IN THE COURT OF APPEALS OF IOWA

No. 9-742 / 08-1831
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE SNEED GIVENS,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla (guilty plea) and Douglas S. Russell (sentencing), Judges.

A defendant appeals his conviction and sentence for assault with a weapon, contending that his guilty plea was not knowing, voluntary, and intelligent. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Harold Denton, County Attorney, and Nicholas Maybanks, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

George Givens pleaded guilty to assault with a weapon, an aggravated misdemeanor. *See* Iowa Code § 708.2(3) (2007). After he entered the plea, but before he was sentenced, the Linn County Courthouse flooded and Givens's court file was destroyed. At the subsequent sentencing hearing, Givens's attorney voiced no objection to proceeding with sentencing. The court asked her whether she knew "of any legal cause why judgment and sentence may not be pronounced." Counsel answered, "No, Your Honor." The district court proceeded to sentence Givens.

Givens appealed his judgment and sentence after which he sought and obtained a limited remand to reconstruct the record. The reconstructed record contained no written plea agreement[1] or transcript of a plea colloquy but did include an order captioned "Plea." That order states, "The Court, with Defendant's approval, waives formal proceedings pursuant to I.R.C.P. 8(2). The Court finds that the Defendant's plea is knowingly, voluntarily, and intelligently made, has a factual basis, and accepts the plea."

Givens takes issue with this order. He contends he

> did not make a knowing and voluntary plea because there is no indication either through a personal colloquy or any written plea agreement that the district court informed [him] of any of the rights he was waiving when he pled guilty.

The State counters that the onus was on Givens to create an adequate record affirmatively disclosing the error and that his limited reconstruction of the record did not accomplish this task.

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[1] The certified court record reflects that a written guilty plea was filed prior to the flood.

As a preliminary matter, we note that Givens's issue is a narrow one: whether the record discloses that the plea was knowing, intelligent, and voluntary. Givens does not argue that the absence of a written record deprived him of a meaningful appeal. *See In re T.V.*, 563 N.W.2d 612, 614–15 (Iowa 1997) (holding absence of a full recording of juvenile proceedings and inability of juvenile to reconstruct the record deprived juvenile of a meaningful appeal). Nor does Givens argue that the State, as repository of criminal court files, had the burden to reconstruct files destroyed by a force of nature. *Cf. McKnight v. State*, 356 N.W.2d 532, 535 (Iowa 1984) ("[W]hen the State shows that the original records of a criminal proceeding cannot be produced notwithstanding its good faith effort to make and preserve those records, a postconviction court should allow the State to offer substitute proof of what occurred in those proceedings.").

Focusing on the narrow issue raised here, we agree with the State that Givens did not provide us with a sufficient record to resolve it. Specifically, Givens did not furnish a copy of his written plea or a statement attesting to its contents. *See T.V.*, 563 N.W.2d at 613 (noting that appellate attorney filed affidavit of trial attorney attesting he lacked sufficient independent recollection of proceedings). Givens also did not furnish a transcript of the plea proceeding or an attestation concerning what transpired in that proceeding. *See id.* (noting attorney "attempted to obtain a certified transcript of the hearing from a private shorthand reporter firm" but could not, given poor quality of tapes); *McKnight*, 356 N.W.2d at 536 (noting State attempted to reconstruct record by eliciting testimony from attorney who represented defendant). Without these documents,

we have no basis for scrutinizing the district court's finding that the plea was knowing, voluntary, and intelligent. *See State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995) (declining to speculate as to what took place at an unreported sentencing hearing where "[t]here [was] no written plea agreement, no transcript of the proceedings, and no record of Mudra's criminal background" and concluding that "by voluntarily failing to provide such a record, Mudra has waived error on his claim"); *State v. Ludwig*, 305 N.W.2d 511, 513 (Iowa 1981) ("It is defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon."). As our highest court has stated, "We will not predicate error on speculation." *State v. Belt*, 505 N.W.2d 182, 185 (Iowa 1993).

Because the error cited by Givens is not apparent in the record before us, we will presume the regularity of the district court's finding that his plea was knowing, intelligent, and voluntary. *See State v. Snook*, 260 Iowa 160, 162, 146 N.W.2d 252, 254 (1966) ("The rule is well established in this jurisdiction that we presume the regularity of actions by officials and courts unless the contrary is made to appear."); *see also* Iowa Code § 622.56 ("The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared."). Accordingly, Givens's judgment and sentence for assault with a weapon is affirmed.

AFFIRMED.