IN THE COURT OF APPEALS OF IOWA

No. 2-874 / 12-0571
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS V. HALVERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mark E. Kruse, District Associate Judge.

Curtis Halverson contends the district court failed to make a finding that his written pleas of guilty were made voluntarily and intelligently and had a factual basis. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Patrick Jackson, County Attorney, and Jennifer Bailey, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

On July 29, 2011, Curtis Halverson was charged by trial information with possession of a controlled substance (marijuana), third offense, in violation of Iowa Code section 124.401(5) (2011). On the same day, he was also charged by trial information with two counts of animal neglect, in violation of Iowa Code section 717B.3. On November 3, 2011, Halverson filed two forms entitled "Written Waiver of Rights and Plea of Guilty," one for the possession charge and one for the animal neglect charges. Both were "open pleas." The State agreed to dismiss one count of animal neglect and to have the possession and animal neglect sentences run concurrently. The same day the written pleas were filed, the district court entered guilty plea orders accepting Halverson's pleas of guilty to the possession charge and to one count of animal neglect.

On the day set for sentencing, Halverson filed a motion in arrest of judgment. He claimed his prescribed medications "prevented his guilty plea from being entered knowingly and voluntarily." He denied he understood the "Written Waiver of Rights and Guilty Plea" forms he signed. He asked to withdraw his guilty pleas and requested he be able to enter an *Alford* plea in each case.[1] At the sentencing hearing that day, the district court denied his motion as untimely, but it continued the sentencing hearing.[2]

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[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 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).

[2] A motion in arrest of judgment must be made not later than forty-five days after the plea and not later than five days before the date set for pronouncing judgment. Iowa R. Crim. P. 2.24(3)(b).

Another hearing was held on February 3, 2012. When asked by the court if there was any legal reason not to proceed with the sentencing hearing, Halverson's counsel stated Halverson had informed him

> that when [Halverson] signed his two guilty pleas in both . . . cases, he was on psychotropic medications, and he contends he did not knowingly and voluntarily and intelligently sign his guilty pleas. And at this time he wants to withdraw his guilty pleas and enter not guilty pleas in both cases.

The court noted it was probably prudent to have a hearing on the issue, and it set a hearing on Halverson's motion in arrest of judgment.

The hearing on Halverson's motion was held on February 14, 2012. Halverson testified, and counsel made their arguments. The court filed its written ruling the same day finding:

> [Halverson] stated that he had taken prescription medications at the time of entering the plea. The pleas of guilty set forth the rights and consequences to [Halverson]. They are initialed by [Halverson] as to the rights he was giving up and the consequences of his plea. [Halverson] is familiar with the criminal justice system. [Halverson] appears to state that he did not understand the rights he gave up by pleading guilty due to the medication that was prescribed. He states he does not have mental health diagnoses.
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> These reasons only came up at the time of the original date of sentencing after these cases had been on file for months. He states that he did remember signing an "open plea" but not a "guilty plea." He stated he wanted an "Alford" plea. He states that he did not fully understand the pleas.
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> [Halverson] states that he had been on medication for many years. He does obviously have a prior criminal record and certainly testifies as someone familiar with the criminal justice system. He has been on medication for years. At the time of the plea in this case, [Halverson] had the advantage of having counsel for months. He has experience in the criminal justice system. There is no proof other than conjecture by [Halverson] that his medication that is prescribed and that he has taken over a period of years made [him] unaware of what he was doing. The contents of the written plea would indicate the exact opposite. The original motion was not timely. The conclusion by [Halverson] that he did not understand

> the consequences of his pleas is at odds with the pleas made. It is unsupported by any other evidence.

In denying the motion in arrest of judgment, the court concluded the facts supported that Halverson was simply having a change of heart and did not show that he did not fully understand his rights and the consequences of his pleas.

At sentencing on March 2, 2012, the district court entered judgment and sentenced Halverson to two years of incarceration on the possession charge and one year on the animal neglect charge, with the sentences to run concurrently.

Halverson now appeals, claiming the court failed to make a finding that the pleas were voluntarily and intelligently made and had a factual basis. Halverson contends he is not subject to the usual error preservation requirements because the motion in arrest of judgment advisory on the written plea forms was inadequate.[3] *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004) (holding failure to file a motion in arrest of judgment does not preclude a defendant's right to assert such challenge on appeal if not properly advised during plea proceedings). He asserts the form failed to advise him that failure to file a motion in arrest of judgment precluded him from challenging the pleas on appeal. *See* Iowa R. Crim. P. 2.8(2)(d). The State responds that the written plea form was adequate. We need not pass judgment on whether the form's statement complies with rule 2.8(2)(d), since Halverson did file a motion in arrest of judgment, and it was ultimately considered and decided on its merits by the district court. We therefore shift our focus from the parties' error preservation arguments to the

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[3] The preprinted plea form states: "In order to raise any objections to this guilty plea proceeding, I must file a Rule 2.24(3)(b) MOTION IN ARREST OF JUDGMENT . . . . Failure to file such a MOTION will prevent me from raising questions regarding this guilty plea."

merits of the denial of the motion. "We review a denial of a motion in arrest of judgment for abuse of discretion and will reverse only if the ruling was based on reasons that are clearly unreasonable or untenable." *State v. Myers*, 653 N.W.2d 574, 581 (Iowa 2002).

For the first time on appeal, Halverson asserts there was no finding that his pleas had a factual basis. This was not addressed in his written or oral motions in arrest of judgment. The district court had no opportunity to rule on this claim. Consequently, his argument is not preserved for our review. *Cf. State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (finding defendant's motion for judgment of acquittal did not preserve specific arguments made for the first time on appeal). "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). In any event, upon our review of the record, we find sufficient factual basis for Halverson's pleas. Each form signed by Halverson contained a hand-written factual basis. Each form also stated Halverson had read and understood that the court could examine the minutes of testimony and investigative reports in finding a factual basis, and these documents clearly support the charges against Halverson.

Halverson also asserts, for the first time on appeal, there was no explicit finding by the district court that his pleas were voluntarily and intelligently made. Nevertheless, we elect to address his argument.

A court "shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." Iowa R. Crim. P. 2.8(2)(b). To be sure, the guilty plea orders accepting Halverson's pleas did

not state the court had determined the pleas were made voluntarily and intelligently (or that the court found a factual basis for the pleas), although such findings are implicit in the court's acceptance of the pleas. But, we need not pass judgment on whether the orders complied with rule 2.8(2)(b), because before entering judgment, the district court did make a finding that Halverson fully understood his rights and the consequences of his pleas at the time he made his written pleas. We therefore conclude the district court complied with rule 2.8(2)(b).

Having switched gears on appeal, Halverson does not argue, as he did before the district court, that his pleas were not knowingly, voluntarily, and intelligently made. Nevertheless, we elect to address the issue.

Here, Halverson submitted two written and signed guilty plea forms—one for the possession charge and one for the animal neglect charge. The plea forms indicate that Halverson had discussed the charges with his lawyer. Each contained a hand-written factual basis. Each stated Halverson read and understood that the court could examine the minutes of testimony and investigative reports in finding a factual basis. Each stated Halverson read and understood the constitutional rights he was waiving as set forth in a verbatim rendition of rule 2.8(2)(b). Each stated Halverson read and understood the motion in arrest of judgment requirement. Each stated Halverson read and understood the penalty ranges for the charges. On each form, Halverson placed his initials next to various paragraphs, including those paragraphs describing the constitutional rights he was waiving.

After having heard Halverson’s testimony and other evidence presented at the motion-in-arrest-of-judgment hearing, the district court found there was no proof that the medications Halverson was taking made him unaware of what he was doing. The court found Halverson’s claim that he did not understand the consequences of his pleas was unsupported by any other evidence. The court concluded the facts “[do] not show that [Halverson] didn’t fully understand his rights and the consequences of his pleas.” We agree. Accordingly, the court did not abuse its discretion in denying Halverson’s motion in arrest of judgment. We therefore affirm his judgments and sentences.

AFFIRMED.