IN THE COURT OF APPEALS OF IOWA

No. 2-1198 / 12-1262
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY WAYNE JARRELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Kim Riley, District Associate Judge.

Timothy Wayne Jarrell appeals the judgment and sentence entered upon his conviction of third-degree burglary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Jennifer Miller, County Attorney, and Jordan Gaffney, Assistant County Attorney, for appellee.

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

DOYLE, J.

Timothy Jarrell appeals the judgment and sentence entered upon his conviction of third-degree burglary. We affirm.

***I. Background Facts and Proceedings*.**

On November 4, 2011, Timothy Jarrell was convicted of third-degree theft, and he was placed on probation for a term of two years. A few weeks later, Jarrell was arrested and charged with third-degree burglary, in violation of Iowa Code section 713.6A(1) (2011), a class "D" felony. While that case was pending, Jarrell was again charged with another count of third-degree, burglary in violation of section713.6A(1). Jarrell pled guilty to those charges as amended in April 2012, and his probation term was extended to three to five years.

The next month, Jarrell was again charged with third-degree burglary, in violation of Iowa Code sections 713.6A(1) and 713.6A(2), and he was also charged with possession of burglar's tools, an aggravated misdemeanor. As a result of his May 2012 charges, Jarrell's probation was revoked.

Although Jarrell initially entered a not guilty plea, he later accepted and signed a written *Alford* plea agreement.[1] The agreement states, in relevant part:

> I have discussed all possible legal defenses with my attorney, and I believe this plea is in my best interest.
>
> . . . .
>
> I am knowingly and intelligently pleading guilty to the above charge because I believe that a jury hearing the evidence in the trial information's minutes would find beyond a reasonable doubt all of the elements of this offense; and in light of the plea agreement, I

[1] An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but voluntarily consents to the imposition of a sentence. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001).

> believe it is in my best interest to enter a plea of guilty to the charge.
>
> I have discussed with my attorney and hereby waive my right to be present and personally inform the court of my plea and to speak for myself regarding sentencing, as is my right under Iowa Rule of Criminal Procedure 2.8(2)(b).
>
> I have discussed with my attorney and understand that to contest the adequacy of my guilty plea, I must do so at least five (5) days prior to sentencing by a motion in arrest of judgment, as provided in Iowa Rule of Criminal Procedure 2.23(3). I waive this right and ask that the court sentence me immediately.
>
> If applicable, I understand that a criminal conviction, deferred judgment or deferred sentence may affect my status under federal immigration laws.
>
> I ask the court to accept my plea of guilty.
>
> I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

At the end of the plea document, Jarrell's attorney verified that she had explained to Jarrell the consequences of the plea:

> As attorney for [Jarrell], I state to the court that I explained to my client, [Jarrell], each of his constitutional rights in relation to the crime charged in the trial information; that I have reviewed with [Jarrell] the elements of the crime and all possible defenses thereto; that [Jarrell] has acknowledged guilt of the crime charged; that [Jarrell] has reviewed and executed in my presence the foregoing plea of guilty; and that I recommend that the court now accept [Jarrell's] plea of guilty to this offense.

The written plea agreement was accepted by the district court.

At a later sentencing proceeding, the court conducted a colloquy with Jarrell, engaging him in a discussion regarding whether he understood the charges and the constitutional rights he would be surrendering if he chose to enter a guilty plea. Jarrell answered "yes" to all of the court's questions, and the court found he understood his rights and his admission was voluntary.

Jarrell requested he be placed on supervised probation for two years and "that a term of the supervised probation be to participate in a mental health

treatment program." In support thereof, he submitted three exhibits for the court's consideration, including recent IQ test results determining his IQ was 49. Additionally, Jarrell's mental health counselor's report noted his low IQ and stated Jarrell "would not benefit from incarceration. He would not fare well at a halfway house as he would easily be manipulated. Hopefully alternative community support can be identified." Jarrell stated he was now eligible to participate in different community support programs based upon his IQ test results.

Ultimately, the court imposed a prison sentence not to exceed two years, rather than place Jarrell back on probation, and it ordered that sentence be served concurrently with the sentences imposed on the two probation revocation cases.

Jarrell now appeals, asserting his plea was not knowing and voluntary because he was not mentally competent to enter a plea in the case.

II. Discussion.

"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." *See* Iowa R. Crim. P. 2.24(3); *see also State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006). Here, Jarrell did not file a motion in arrest of judgment. To bypass his preservation problem, Jarrell argues the trial court should have found, sua sponte, he was not competent to enter guilty plea, or alternatively, his trial counsel was ineffective in not filing a motion in arrest of judgment challenging his competency to enter the guilty plea. *See State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011) ("Whether a defendant's guilty plea was

intelligently made depends, in part, on whether the defendant was properly advised by competent counsel."). We review a claim of error in a guilty plea proceeding for the correction of error at law. *State v*. *Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). "We review claims of ineffective assistance of counsel de novo." *State v*. *Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011).

"A defendant's plea of guilty is a serious act that he or she must do voluntarily, knowingly, and intelligently with an awareness of the relevant circumstances and consequences." *Utter*, 803 N.W.2d at 651. There is a presumption of competency that a defendant bears the burden to overcome. *See State v*. *Lyman*, 776 N.W.2d 865, 874 (Iowa 2010). The statutory test is whether a "defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3. In determining whether due process requires an inquiry into the mental competency of a defendant, the "critical question is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *State v*. *Lucas*, 323 N.W.2d 228, 232 (Iowa 1982) (internal quotation marks and citations omitted). "When 'sufficient doubt' exists as to the defendant's competency, the trial court has an absolute responsibility to order a hearing sua sponte." *State v*. *Mann*, 512 N.W.2d 528, 531 (Iowa 1994).

Alternatively, to establish ineffective assistance of counsel, Jarrell must prove (1) a breach of an essential duty and (2) resulting prejudice. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). A breach of essential duty will be found

where an attorney does not ensure that a plea is voluntarily and intelligently made. *State v*. *Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Prejudice will generally be found in the guilty plea context if there is "'a reasonable probability that, but for counsel's alleged errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" *State v*. *Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (citation omitted).

Applying these standards to our de novo review of the record, we conclude that there was no reason for the trial court or Jarrell's counsel to question his competency. The trial court, in accepting the *Alford* plea, only had before it a written document signed by Jarrell indicating he understood his rights and that his attorney had explained his rights to him. At that point, the court did not have the benefit of Jarrell's exhibits introduced at sentencing.

At the sentencing hearing, Jarrell exhibited no irrational behavior, and there is no suggestion in the record that his demeanor was anything other than normal. Jarrell responded appropriately and unequivocally when he was asked at the sentencing proceeding whether he understood his rights. No comment was made by his counsel or the trial court, who, unlike this court reviewing a cold record, were in a superior position to observe Jarrell's behavior, demeanor, and verbal and nonverbal cues.

It is true that Jarrell's mental health counselor found he presented with a low IQ and indicated possible mental retardation. However, "subnormal intelligence is only one factor to be considered" in determining whether the defendant's mental condition rises to the level of incompetency. *See Mann*, 512 N.W.2d at 531. In this case, Jarrell's mental health counselor also remarked that

Jarrell was "fully oriented" and his "judgment and insight [were] within acceptable limits."

Moreover, Jarrell was not a neophyte to the criminal justice system at the time he entered the *Alford* plea. He had previously been convicted of theft and burglary in the third degree, and he pled guilty in those cases. Additionally, Jarrell had the benefit of being represented by the same attorney throughout this case and his prior burglary cases, and she raised no question as to his competency. In fact, the trial court praised his counsel, stating to Jarrell that his attorney had done "a wonderful job in tracking down . . . these resources for you and making arrangements for you to be evaluated and, . . . I think that she's done a remarkable job in identifying this [program] as a resource that may be available to you." Ultimately, the court determined Jarrell had been unsuccessful at probation and incarceration was appropriate.

Upon our review, we find nothing in the record to indicate Jarrell was not competent such that the trial court should have, sua sponte, requested a competency hearing and rejected his *Alford* plea. We also find nothing in the record to indicate Jarrell was not competent such that his trial counsel had reason to question his competency or question whether his decision to agree to the plea was voluntarily and intelligently made. Similarly, there is nothing in the record that indicates there is any probability that had his counsel questioned his competency, he would not have pled guilty and would have insisted on going to trial. We therefore conclude the trial court did not err in accepting Jarrell's *Alford* plea, nor did the court err in not ordering a competency hearing sua sponte. Further, we conclude Jarrell's trial counsel did not render ineffective assistance.

Accordingly, we affirm Jarrell's judgment and sentence entered upon his conviction of third-degree burglary.

AFFIRMED.