IN THE COURT OF APPEALS OF IOWA

No. 3-838 / 13-0226
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD DOUGLAS CLARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, James C. Ellefson (guilty plea), Timothy J. Finn (motion in arrest of judgment hearing), Judges.

The defendant challenges his conviction, alleging his guilty plea was not knowing and voluntary, his counsel was ineffective, and the plea agreement was substantially frustrated. **AFFIRMED.**

Ryan L. Haaland, Nevada, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Stephen Holmes, County Attorney, and Bryan J. Barker, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., Tabor, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

TABOR, J.

"Ten years is better than seventy-five years." That is what Richard Clark recalled his defense attorneys repeatedly telling him before he accepted a plea offer by the State. The plea agreement reduced his charge from a class "B" to a class "C" felony for manufacturing methamphetamine and included other charging and sentencing concessions by the prosecution.

Now Clark is challenging the knowing and voluntary nature of his guilty plea to the class "C" felony and its ten-year sentence. He contends the district court improperly suggested the twenty-five year sentence under the original charge could have been tripled pursuant to Iowa Code section 124.411 (2011) when the State did not plead that enhancement. He also asserts his attorney was ineffective in failing to correct the plea-taking court regarding the maximum sentence and in declining to file a motion to suppress evidence discovered during a traffic stop. Finally, he argues he should be allowed to withdraw his guilty plea to a separate operating-while-intoxicated (OWI) offense because the purpose of the overall plea agreement has been frustrated.

Because Clark acknowledges the State could have amended the trial information to allege the section 124.411 enhancement and because the district court complied with Iowa Rule of Criminal Procedure 2.8(2)(b), we conclude Clark's guilty plea was knowing and voluntary. We preserve his claim of ineffective assistance of counsel concerning the motion to suppress for possible postconviction relief proceedings. Because we do not reverse his manufacturing conviction, we do not need to address the OWI plea.

I. Background Facts and Proceedings

The following facts appeared in the minutes of evidence. On June 10, 2012, Story County Sheriff Deputies Brian Tickle and Aaron Kester stopped a car driven by Richard Clark. The deputies recognized Clark's passenger, William Farrand, as having a warrant out for his arrest. During the stop, Christine Cornwell, another passenger in the car, admitted to the deputies she had an open container of alcohol. Eventually, the deputies asked for Clark's permission to search the vehicle. Clark consented. The deputies found portable methamphetamine labs in the back seat and arrested Clark.

The State filed a trial information on June 20, 2012, charging Clark with manufacturing not more than five grams of methamphetamine, a class "C" felony, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.413. While out on bond, Clark was arrested for OWI, in violation of Iowa Code section 321J.2.[1] On August 16, 2012, the State amended the drug charge to a class "B" felony, in violation of sections 124.401(b)(7) and 124.413.

Clark reached a plea agreement with the State. At a plea hearing on August 21, 2012, the prosecutor recited the terms of the agreement. In exchange for Clark's guilty plea, the State reduced the charge from a class "B" to a class "C" felony, agreed not to seek the habitual offender enhancement, agreed to recommend waiver of a mandatory minimum one-third sentence, dismissed one OWI charge and agreed to recommend another OWI sentence would run

[1] The State charged him with first-offense OWI on July 31, 2012.

concurrently with the drug sentence, and agreed not to seek prosecution in "seven more methamphetamine lab cases."

During the colloquy the district court asked Clark if he understood he was "cutting [his] risk" from twenty-five years to a maximum of ten years in prison by accepting the plea deal. Defense counsel Katherine Flickinger added that Clark "might have been subject to tripling as well." The court told Clark, "in other words, the court would have discretion to not just leave it at a maximum of 25 years but could impose some kind of multiple, and the maximum of that can be a maximum of 75 years if you were convicted of the Class B." Clark said he understood and entered an *Alford* plea[2] to the class "C" felony manufacturing offense.

But on September 28, 2012, Clark filed a pro se motion for "continuance to set aside guilty plea and obtain a new attorney." He claimed his attorneys coerced him into pleading guilty. On October 2, attorney Flickinger filed a motion in arrest of judgment and motion for new counsel on Clark's behalf. The court appointed new counsel for Clark and held a motion-in-arrest-of-judgment hearing on November 26, 2012.

Clark testified at the hearing that his attorneys "spent hours convincing [him] . . . 10 years would be better than 75 years." He also asserted they advised him to lie in court. Attorney Flickinger testified she did not advise her client to lie at the plea hearing but recalled telling him a jury would likely find him guilty. The

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[2] An *Alford* plea allows a defendant to consent to the imposition of a prison sentence without admitting he committed the acts constituting the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

court denied the motion in arrest of judgment on December 13, 2012, finding Clark's testimony was "simply not credible." Clark now appeals.

II. Standard and Scope of Review

We review the denial of a motion in arrest of judgment for abuse of the district court's discretion. *State v. Myers*, 653 N.W.2d 574, 581 (Iowa 2002). To the extent that challenges to the validity of a guilty plea involve determinations of a constitutional magnitude, we review them de novo. *State v. Thomas*, 659 N.W.2d 217, 220 (Iowa 2003). Ineffective-assistance-of-counsel claims are also reviewed de novo. *See State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Analysis

A. Did the District Court Abuse its Discretion in Denying Clark's Motion in Arrest of Judgment?

We must determine if the guilty plea colloquy was appropriate given the State's failure to cite section 124.411[3] in the original or amended trial informations. Before reaching the merits of that question, we consider the State's argument that Clark's motion in arrest of judgment did not raise the same defects in the plea proceeding that he is alleging on appeal. The State contends Clark's pro se motion to set aside his plea did not advance the specific claim that the district court misinformed him about the maximum sentence he faced. In his reply brief, Clark argues the pro se motion and his hearing testimony pointed to a general lack of voluntariness based on the colloquy. We presume, without

[3] "Any person convicted of a second or subsequent offense under this chapter, may be punished by imprisonment for a period not to exceed three times the term otherwise authorized, or fined not more than three times the amount otherwise authorized, or punished by both such imprisonment and fine." Iowa Code § 124.411(1).

deciding, that Clark's admittedly vague request to arrest judgment embraced the ground specified in the appellate briefing.

On appeal, Clark focuses on the district court's warning at the plea hearing that his sentence of twenty-five years for a class "B" felony could have been tripled had he not accepted the State's offer. Clark contends the court misinformed him as to the maximum possible sentence because the State never pled the section 124.411 enhancement. Clark argues this misinformation inhibited his ability to knowingly and voluntarily reach a decision regarding his guilty plea. He argues he only should have been told about the possibility of tripling if the State first properly invoked that enhancement and then was able to prove his applicable prior conviction at a separate proceeding.

Clark cites Iowa Rule of Criminal Procedure 2.8(2)(b)(2), which requires the plea-taking court to inform a defendant of "the maximum possible punishment provided by the statute defining the offense to which the plea is offered." The court followed that rule, informing Clark that he could be imprisoned for a period not to exceed ten years for the class "C" felony to which he was pleading guilty.

The rules of criminal procedure also require the terms of any plea agreement to appear on the record. *See* Iowa R. Crim. P. 2.8(2)(c), 2.10(2). When the prosecutor recited the plea agreement he mentioned the State reducing the charge from a class "B" to a class "C" felony and declining to pursue habitual offender status and a mandatory minimum one-third sentence, as well as forgoing several other potential manufacturing charges. But the prosecutor did not mention the possibility Clark's twenty-five year sentence for a class "B"

felony could be tripled. It was attorney Flickinger who broached that topic—with the district court relaying the possibility to Clark. The court's reference to Clark serving a "maximum of 75 years if you were convicted of the Class B" came during a discussion of the reasons Clark decided to enter an *Alford* plea to the class "C" felony. At the plea hearing, Clark told the judge: "Sir, I believe that the outcome from the plea agreement would be a better outcome than the trial or the possibility of the ending of the trial."

While it may have been the better practice for the district court to inform Clark that section 124.411 would apply only if the State pled the sentencing enhancement and proved the prior drug offense, we do not find the court provided Clark misinformation at the plea hearing. The presentence investigation shows Clark had a prior conviction for delivery of methamphetamine, which could subject him to the enhancement at section 124.411. It was obvious Clark's attorneys were concerned he could face the tripling enhancement, as Clark testified the benefit of the bargain—"10 years was better than 75 years"—was "discussed constantly over and over and over and over and over again." The fact that the State had not yet charged the section 124.411 enhancement does not change the calculus that Clark was avoiding the potential of a seventy-five-year sentence by accepting the plea deal. Clark recognizes in his appellate brief that under rule 2.4(8), the State could amend the trial information to include the enhancement at section 124.411. *See Brothern*, 832 N.W.2d at 197 (finding the State could amend trial information to add habitual offender enhancement so long as it did not prejudice the substantial rights of defendant).

While involuntary guilty pleas are unacceptable, the fact that the risk of more onerous consequences induced a defendant to plead guilty does not render the plea involuntary. *Brewer v. Bennett*, 161 N.W.2d 749, 751 (Iowa 1968). The open presentation of "the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution" does not violate a defendant's right to due process. *See State v. Longbine,* 263 N.W.2d 527, 528 (Iowa 1978).

We do not believe the district court misinformed Clark by advising him of the possibility that his sentence could have reached seventy-five years if he had rejected the plea agreement. In reality, Clark had already received that same information during pre-plea conferences with his attorneys. While the court's explanation of how the State would have to seek the enhancement could have been more detailed, the court's pithy admonition that the twenty-five-year sentence could be multiplied did not render Clark's plea unknowing or involuntary. The district court properly denied his motion in arrest of judgment.

B. Did Clark Receive Ineffective Assistance From His Plea Counsel?

Clark claims his attorney was remiss in two respects: (1) for failing to correct the plea-taking court regarding the maximum sentence he faced if he went to trial and (2) for failing to file a motion to suppress.

To succeed on his ineffective-assistance-of-counsel claims, Clark must show his attorney breached a duty and prejudice resulted. *See Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012); *see also Strickland v. Washington*, 466

U.S. 668, 687 (1984). Clark "must prove both elements by a preponderance of the evidence." *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To establish his counsel breached a duty, Clark has to show her performance fell below the standard of a reasonably competent attorney. *See Strickland*, 466 U.S. at 687. To satisfy the prejudice requirement in a guilty plea case, the defendant must show a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Straw*, 709 N.W.2d at 136 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Generally, we do not resolve ineffective-assistance issues on direct appeal, preferring to leave them for possible postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Those proceedings allow the parties to develop an adequate record and the attorney accused of error to respond to the defendant's claims. *Id*. But we will decide ineffective-assistance claims on direct appeal when the record is sufficient to resolve them. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Clark contends his plea attorney should have corrected the district court concerning the maximum sentence he faced. Clark points us to *State v. Kress*, 636 N.W.2d 12, 22 (Iowa 2001) (holding failure to correct the court as to the sentence constitutes a breach of duty).[4] As stated above, the district court did not misinform Clark concerning the maximum sentence for the offense to which he was pleading. Nor did the court err in picking up on attorney Fickinger's point of information that if Clark rejected the plea offer his class "B" felony sentence

[4] We note that the prejudice analysis in *Kress* was called into question in *Straw*, 709 N.W.2d at 136–37.

"might be subject to tripling." Given the court's proper execution of the plea colloquy, counsel had nothing to correct. Moreover, Clark cannot show but for counsel's performance he would have opted to stand trial. *See Straw*, 709 N.W.2d at 137. Accordingly, we reject his first claim of ineffective assistance of counsel.

In addition, Clark argues attorney Flickinger provided ineffective assistance in declining to file a motion to suppress evidence seized from his vehicle after a valid traffic stop. He claims "the scope of the traffic stop was unlawfully expanded rendering [his] consent invalid." The question is whether Flickinger breached a duty in advance of Clark entering his guilty plea and whether that breach rendered his plea unintelligent or involuntary. *See Castro v. State*, 795 N.W.2d 789, 793 (Iowa 2011); *State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009). The record is inadequate for us to determine whether counsel had a duty to challenge the voluntariness of Clark's consent to search his car. Accordingly, we preserve that claim for possible postconviction relief proceedings.[5]

[5] This case offers a procedural twist because Clark did have a hearing on his motion in arrest of judgment with new counsel. At the hearing, Attorney Flickinger testified she discussed possible defenses with Clark. But because the State does not contend Clark was required to raise the suppression issue at that hearing, we do not address the prospect of waiver.

C. Should We Vacate Clark's OWI Guilty Plea Because the Purpose of the Plea Agreement Has Been Substantially Frustrated?

Because we do not reverse the conviction for methamphetamine manufacturing, we do not need to reach Clark's substantial-frustration argument concerning his guilty plea to OWI.

AFFIRMED.