IN THE COURT OF APPEALS OF IOWA

No. 2-971 / 12-0552
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN SCOTT COFFEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

A defendant contends that his guilty plea should be set aside on the ground that it was not voluntarily and intelligently made. **AFFIRMED.**

Matthew A. Leddin of Soper Law Firm, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Khara Coleman Washington and Kelly Cunningham, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Justin Coffey appeals his judgment and sentence for three drug-related offenses. He contends his guilty plea should have been set aside on the ground that it was not made voluntarily and intelligently.

I. Background Proceedings

The State charged Coffey with possession with intent to deliver marijuana, a drug tax stamp violation, and possession of marijuana. Coffey agreed to plead guilty as charged, and the State agreed it would make no recommendation on sentencing. The district court's concurrence with the agreement was a condition of acceptance of the plea.

At the guilty plea hearing, the district court summarized the plea agreement for Coffey.[1] Included in the summary was the following statement: "[T]he state agrees to make no recommendation concerning sentencing, meaning that the Court may impose any sentence allowed by law." Coffey responded to this statement as follows: "No, I was under the impression that the state make no recommendation was meaning no jail time, or recommending no jail time." The court answered, "They're *recommending no jail time*, but it means the Court can impose any sentence allowed by law, including a sentence of incarceration." (Emphasis added.) In fact, the prosecutor agreed to provide no sentencing recommendation; she did not agree to recommend "no jail time."

The court accepted Coffey's guilty plea to all three counts, advised Coffey he would be required to file a motion in arrest of judgment if he wished to

[1] Iowa Rule of Criminal Procedure 2.8(2)(c) requires the terms of any plea agreement to be disclosed on the record.

challenge his plea,[2] set forth the timeframe for making that filing,[3] and scheduled a sentencing hearing.

Coffey filed a motion in arrest of judgment but filed it late. He asked the court to allow him to withdraw his guilty plea on the ground that "he signed it under extreme duress and confusion" and, accordingly, "did not enter into the plea of guilty voluntarily or intelligently." He also asserted that he unsuccessfully attempted to contact his attorney about withdrawing the plea. In a brief supporting the motion, he alleged his prior attorney was "completely at fault" in failing to file the motion and the court should consider the claim under an ineffective-assistance-of-counsel rubric. He later amended the motion to add an allegation that the court partially misstated the plea when the court stated, "[The prosecutor is] recommending no jail time." He alleged that, as a result of this misstatement, "he did not 'voluntarily and intelligently' plead guilty as required by Iowa Rule of Criminal Procedure 2.8(2)(b)." Coffey alternately filed the amended motion as a "motion to withdraw plea of guilty."

The district court denied the motion on the ground that it was not timely filed and the court was without authority to address the issue of ineffective assistance of counsel. The court scheduled a sentencing hearing.

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[2] *See* 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"); *see also* Iowa R. Crim. P. 2.8(2)(d) ("The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.").

[3] *See* Iowa R. Crim. P. 2.24(3)(b) ("The motion must be made not later than 45 days after plea of guilty . . . but in any case not later than five days before the date set for pronouncing judgment.").

At that hearing, a different judge reversed course on the disposition of the ineffective-assistance-of-counsel claim and agreed to address the merits. *See Strickland v*. *Washington*, 466 U.S. 668, 687 (1984) (requiring proof of deficient performance and resulting prejudice in order to establish an ineffective-assistance-of-counsel claim). The court found deficient performance, reasoning as follows:

> [T]he failure to file a motion in arrest of judgment when the defendant has requested it be done within the time limit allowed for that motion does constitute ineffective assistance of counsel in terms of failure to perform an essential duty.

The court nonetheless concluded that Coffey failed to establish prejudice:

> The transcript of the plea proceeding does not lead this Court to believe that the motion in arrest of judgment was founded on grounds that would support granting of the motion; therefore, had the motion been timely filed, and considering the merits of the motion in arrest of judgment, the Court finds that the motion in arrest of judgment should be denied. Therefore, the defendant has failed to show prejudice as a result of previous counsel's failure to timely file the motion in arrest of judgment.

The court proceeded with sentencing.

II. Analysis

On appeal, Coffey contends (1) the "district court incorrectly denied [his] amended motion in arrest of judgment or motion to withdraw guilty plea" and (2) his "attorney was ineffective for failing to timely file the motion in arrest of judgment."[4] Because Coffey's motion in arrest of judgment was not timely filed,

[4] Coffey also raises a two-pronged attack on the first judge's ruling. First, he argues that the judge who denied the motion in arrest of judgment as untimely "failed to recognize that Rule 2.8(2)(a) gave her the authority to grant or deny [his] Motion to Withdraw Plea of Guilty." *See* Iowa R. Crim. P. 2.8(2)(a) ("At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted."). He asserts the judge failed to exercise her discretion under this provision. *See State v. Ramirez*, 400

we can only reach the first issue if we find counsel was ineffective in failing to file the motion in arrest of judgment in a timely manner. *See State v*. *Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (ruling that, where trial court adequately advises a defendant that the failure to file a motion in arrest of judgment would preclude him from raising issues regarding his guilty plea on appeal and the defendant does not file a motion, we may consider the merits of a challenge to a guilty plea proceeding only if the failure to file the motion resulted from ineffective assistance of counsel); *State v*. *Hildebrant*, 405 N.W.2d 839, 840 (Iowa 1987) (same). The answer to that question depends on whether there was any valid reason to file the motion, because, if there was not, then the filing of a motion in arrest of judgment, timely or otherwise, was unnecessary. *Hildebrant*, 405 N.W.2d at 841 ("While counsel should always protect a defendant's rights diligently and uncompromisingly, counsel is under no obligation to engage in an obviously useless act.").

Material misstatements about a plea may render the plea unknowing and involuntary. *See State v*. *Philo*, 697 N.W.2d 481, 489 (Iowa 2005) ("[I]f material

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N.W.2d 586, 588 (Iowa 1987) (establishing that a judge has discretion of whether to grant or deny a withdrawal of a guilty plea). We are not persuaded that his assertion was preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Although Coffey styled his amended motion as a motion to withdraw a guilty plea, neither the motion nor a supporting brief cited this rule. Instead, Coffey focused on the untimeliness of the motion under rule 2.24(3)(b), an issue that the first judge addressed.

Coffey also argues that the first judge improperly refused to consider his ineffective-assistance-of-counsel claim, but he concedes the sentencing judge corrected this error. For that reason, we decline to address the first judge's ruling on this issue. *See Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000) ("We have long recognized that a district court has the power to correct its own perceived errors, 'so long as the court has jurisdiction of the case and the parties involved.' Until the district court has rendered a final order or decree, it has the power to correct any of the rulings, orders or partial summary judgments it has entered." (citations omitted)).

misstatements are made by the court that induce a defendant to plead guilty, and those misstatements are not corrected, the plea is not intelligently and voluntarily entered, and the defendant is entitled to have it set aside and to plead anew."); *State v*. *Loye*, 670 N.W.2d 141, 151 (Iowa 2003) (stating that if "the record shows the court gave misleading or inaccurate advice concerning the nature of the offense, the requisite understanding cannot be found" (citation omitted)). The district court did not take evidence on this question, relying instead on the transcript of the guilty plea colloquy. That transcript is inadequate to address the precise issue raised by Coffey: whether the court's partial misstatement of the agreement confused Coffey, rendering the plea unknowing and involuntary, and whether counsel was ineffective in failing to bring this issue to the attention of the court via filing a timely motion in arrest of judgment. There is also an inadequate record on Coffey's related assertion that his attorney was ineffective in failing to discuss the possibility of withdrawing the plea.

Because a record needs to be made on this matter, we preserve this ineffective-assistance-of-counsel claim for postconviction relief. *See Philo*, 697 N.W.2d at 489 ("It is evident that the claim of ineffective assistance of counsel asserted by Philo on appeal based on the confusion over the plea agreement must be preserved for postconviction relief. This will allow a record to be developed concerning the actual terms of the plea agreement and Philo's understanding of the terms of the plea agreement. The record must also be developed whether Philo was actually confused by the court's statements during the plea colloquy and whether those statements induced Philo to plead guilty." (citations omitted)); *see also Straw*, 709 N.W.2d at 138 (stating that "[i]n only rare

cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing" and preserving the claim for postconviction relief); *State v. Mann*, 512 N.W.2d 814, 817 (Iowa Ct. App. 1993) ("Where the record is inadequate to permit us to resolve the claim, we preserve the claim in order to provide the allegedly ineffective attorney the opportunity to explain his or her conduct.").

We affirm Coffey's judgment and sentence, and preserve the stated matter for postconviction relief proceedings.

AFFIRMED.