

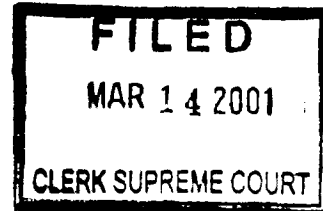
IN THE COURT OF APPEALS OF IOWA

No. 1-076 / 00-0126
Filed March 14, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAYMOND CONARD HAMMER,
Defendant-Appellant.



Appeal from the Iowa District Court for Boone County, Dale E. Ruigh,
Judge.

Defendant appeals from the judgment and sentence entered upon his
guilty plea to going armed with intent in violation of Iowa Code section 708.8
(1995). **AFFIRMED.**

Dennis A. Bjorklund, Coralville, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, and Jim Robbins, County Attorney, for appellee.

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

MAHAN, J.

Defendant appeals from the judgment and sentence entered upon his guilty plea to going armed with intent in violation of Iowa Code section 708.8 (1995). He contends (1) his trial counsel was ineffective in failing to consider the merits of his legal defense and failing to adequately explain the consequences of his plea, and (2) the sentencing court abused its discretion by imposing an excessive sentence because his past history and mitigating factors do not support incarceration. We affirm.

Background Facts and Proceedings. On May 10, 1996, Hammer struck Bruce Kelly with a baseball bat, breaking Kelly's arm. According to Kelly, Hammer approached him and stated, "I'm going to get you," to which Kelly replied, "how about now." Hammer exited his vehicle holding a baseball bat. Kelly raised his arm to protect himself and Hammer struck Kelly's arm. Hammer got into his car and drove off. At the time of the incident, Hammer was under a restraining order requiring him to refrain from contact with Kelly.

In January 1999, the State filed a trial information charging Hammer with willful injury, in violation of Iowa Code section 708.4 (1995). Pursuant to a plea agreement with the State, Hammer withdrew a not guilty plea in September 1999, and pled guilty to the amended charge of going armed with intent, in violation of Iowa Code section 708.8 (1995). The court sentenced Hammer to an indeterminate five-year term of incarceration. Hammer appeals.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily 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). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Hammer contends his trial counsel was ineffective and failed to perform an essential duty by ignoring self-defense and reasonable force evidence as a defense to the criminal charge. He asserts pretrial discovery revealed he was

suffering from stress related to the breakdown of his marriage, and approached Kelly after Kelly provoked a fight and escalated the situation. Hammer argues his attorney failed to weigh the strength of the self-defense evidence when negotiating a plea. Further, Hammer claims his attorney failed to adequately explain the consequences of the plea.

We conclude the record in this case is insufficient for us to address Hammer's claim of ineffective assistance of counsel in this direct appeal. Therefore, we preserve the ineffective assistance of counsel claim for possible postconviction relief action, so the facts can be further developed.

Sentence Imposed. Our review is for the correction of errors at law. Iowa R. App. P. 4. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's consideration of impermissible factors. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

In determining the proper sentence, the district court should weigh and consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities and chances of his reform. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)). The courts owe a duty to the

public as much as to defendant in determining a proper sentence. *Id.* The punishment should fit both the crime and the individual. *Id.*

Hammer contends his history does not support a term of incarceration. In addition, he claims the district court considered numerous unproven allegations made by his ex-wife in a letter to the court. Even though the court made it clear on the record several times it was not considering the allegations by Hammer's ex-wife, Hammer contends a review of the record and the presentence investigation report reveals, "the district court decision appears less rational, and creates an inference that [the court] considered impermissible factors when imposing the sentence." We disagree.

The presentence investigation report revealed Hammer had four prior convictions for simple assault in the seven years preceding the May 1996 incident. As a result of these convictions, Hammer received, respectively, a ten-day suspended sentence and six months probation, a fine, a two-day suspended sentence, and a two-day jail term. The court rejected Hammer's request for a suspended sentence and probation, stating:

I have concluded after looking at all of the evidence available to me that you need to understand very, very clearly the need to avoid this kind of conduct in the future. And I think the way that the Court has to send that message to you and impress that upon you is by having you serve a term of incarceration. . . . I see a pattern of violent behavior by you. . . . [Y]ou've shown a violent streak, and I think that to rehabilitate you and to deter others and to protect the community from this type of offense, the court believes that incarceration in your case is an appropriate sentence.

In its sentencing order, the court added:

The court has imposed a sentence of incarceration, rather than probation via a deferred judgment or suspended sentence, for

the reasons described [in] the record in open court and for a number of additional reasons. The Defendant had sufficient maturity to know that his criminal conduct could be met with serious consequences. He is not a youthful first offender. The Defendant's pattern of violent conduct could not be adequately addressed on probation. That pattern of conduct could result in significant danger to the public, if the Defendant was granted probation. Also, the Defendant exhibits very limited appreciation of the seriousness of his crime. The Defendant's rehabilitation and the addressing of the mental health issues relating to his crime could not be adequately handled on probation while still providing a reasonable measure of public protection. Mental health services are available through the Iowa Department of Corrections. A sentence of incarceration should serve to deter the Defendant and others from similar criminal misconduct in the future. Probation, fines, and a brief period of confinement in the county jail for past crimes have failed to rehabilitate the Defendant.

The record reveals the court carefully weighed all pertinent matters. Therefore, we conclude the court did not abuse its discretion in imposing a term of incarceration. Moreover, Hammer fails to overcome the presumption the district court properly exercised its discretion by making an "affirmative showing the court relied on . . . improper evidence." See *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998) (quoting *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App.1996)) (citations omitted).

AFFIRMED.