IN THE COURT OF APPEALS OF IOWA

No. 8-486 / 97-1930

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MONZELLE MILLER,

Defendant-Appellant.

FILED
OCT 29 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Defendant appeals from her conviction for forgery by credit card as an habitual offender. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey K. Noble, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

On appeal from her conviction for forgery by credit card as an habitual offender, defendant Monzelle Miller claims her counsel was ineffective in permitting her to plead guilty when the record failed to establish a factual basis for the offense. We affirm the conviction and preserve defendant's ineffective assistance of counsel claim for possible postconviction review.

Pursuant to a plea agreement in which four possible felonies were not charged, defendant pled guilty to the charge of forgery by credit card as an habitual offender. Iowa Code § 715A.6 (1997). The plea resulted from her use of stolen credit cards to make purchases on June 22 and 28, 1997. None of the individual purchases exceeded $1000 in value nor did the aggregate purchases made with any individual card exceed $1000, although the total of all purchases made did.

On appeal, defendant claims her trial counsel was ineffective in permitting her to plead guilty when the record failed to establish a factual basis for the plea. Because no motion in arrest of judgment was filed, defendant waived her right to challenge the guilty plea proceeding. *See* Iowa R. Crim. P. 23(3). Therefore, defendant's claim is framed as one of ineffective assistance of counsel; however, she argues such a challenge should be subject to direct review on appeal regardless of any failure to challenge the factual basis in the trial court. We disagree and affirm defendant's conviction.

Citing *State v. Allison*, 576 N.W.2d 371 (Iowa 1998), defendant claims the aggregation of the value of the items obtained with the stolen credit cards was not authorized under section 715A.6. The State concedes that "*Allison* would in all likelihood apply to the facts in this case;" however, it contends *Allison* had not been decided at the time defendant entered her plea and her counsel could not have breached any duty for failing to anticipate how the court would interpret section 715A.6. *See Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel."); *but see State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982) (stating there were no court decisions which foreclosed the question, and the language in the statute could have supported such an argument). The State further contends defendant cannot demonstrate any prejudice because of the favorable plea agreement she received. The State alternatively argues the issue should be preserved for postconviction proceedings in order to allow defense counsel to respond.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied*, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an

opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Improvident strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). We conclude the record before us is not sufficient to address this claim and preserve it for possible postconviction review. *See State v. Connelly*, 551 N.W.2d 329, 332 (Iowa App. 1996).

AFFIRMED.

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