IN THE COURT OF APPEALS OF IOWA

No. 2-639 / 11-2082
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID WAYNE FRIES,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman (sentencing) and Gregory W. Steensland (plea), Judges.

David Fries appeals from his judgment, conviction and sentence for burglary in the third degree and criminal mischief in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

David Fries, Council Bluffs, appellant pro se.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Tom Nelson, Assistant County Attorney, for appellee.

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

POTTERFIELD, J.

David Fries appeals from his judgment, conviction, and sentence for burglary in the third degree and criminal mischief in the second degree. He contends his guilty plea was not made knowingly and voluntarily due to insufficiencies in the in-court colloquy. If this issue is not preserved, he argues in the alternative, he received ineffective assistance of counsel. Fries also contends in his pro se brief that his counsel was ineffective and the evidence to support his plea was inadequate.

We find error was not preserved to directly challenge the guilty plea on appeal, and preserve the ineffective assistance of counsel claim regarding the guilty plea for postconviction relief. Fries cites no authority in support of his pro se argument;[1] therefore we decline to address its substance here. *See* Iowa R. App. P. 6.903(2)(g)(3).

I. Facts and Proceedings

On May 9, 2011, the Mister Money Pawn in Council Bluffs was broken into and a television stolen. Later that morning, a nearby tobacco store was also broken into and tobacco products were stolen. Security cameras in both shops caught the theft on video. That day, David Fries sold a television with a serial number matching that which was stolen from Mister Money Pawn to Metro Pawn of Council Bluffs. Police compared the surveillance images from all three shops with Fries' license photo and determined he was the subject in all of them. The officers also made a positive comparison of his fingerprints between the pawn

[1] Fries contends he was "railroaded and buffaloed" into his guilty plea as he merely received the stolen property, the evidence was insufficient to find he actually stole the property, and his counsel colluded with the State to obtain a felony conviction.

shop transaction and his print on file. The police arrested Fries at his home, where he was hiding beneath a treadmill in the basement.

On August 1, 2011, Fries was charged with two counts of burglary in the first degree, criminal mischief in the second degree, and theft in the second degree. He pled not guilty, demanded a speedy trial, and filed a pro se motion to dismiss alleging a lack of evidence to support the offenses. His pro se motion was denied. Ultimately, Fries accepted a plea agreement in which he agreed to plead guilty to one count of burglary in the third degree and criminal mischief in the second degree; the remaining counts were dismissed. Fries was sentenced in accordance with this agreement to two concurrent five year indeterminate terms; this term was suspended and Fries was put on probation. The terms of the probation included substance abuse evaluation, abstention from controlled substances, and residential treatment for 180 days. Fries now appeals.

II. Analysis

a. Preservation of Error

To preserve a direct challenge to his guilty plea on appeal, Fries must have filed a motion in arrest of judgment. *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006). Fries did not file a motion in arrest of judgment. Absent such a filing, Fries must show the court did not adequately notify him of the requirement of doing so under Iowa Rule of Criminal Procedure 2.8(2)(d). *Id.*

> We employ a substantial compliance standard in determining whether a trial court has discharged its duty under rule 2.8(2)(d). The court must ensure the defendant understands the necessity of filing a motion to challenge a guilty plea and the consequences of failing to do so.

> The court's comments were sufficient to discharge its duty under rule 2.8(2)(d). Instead of quoting rule 2.8(2)(d) verbatim, the court performed its duty commendably by using plain English to explain the motion in arrest of judgment. The court's statement plainly indicated that if [the defendant] wanted to appeal or challenge the guilty plea, he had to file a motion in arrest of judgment. It also indicated this motion had to be filed not less than five days before sentencing. In whole, it conveyed the pertinent information and substantially complied with the requirements of rule 2.8(2)(d).

Id. Here, the court informed Fries that if he wished "to challenge the sufficiency of the guilty plea proceedings, it will be necessary for [him] to file a motion in arrest of judgment . . . within forty-five days of today's date and in no event less than five days prior to the date scheduled for sentencing." We find this colloquy sufficiently notified Fries of the motion in arrest of judgment filing requirements under *Straw* and, as such, the direct challenge to the guilty plea was not preserved for review. *See id.*

b. Ineffective assistance of counsel

In the alternative, Fries brings his claim regarding the sufficiency of the guilty plea colloquy as a claim of ineffective assistance of counsel. Because he was allowed to plead guilty in response to an insufficient colloquy, he argues, his plea was not knowing and intelligent. Therefore, he concludes, his counsel was ineffective in allowing him to plead guilty and then failing to advise him to file a motion in arrest of judgment. In contesting the sufficiency of his guilty plea, he points to the absence of explanation regarding his right to cross examine witnesses, compel process, and right against self-incrimination.

We review claims of ineffective assistance of counsel de novo. *Id.* at 133. To show he was provided with ineffective assistance, Fries must demonstrate by

a preponderance of the evidence first, that his trial counsel failed to perform an essential duty, and second, that this failure resulted in prejudice. *See id.*

We turn to the prejudice component first. "In analyzing this claim, we need not determine whether his trial counsel's performance was deficient before examining the prejudice component of his ineffective-assistance claim." *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (citations omitted). The record before us does not contain sufficient evidence to satisfy Fries' burden of demonstrating prejudice. *See State v. Bearse*, 748 N.W.2d 211, 219 (Iowa 2008) (stating "the record before us on this direct appeal is devoid of evidence indicating [the defendant] would not have pleaded guilty, but would have insisted on going to trial. In the absence of such evidence, we must preserve the claim for postconviction proceedings.").

We therefore preserve the ineffective assistance of counsel claim for postconviction proceedings.

AFFIRMED.