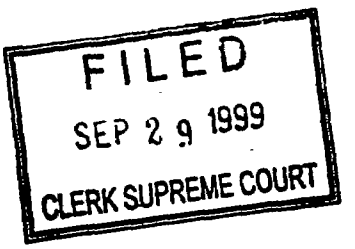
IN THE COURT OF APPEALS OF IOWA

No. 1999-141 (9-357) / 98-1810
Filed September 29, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN R. PODELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

Defendant appeals from his conviction for possession of marijuana with intent to deliver. **AFFIRMED.**

Thomas J. O'Flaherty of the O'Flaherty Law Firm, Swisher, for appellant.

Thomas J. Miller, Attorney General, Julie Brown, Assistant Attorney General, Richard N. Dunn, County Attorney, and Harry L. Haywood III and Jason T. Hauser, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Kevin Podell appeals from his conviction for possession of marijuana with intent to deliver. Podell claims his guilty plea and sentence are void because the State reneged on its agreement to recommend a two-year sentence. He also claims the district court failed to exercise its sentencing discretion. We affirm.

Podell was charged with three drug law violations in a trial information filed on April 1, 1998.[1] Plea proceedings were held July 20, 1998. Pursuant to agreement, Podell entered a plea of guilty to Count I. The district court inquired as to the terms of the agreement and was informed Counts II and III would be dismissed. In addition, defense counsel stated:

> My understanding is the State agrees to accept the presentence investigation. That the initial recommendations of the State will be a two-year suspended sentence, placement in a halfway house for a period of up to six months, a fine in the amount of fifteen hundred plus surcharge and court costs and probation.

The State and Podell then informed the court on the record that this was their understanding of the plea agreement.

The district court then proceeded to explain to Podell the consequences of the plea including the penalty involved. With respect to any possible incarceration, the district court stated:

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[1] Count I alleged possession of marijuana with intent to deliver; Count II alleged failure to affix a drug tax stamp; and Count III alleged prohibited acts. Counts I and II are class D felonies and Count III is an aggravated misdemeanor. All offenses were alleged to have occurred on March 25, 1998.

> All right. The last thing we need to talk about, Mr. Podell, is the penalty involved here.
>
> What you are pleading guilty to is a Class "D" felony. Under Iowa law under Section 902.9, a Class "D" felon shall be confined for no more than five years. . . .
>
> Do you understand that in terms of the sentence here that carries with it a potential five-year prison sentence?

Podell responded, "Yes, sir."

Finally, the district court explained to Podell the sentencing judge could impose this prison term regardless of any plea agreement between the lawyers and regardless of what the presentence investigation recommended. When asked if he understood, Podell responded, "Yes, I do, sir."

Sentencing proceedings were held on September 28, 1998. The State recommended a five-year suspended prison term. The State summed up its recommendation by stating, "our recommendation is for suspended sentence with placement in a residential facility." No objection was made to this recommendation. Both defense counsel and Podell were addressed by the court and neither knew of any "legal cause or reason" why sentence should not be imposed. Podell was sentenced to a five-year term of imprisonment. Podell appeals.

I. VALIDITY OF PLEA AGREEMENT. Podell alleges his constitutional rights were violated because the State reneged on a promised plea agreement. Our review of constitutional claims is de novo in light of the totality of the circumstances. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996).

We have carefully reviewed the record and conclude under the totality of the circumstances there is insufficient evidence to establish the State reneged on the plea agreement. It is true the record contains a reference to a "two-year" suspended sentence. However, that reference only appears once. It was not commented upon by the district court, counsel for the State, defense counsel or Podell. In addition, it was not objected to by Podell's counsel. In addition, the district court carefully explained to Podell in the plea proceedings that the offense was a Class "D" felony punishable by a term of confinement not to exceed "five years". Podell acknowledged his understanding of the maximum penalty. The district court also fully explained to Podell the plea agreement was not binding on the sentencing judge. Once again Podell indicated his understanding. This court concludes from the totality of the circumstances that the evidence is insufficient to prove the State reneged[2] on the plea agreement. The State recommended a suspended sentence and placement in a residential facility in compliance with the terms of the plea agreement.[3]

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[2] We note that the reference to a "two-year" suspended sentence in the plea proceeding could have been an unintentional and unnoticed misstatement by the prosecutor or a typographical error in the record. In any event, the record does not support Podell's argument the State violated the terms of the plea agreement.

[3] It is noted the State does not have the authority to change the term of incarceration for a Class "D" felony from five years to two years. *See State v. Rodgers*, 560 N.W.2d 585, 587 (Iowa 1997) ("Under the general indeterminate sentencing statute, a sentencing judge must impose an indeterminate sentence for the full statutory maximum.")

We further note Podell was informed by the district court at the sentencing proceedings of the potential "five-year prison sentence" and the sentencing judge could impose this term regardless of the plea agreement for a suspended term.

In summary, we conclude the evidence fails to establish the State reneged on the plea agreement. We also conclude Podell was not prejudiced by the actions of the district court in imposing the sentence.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Generally, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve such a claim on direct appeal when the record is adequate to decide the issue. *State v. Arne,* 579 N.W.2d 326, 329 (Iowa 1998). We conclude the record before us is adequate to decide the issue of ineffective assistance of counsel raised in this case.

Podell's claim his attorney was ineffective at sentencing by not objecting when the State recommended a suspended *five-year* term instead of a suspended *two-year* term. We have already discussed this issue in detail. We conclude Podell has failed to establish either (1) defense counsel failed to perform an essential duty or (2) he suffered prejudice. As such, his claim of ineffective assistance of counsel must fail. *Strickland v. Washington,* 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997).

III. SENTENCING DISCRETION. A sentence will be disturbed by a reviewing court only upon a showing the trial court abused its discretion. *State v. Neary,* 470 N.W.2d 27, 29 (Iowa 1991). Podell raises three objections with regard to his sentence.

A. FAILURE TO STATE ADEQUATE REASONS FOR SENTENCE. The purpose of Iowa Rule of Criminal Procedure 22(3)(d) is to allow a reviewing court to determine whether there has been an abuse of discretion. *State v. Matlock,* 304 N.W.2d 226, 228 (Iowa 1981). A sentencing court's statement of its reasons satisfies the rule if it recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed. *See State v. Johnson,* 445 N.W.2d 337, 342-43 (Iowa 1989); *State v. Victor,* 310 N.W.2d 201, 205 (Iowa 1981); *State v. Garrow,* 480 N.W.2d 256, 259 (Iowa 1992).

The sentencing judge listed several reasons for the sentence in this case including (1) Podell's prior criminal history which included two prior drug-related convictions; (2) nature of the offense; (3) the fact probation would not be appropriate in this case; (4) protection of the community; (5) Podell's continued use of marijuana on a daily basis following his arrest; and (6) the serious problems drugs have caused in Podell's life. We have carefully reviewed the sentencing order and conclude the reasons stated by the district court were adequate to demonstrate a proper exercise of discretion.

B. SENTENCE REDUCTIONS AND PAROLE ELIGIBILITY. Podell argues the district court failed to make the "public announcement" concerning any sentence reductions or parole eligibility pursuant to Iowa Code section 901.5(9)(a) and (b). Podell is correct that the district court did not make the announcement during the sentencing hearing. The sentencing order stated Podell "is advised through this order that his sentence of incarceration may be reduced through prison credits or parole." In addition, our supreme court recently stated:

> Johnson's argument based on section 901.5(9) is invalid for other reasons as well. In order to invalidate proceedings taken in disregard of stated procedural requirements, it must be determined that the omitted duty is essential to accomplishing the purpose of the statute as applied to the party seeking to take advantage of the omission. *See In re A.E.O.*, 437 N.W.2d 238, 239 (Iowa 1989). We conclude that the manifest intent of the requirement to announce the potential for sentence reduction under section 901.5(9) is to inform the public of the true dimension of the sentence imposed. While the court's responsibility to comply with this directive is essential to that goal, it serves no function in imparting information to the defendant that is necessary for a valid plea and sentencing.

State v. Johnson, 513 N.W.2d 717, 719-20 (Iowa 1994). We conclude Podell is not entitled to relief on this issue.

C. FAILURE TO IMPOSE APPROPRIATE MINIMUM FINE. Podell argues the district court erred in imposing a fine of $500 instead of $1000 in this case. Podell argues the required fine is not mandatory and may be suspended in whole or in part. *State v. Standifer*, 570 N.W.2d 256, 257 (Iowa App. 1997). Podell argues the district court erroneously determined the minimum fine to be $500 instead of $1000 and the case should be remanded for resentencing. The State argues the record is

clear the district court was well aware of the minimum fine and used proper discretion in deciding to suspend half of that fine. We agree. A careful review of the record disclosed the district court properly exercised its discretion with regard to the imposition of this fine.

In summary, we conclude the judgment of the district court should be affirmed in its entirety.

AFFIRMED.