be searched, the number of invited guests at the party, and some of the individuals identified in the police reports. *Id*. at 645-46.

We are faced with a situation similar to that encountered by our supreme court in *Carroll*. Because Atkinson entered a written plea, we have only the minutes and attached police reports to aid our review. The minutes do not provide all of the information necessary to decide whether counsel was ineffective in declining to file a motion to dismiss. The question of the existence of an arrest for speedy indictment purposes often requires a fact-intensive analysis. *See Wing*, 791 N.W.2d at 256 (Cady, J., dissenting). Certain critical facts are not spelled out in the minutes.[4] For instance, it is important to our review to know what the patrol officers said to Atkinson about her arrest status. *See Wing*, 791 N.W.2d at 248 (explaining "what a suspect is told about his arrest status is a factor to be considered when determining whether an arrest has occurred"). It appears from the patrol officer's report that Atkinson was initially

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[4] Because the purpose of filing minutes of testimony is to provide the accused with a "full and fair statement" of the anticipated testimony of each witness at trial, Iowa R. Crim. P. 2.5(3); *State v. Wells*, 522 N.W.2d 304, 307 (Iowa Ct. App. 1994), the State might not include details about a defendant's arrest status or cooperation agreement that would not be offered as part of the prosecution's case-in-chief, but may be important in a motion to dismiss hearing regarding a speedy indictment violation.

taken into custody for disobeying their orders to stay in her car. If the defendant had been placed under arrest, but for a different offense arising from the same incident, the State could still bring the marijuana possession charge. *See State v. Lies*, 566 N.W.2d 507, 508-09 (Iowa 1997). It is unclear from the police reports at what point Atkinson admitted to possessing marijuana and whether she was ever held in custody for that offense.

In addition, the police reports do not reveal whether Officer Ballantini advised Atkinson how her cooperation with other drug investigations could result in police not filing the possession charge. *See Wing*, 791 N.W.2d at 252 (comparing formal cooperation agreement in *State v. Johnson-Hugi*, 484 N.W.2d 599, 600 (Iowa 1992) with lack of guidance given Wing about what police expected from him to avoid prosecution). Precisely how the officers framed the choice between cooperating and being arrested would be helpful to a court's determination whether a reasonable person in Atkinson's position would have believed that she was under arrest. We also believe that defense counsel should be given an opportunity to testify regarding the advice he provided the defendant concerning the State's plea offer, which was off the table if he filed a motion to dismiss.

On the instant record, we do not know if counsel's performance led to an involuntary plea. Atkinson's claim is better left for postconviction relief proceedings.

AFFIRMED.