IN THE COURT OF APPEALS OF IOWA

No. 3-632 / 11-2079
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARNELL ALLEN BROWDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Darnell Browder appeals from the judgment and sentence entered following his plea of guilty to delivery of a controlled substance. **AFFIRMED.**

Peter McRoberts of McRoberts Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Pamela J. Summers, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Darnell Browder pled guilty to delivery of a controlled substance (cocaine salt hydrochloride) and the district court imposed judgment and sentence. On appeal, Browder contends: (1) he was denied his right to a speedy appeal; (2) his guilty plea was not voluntary and intentional; (3) the district court abused its discretion in denying his motion in arrest of judgment; (4) the district court abused its discretion in denying his motion for the withdrawal of his court-appointed attorney; and (5) the district court abused its discretion in sentencing him to prison.

I. Right to Speedy Appeal

After Browder filed his notice of appeal, there were several delays, the most significant one resulting from a delay in the preparation of the transcript. The sentencing transcript should have been filed within twenty days of the service of a combined certificate. *See* Iowa R. App. P. 6.803(3)(a). According to the court-reporter who was to prepare the transcript, the transcript was delayed because she was no longer employed by the State of Iowa and had moved out of the area. The Iowa Supreme Court granted the court reporter an extension of time; the transcript was filed approximately five months after it was originally due.

Browder asserts that he had a right to a speedy appeal and this right was violated. He premises the right on our rules of appellate procedure and the federal and state constitutions.

With respect to the claimed rule violations, we are hard-pressed to find that the Iowa Supreme Court "egregiously violated its own orders" by permitting extensions for the filing of a transcript and other appellate matters.

As for the claimed violation of the United States Constitution, there is no recognized right to a speedy appeal under the Sixth Amendment, but delays in criminal proceedings may implicate the Due Process Clause of the Fifth Amendment. *See Rheuark v. Shaw*, 628 F.2d 297, 302-04 (5th Cir. 1980) ("[W]hen a state provides a right to appeal, it must meet the requirements of due process and equal protection." (citing *Douglas v. California*, 372 U.S. 353 (1963)). *Accord Threatt v. State*, 640 S.E.2d 316, 319 (Ga. Ct. App. 2006); *State v. Crabtree*, 625 S.W.2d 670, 673-74 (Mo. Ct. App. 1981); *State v. Burton*, 269 P.3d 337, 342 (Wash. Ct. App. 2012); *Daniel v. State*, 78 P.3d 205, 218 (Wyo. 2003).

Similarly, article I, section 10 of the Iowa Constitution confers a "right to a speedy and public trial," saying nothing about a speedy appeal. Browder argues, however, that the due process clause of article I, section 9 affords him a right to a speedy appeal. He cites the factors used in analyzing a procedural due process claim: (1) the private interest that will be affected by the government action; (2) the risk of the erroneous deprivation of the interest, and the probable value of additional procedures; and (3) the government interest in the regulation, including the burdens imposed by additional procedures. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 240-41 (Iowa 2002). Based on these factors, Browder asserts:

> [C]learly [his] right to life and liberty is affected by the long delay in his appeal; considering the explicit rules adopted for expedited appeals, there is a strong risk erroneous deprivation of the right to speedy appeal and the government's interest in affording a speedy appeal has already been taken into consideration in the expedited process of criminal appeals on a plea of guilty and sentence.

We are unclear how these procedural due process factors are implicated under the facts of this case. In any event, Browder has not cited any Iowa precedent that has found a federal or state due process violation based on a delay in preparing the transcript for appeal. Moreover, other jurisdictions considering due process implications in appellate delays have required a showing of actual prejudice, a showing that is absent here. *See*, *e.g.*, *Coutta v. State*, 385 S.W.3d 641, 652 (Tex. Ct. App. 2012) ("A violation of due process cannot be established without a showing of prejudice to Appellant."); *Burton*, 269 P.3d at 345 n.7. We conclude Browder has not made a case for finding a due process violation based on the delay in filing the transcript.

II. Guilty Plea

Browder contends his guilty plea "was not made knowingly and intelligently," as required by "the due process clause of the Fourteenth Amendment to the United States Constitution." Rule 2.8(2)(b) codifies this due process mandate. *State v. Loye*, 670 N.W.2d 141, 151 (Iowa 2003). It requires the court to "address the defendant personally in open court and inform the defendant of" certain aspects of the plea. *See* Iowa R. Crim. P. 2.8(2)(b).

Browder specifically maintains that the district court "did not personally address [him] in open court o[n] the matters required" in rule 2.8(2)(b). To the contrary, after the prosecutor described the plea agreement, the court asked Browder about circumstances that might affect his understanding of the agreement. The court then engaged Browder in the following colloquy:

> COURT: You are charged with and wish to plead guilty to delivery of a controlled substance, that being cocaine salt hydrochloride. It is a Class C felony enhanced as a second or

> subsequent offender. [The prosecutor] spent some time here just a moment ago telling all of us about that offense in a couple of different ways. Number one, he told us what was involved in the commission of that offense. In other words, he tried to explain what we refer to as the elements of the offense. He set out what the State would have to prove if we were at a trial on order for you to be found guilty of that offense.
>
> Now, he also approached it from another angle. He told us what the potential consequences would be to you punishment-wise if you were found guilty of that offense. Did you listen to everything that he had to say?
>
> DEFENDANT: Yes, sir.
>
> COURT: Do you feel like you understood all of it?
>
> DEFENDANT: Yes, sir.
>
> COURT: Do you have any questions whatsoever?
>
> DEFENDANT: No, sir.
>
> COURT: I am assuming you have probably visited with [your attorney] about those same things. Would that be right?
>
> DEFENDANT: Yes, sir.
>
> COURT: To the extent that you took advantage of that and asked her some questions, is it fair for me to assume that she satisfactorily answered your questions?
>
> DEFENDANT: Yes, sir.
>
> COURT: Based on all of that information, then, that you have heard from Mr. Taylor this morning and also the information that you have learned from your own attorney, do you feel like you have a good, general understanding of the nature of this offense that you are pleading guilty to?
>
> DEFENDANT: Yes, sir.

The court proceeded to explain the trial rights Bowder would be relinquishing by pleading guilty. Browder repeatedly stated that he understood these rights and had no questions.

We conclude the district court substantially complied with the requirements of rule 2.8(2)(b). *See State v*. *Myers*, 653 N.W.2d 574, 578 (Iowa 2002) ("Under the substantial-compliance standard, a trial court is not required to advise a defendant of his rights using the precise language of the rule; it is sufficient that the defendant be informed of his rights in such a way that he is

made aware of them."). We further conclude Browder entered a knowing, intelligent, and voluntary plea.

III. Motion in Arrest of Judgment

Browder filed a pro se motion in arrest of judgment, essentially asserting that his plea was not voluntary. After soliciting comments from Browder's attorney and the prosecutor and after setting the matter for hearing, the district court denied the motion, reasoning Browder's plea "was not involuntary or coerced in any way." The court's ruling was filed after the thirty-day period prescribed by court rule. *See* Iowa R. Crim. P. 2.24(3)(f) (stating motion in arrest of judgment "shall be heard and determined by the court within thirty days from the date it is filed, except upon good cause entered in the record.").

On appeal, Browder does not take issue with the merits of the court's ruling but focuses exclusively on its untimely filing. He asserts that "no legal judgment could be pronounced because the District Court did not timely rule on Browder's motion in arrest of judgment."

The rule does not set forth a sanction for violation of the time limit. *See State v*. *Hilleshiem*, 305 N.W.2d 710, 718 (Iowa 1981). Additionally, the Iowa Supreme Court has stated, "[e]ven assuming absence of good cause for the delay . . . , the drastic sanction of arresting judgment" is not appropriate "when the rights of persons are not injuriously affected by the delay." *Id.*

The district court conceded its ruling was untimely and apologized for the delay but noted no "injurious effect said delay has had on defendant's rights." Browder now asserts he "was prejudiced" but does not explain how. In the

absence of a showing of an injurious effect, we conclude the conceded untimeliness of the ruling does not warrant arrest of judgment.

IV*. *Motion for Withdrawal of Counsel

Browder filed a motion for the withdrawal of his court-appointed attorney. He cited his attorney's refusal to advocate for his pro se motions and asserted her statements favoring a plea were coercive. The district court questioned Browder about his motion, then stated, "[Y]our attorney . . . has determined that your motions have no merit either and that's why you are on your own." The court asked Browder, "[W]hy do you want [your attorney] replaced as your attorney to the extent at the present time that we don't already know?" Browder responded, "It's ineffective assistance of counsel. I'm struggling in the courtroom. She's sitting right next to me and you all appoint her to work for me. Not me work for her. And if I'm struggling or stumbling on something, it is her job as a lawyer to help me do that. And she's not." The following colloquy ensued:

> COURT: She's not obligated to urge motions or requests by you that she believes have no legal merit.
> [BROWDER'S ATTORNEY]: And that I do not file.
> COURT: Correct.
> . . . .
> COURT: Mr. Browder, I want to know why you want [her] removed as your attorney.
> DEFENDANT: Ineffective assistance of counsel. She's not saying a word.

The court denied the motion.

On appeal, Browder argues "as there was not the personal colloquy, this Court should find the District Court abused its discretion." In fact, there was a personal colloquy. Browder has not established a deficiency in that colloquy or "sufficient cause" to justify the appointment of replacement counsel. *See State v*.

Lopez, 633 N.W.2d 774, 781 (Iowa 2001) (finding district court conducted an adequate inquiry into the defendant's allegations against his attorney where the presiding judge, when apprised of a potential breakdown in communication, personally asked the defendant to explain the nature of the communication problem). Accordingly, we affirm the denial of his motion.

V. Sentencing

At sentencing, both the prosecutor and defense attorney recommended that Browder receive an indeterminate prison sentence of fifteen years. Browder asked why probation was not an option. The district court responded, "It is an option for me, Mr. Browder." The court continued, "You agreed to go to prison. That was the plea agreement. The Judge is never bound by the plea agreement." The court then allowed Browder to address the court in mitigation of his sentence and Browder explained why he believed he should not go to prison. The court ended the sentencing colloquy as follows:

> The Court has two options, Mr. Browder. One, is to impose the prison sentence, the other one is to impose the prison sentence and then suspend it and put you on probation.
>
> The Court takes all the information that's available to it for purposes of making its decision, that includes all this information that is contained within the PSI, the presentence investigation report, which you've had a chance to review yourself.
>
> You know that that's a comprehensive document, including all kinds of information about all aspects of your life. The Court also takes into consideration the comments of counsel, your comments, the court files and so forth for purposes of making its decision.
>
> The Court has an obligation to come up with a sentence that adequately is accomplishing two goals at the same time. One, is to protect the public from the possibility that you would commit other offenses, if you were given the opportunity. The other goal is give you the maximum opportunity for your own rehabilitation.
>
> We have a joint recommendation here for a 15-year indeterminate term. Incarceration is recommended by the PSI

> writer. You have a significant criminal history, including, but not limited to, at least three previous drug offenses.
>
> Based on your significant criminal history, based on the fact that the PSI recommends imprisonment, based on the fact that we do have an agreement here, a joint recommendation for the imposition of a 15-year term, I find that that is the outcome here that best addresses those two goals, protection of the public and accomplishment of your own rehabilitation.
>
> You've had in the PSI—your PSI also reflects that you've had numerous, numerous opportunities to rehabilitate yourself and, apparently, you failed at those because of the instant offense.
>
> So, for that reason—for all those reasons, prison is in order.

On appeal, Browder contends the district court abused its discretion in sentencing him to prison. We discern no abuse because the court acknowledged probation was an option and explained why this option was not exercised.

We affirm Browder's judgment and sentence.

AFFIRMED.