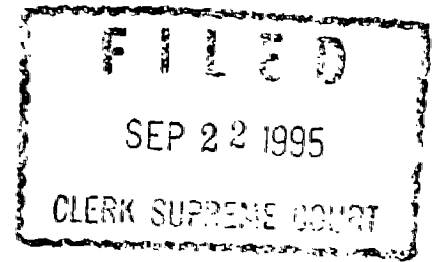


IN THE COURT OF APPEALS OF IOWA

No. 5-402 / 94-1748



STATE OF IOWA,

Appellee,

vs.

WILLIAM JOSEPH McDONNELL III,

Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

McDonnell challenges the acceptance of his guilty plea and the sentence imposed for indecent contact with a child. **AFFIRMED.**

Stephen P. Wing of Dwyer & Wing, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, William E. Davis, County Attorney, and Joseph A. Grubisich, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

McDonnell, by written plea, entered a guilty plea to indecent contact with a child in violation of Iowa Code section 709.12 (1995). In exchange for his plea, the State agreed to drop an additional charge and remain silent at sentencing.

The written plea of guilty contained a number of recitations including an itemization of the rights waived by pleading guilty and an acknowledgment of the underlying factual basis supporting the charges made by the State. Paragraph ten provided:

If I claim there are any irregularities or errors in this guilty plea, I must file a motion in arrest of judgment not later than forty-five days after this plea of guilty or in any case, not later than five days before the day set for sentencing. Failure to do so will preclude my right to assert any defects in this plea in any appeal to the Iowa Supreme Court.

McDonnell also signed a waiver of presence form which provided:

I understand and give up my right to challenge and/or appeal from any irregularities or errors in the taking of my guilty plea by filing of a motion in arrest of judgment.

The district court accepted McDonnell's plea and set sentencing for a later date. The court also requested an abbreviated presentence report consisting of McDonnell's Iowa criminal history. McDonnell failed to file a motion in arrest of judgment within the required time.

At sentencing McDonnell argued for a deferred sentence. This request was rejected, and McDonnell was sentenced to a term of incarceration not to exceed two

years. The court cited the seriousness of this offense, individual deterrence, and public security as its reasons for selecting the sentence imposed. The sentencing judge cited the same reasons supporting rejection of McDonnell's request to defer judgment.

On appeal, McDonnell challenges the validity of his guilty plea and the district court's exercise of its sentencing discretion. He also claims trial counsel was ineffective for failing to challenge the validity of his plea and in failing to request a complete presentence investigation.

We initially determine McDonnell failed to preserve any error resulting from his guilty plea. His unexcused failure to file a motion in arrest of judgment precludes appellate review of his guilty plea. Iowa R. Cr. P. 23(3)(a).

McDonnell's challenge to his sentence includes both the district court's failure to order a "complete" presentence investigation and the severity of his sentence. The scope of our review on these issues is for correction of errors of law. Iowa R. App. P. 4. A sentence within statutory limits will be set aside only for an abuse of discretion. *State v. Nelson*, 279 N.W.2d 1, 3 (Iowa 1979).

This case involves a plea to an aggravated misdemeanor. Ordering a presentence investigation for an aggravated misdemeanor is discretionary. Iowa Code § 901.2 (Iowa 1993). No abuse of discretion will be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or unreasonable. *State v. Dicks*, 473 N.W.2d 210, 215 (Iowa App. 1991). Here, the sentencing judge

exercised discretion by requesting an abbreviated presentence report in the form of McDonnell's criminal history. Contrary to McDonnell's assertions, we find this thoughtful and considered action falls well within the scope of the sentencing judge's discretion under section 901.2.

We also disagree with McDonnell's claim that the sentencing judge failed to cite adequate reasons for the sentence imposed. The reasons cited are sufficient if they reveal an exercise of discretion and reveal the motive for the sentence. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). The sentencing record reveals the sentencing judge considered the severity of the offense, the individualized benefits of incarceration as they related to the defendant, and the security of the community in reaching his sentencing decision. We find the reasons stated demonstrate the required exercise of discretion and the motive for the sentence.

The remainder of McDonnell's complaints regarding his sentence are also without merit. The nature of and seriousness of his criminal behavior provide sufficient reasons supporting the sentencing judge's refusal to defer judgment in this case. We are unable to find any abuse of discretion by the sentencing judge and affirm on these issues.

McDonnell also claims he was denied effective trial counsel. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890

(Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We, however, find the record sufficient to allow resolution of this issue on appeal.

Established principles govern our review of defendant's Sixth-Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see *Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. *Strickland*, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

Written plea procedures are clearly contemplated by our rules of criminal procedure. See Iowa R. Cr. P. 8(2)(b) (permitting waiver of plea procedures in

misdemeanor cases). Contrary to McDonnell's assertion, we do not believe counsel has a duty to challenge the propriety of a written guilty plea when the resulting procedural waivers are expressly authorized by rule 8(2)(b). We are also unable to find any breach of essential duty resulting from counsel's failure to file a motion in arrest of judgment. The plea documents contain an unequivocal statement of McDonnell's obligation to file a motion in arrest of judgment and the consequences of his failure to do so. Counsel had no duty to perform "the useless act" of filing a motion which was not supported in the record. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). McDonnell's failure to file a motion in arrest of judgment was accordingly not excused by ineffective assistance of counsel.

Finally, we reject McDonnell's claim that his lawyer had an essential duty to request a presentence investigation under the circumstances of this case. As already noted, a presentence investigation in an aggravated misdemeanor case is discretionary. Counsel's conduct was reasonable under prevailing professional norms. In any event, there was no resulting prejudice. McDonnell had sufficient opportunity at the sentencing hearing to offer evidence in mitigation of punishment.

The judgment of the district court is affirmed.

AFFIRMED.