IN THE COURT OF APPEALS OF IOWA

No. 7-146 / 06-0990
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY THOMAS RICH,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge.

The defendant appeals his conviction and sentence following a guilty plea.

AFFIRMED.

Patricia Hulting, Des Moines, for appellant.

Jeffrey Rich, pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Wayne Reisetter, County Attorney, and Jeannine Gilmore, Assistant County Attorney, for appellee.

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

VOGEL, P.J.

Jeffrey Rich appeals his conviction and sentence for third-degree theft, in violation of Iowa Code sections 714.1 and 714.2 (3) (2005), asserting the district court erred in failing to make a verbatim record of the plea proceedings. In our review of the record, we conclude Rich waived the right to challenge his guilty plea entered on February 19, 2006, because he failed to file a motion in arrest of judgment prior to sentencing on June 8, 2006, as required under the parameters of Iowa Rule of Criminal Procedure 2.24(3)(*a*). We affirm Rich's conviction and sentence pursuant to Iowa Court Rule 21.29(1)(*c*), (*e*).

Rich next asserts his counsel was ineffective for not requiring the court to create a verbatim record of the plea proceedings as required under Iowa Rule of Criminal Procedure 2.8(2)(*d*). He claims such a record would indicate whether the court personally advised him of his obligation to file a motion in arrest of judgment to challenge his guilty plea. Section III of the plea form contained this language:

> After pleading guilty, I further understand the following:
>
> A) In order to contest this plea of guilty, I must file a motion in arrest of judgment no later than 45 days after a plea of guilty and no later than five days prior to pronouncing judgment, and that the Court will set a sentencing date not less than fifteen days after the date of its acceptance of this guilty plea unless I waive this right, and the right to file a motion in arrest of judgment will be waived by having the Court impose a sentence immediately or as soon as possible.
>
> B) By having sentence imposed immediately or as soon as possible, I will never be able to challenge this plea of guilty and I will be giving up my right to directly appeal my guilty plea.

Under section IV (A) of the plea form, Rich struck this language: **"I hereby waive my right to have the Court address me personally and explain to me each of the rights herein which I have acknowledged."**. Notwithstanding that language, Rich proceeded to sign the plea form immediately under this language: "I approve of the waiver of the procedures of Iowa Rule of Criminal Procedure 2.8(2) and ask the Court to accept my plea of guilty by this written document ~~and pronounce judgment and sentence~~." The requirement of a verbatim record does not fall under Rule 2.8(2), but rather under 2.8(3). Nonetheless, as Rich was aware of (as demonstrated in his written plea), yet waived all requirements of 2.8(2), there remains nothing to challenge even if a verbatim record were made. *See State v. Barnes*, 652 N.W.2d 466, 467-8 (Iowa 2002) (holding no in-court plea colloquy is necessary where the defendant received notice of both requirements of 2.8(2)(*d*) and time for motion in arrest of judgment and sentencing was specifically waived by the written plea). The written plea in this case tracked the language of the rule and informed Rich of the consequences of a failure to file a timely motion in arrest of judgment. *Cf. State v. Meron*, 675 N.W.2d. 537, 541-2 (Iowa 2004) (holding a verbal guilty plea and abbreviated colloquy invalid when the defendant was not adequately informed of both the motion in arrest of judgment requirement and the consequences of failing to file such motion). Therefore, we find no prejudice to Rich for his attorney's failure to request a verbatim record of the plea proceedings. *See State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999) (stating that prejudice is shown by a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different).

AFFIRMED.

Eisenhauer, J. concur, and Vaitheswaran, J. dissents.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. Rich argues trial counsel was ineffective "for not requiring that the court create a verbatim record of his waiver of right to challenge his guilty plea." Under *State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002), "defendants charged with serious or aggravated misdemeanors may enter into a valid written waiver of the right to file a motion in arrest of judgment and thus trigger the bar that rule 2.24(3)(*a*) imposes to challenging a guilty plea on appeal." Based on this opinion, I agree Rich could have waived his right to file a motion in arrest of judgment. As a factual matter, I am not convinced he did so, as he specifically struck the portion of the written plea pertaining to a waiver of this right. However, even if Rich did waive this right, I agree with him that he could not waive the court's obligation to inform him of his rights in an on-the-record proceeding. *See State v. Meron*, 675 N.W.2d 537, 543 (Iowa 2004). In *Meron*, the court stated:

> Thus, while the rule embraces the use of written waiver forms, neither [*State v.*] *Kirchoff* [452 N.W.2d 801 (Iowa 1990)] nor the waiver language of rule 2.8(2)(*b*) diminishes the importance and necessity of the court's role to ensure each plea is voluntary, intelligent, and supported by facts. Instead, they simply recognize that the court, in making its required determination in misdemeanor cases, can use a defendant's written acknowledgement. The language of the waiver portion of the rule adopted after *Kirchoff* tracks with this approach and explains why it is written to permit the *court* to waive the procedures, subject to the approval of the defendant. *See* Iowa R.Crim. P. 2.8(2)(*b*). It allows the court, upon examination of a written plea, to waive the necessity of a full in-court colloquy. It does not give the defendant the right to waive the means for the court to determine that the plea is voluntarily and intelligently entered.

> This background reveals the flaw in the State's argument. There are two separate components of rule 2.8(2)(*b*). *See* [*State v.*] *Myers,* 653 N.W.2d [574,] 577-78 [(Iowa 2002)]. The first concerns the requirement of an in-court colloquy. *See id.* The second concerns the requirement the defendant is informed. *See id.* Although the court in guilty pleas to serious and aggravated misdemeanors can waive the in-court colloquy component, the rule still requires substantial compliance with the requirement that the defendant be informed.

Based on this language, I believe Rich was entitled to an on-the-record court proceeding and I would conclude trial counsel was ineffective in failing to ensure that such a proceeding was held.