

IN THE COURT OF APPEALS OF IOWA

No. 9-528 / 08-1153
Filed August 6, 2009

JORGE LUIS MELENDEZ, SR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Jorge Melendez appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant State Appellate Defender, for appellant.

Jorge L. Melendez, Newton, appellant pro se.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Gary Allison, County Attorney, and Alan R. Ostergren, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mansfield, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

On August 4, 2005, law enforcement officials observed a confidential informant purchase cocaine from Jorge Melendez Sr. in the parking lot of Pete's Tap in Muscatine. Melendez was arrested in January 2007. He applied for court-appointed counsel, and Philip Fontana was appointed. Melendez then privately retained attorney James Weaver, and Fontana withdrew.

Melendez was charged with delivery of a controlled substance, in violation of Iowa Code sections 124.401(1)(b)(2)(b) and 124.411 (2005), a class "B" felony, and failure to affix a drug tax stamp, in violation of section 453B.12. Melendez entered into a plea agreement whereby he pled guilty to a lesser included offense of a class "C" felony under count I and pled guilty to count II. At the plea proceedings Melendez was initially reluctant to admit the facts that gave rise to the charges, but eventually agreed that he intentionally gave the confidential informant a box containing cocaine. He also agreed that he was satisfied with the advice and counsel from his attorney.

Melendez was sentenced to a term of imprisonment not to exceed ten years on the delivery charge, and five years on the drug tax stamp charge, to be served consecutively. He did not timely file a motion in arrest of judgment, or appeal his conviction. Melendez filed some pro se motions. The district court ruled these were improper pleadings to accomplish what he requested.

On August 9, 2007, Melendez filed an application for postconviction relief. He claimed he received ineffective assistance because his defense counsel did

not conduct depositions as he requested. He also claimed his attorney would not agree to take the case to trial. Weaver testified he did not recall Melendez asking him to take depositions. Weaver stated that at first Melendez wanted to go to trial, but as they discussed the case he decided to accept the plea agreement. Weaver testified he would have gone to trial with the case if Melendez had wanted to do so.

The district court denied Melendez's application for postconviction relief. The court concluded Melendez had failed to show he received ineffective assistance of counsel, finding he was "unable to prove either prong of this required legal test for establishing ineffective representation." Melendez appeals the district court's order.¹

II. Ineffective Assistance

Melendez contends he received ineffective assistance from his defense counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

¹ Melendez's appeal was sent to the Supreme Court Clerk of Court's Office, instead of filed in district court, which caused his appeal to be untimely. He filed an application for a delayed appeal, which was granted by the Iowa Supreme Court.

Melendez contends he received ineffective assistance because his defense counsel failed to ensure that his guilty plea was voluntary. As noted above, Melendez was initially reluctant to admit the facts that gave rise to the charges, and he had three off-the-record discussions with his attorney. Melendez claims this shows he was being browbeaten into a plea by his attorney. He states “[h]is plea was not the product of a free and willing decision and was obtained only to appease his attorney.”

The district court did not find Melendez’s claims that he was intimidated by his attorney to be credible, and neither do we. Weaver testified he believed the State had a strong case against Melendez, but he would have been willing to go to trial if that was what his client wanted. He stated, “there would have been no reason for me to deny that, had he indicated to me that he wanted to have a trial.” Weaver also testified, “at no time did he assert I’m not going to do this, I want to have a trial, or anything like that. Had he done so, I would have allowed him—I had no objection to that.” We conclude Melendez has failed to show he received ineffective assistance of counsel.

III. Pro Se Issues

Melendez has filed a pro se brief, claiming his arrest was improper because there was no arrest warrant. He alternatively argues that if there was an arrest warrant, he was never advised of the contents of the warrant. He claims the criminal charges against him should be dismissed, and the evidence against him should be suppressed.

The entry of a guilty plea under Iowa Rule of Criminal Procedure 2.8(2)(b) waives all defenses and objections that are not intrinsic in the plea itself. *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000). A defendant seeking to challenge a guilty plea must do so by means of a motion in arrest of judgment.² Iowa R. Crim. P. 2.24(3)(a) (“A defendant’s failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant’s right to assert such challenge on appeal.”); *State v. Bearnse*, 748 N.W.2d 211, 218 (Iowa 2008).

Melendez did not file a timely motion in arrest of judgment. We conclude he has failed to preserve error on his claims concerning the arrest warrant. Because Melendez has not preserved these claims, we do not address the merits of his arguments.

We affirm the decision of the district court denying Melendez’s request for postconviction relief.

AFFIRMED.

² A party may be excused from filing a motion in arrest of judgment if the failure is due to ineffective assistance of counsel. See *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009). Melendez’s pro se brief, however, does not raise his issues within the context of a claim of ineffective assistance of counsel.