IN THE COURT OF APPEALS OF IOWA

No. 0-49 / 89-846

STATE OF IOWA,

Appellee,

vs.

GREGORY ALLEN SAWVELL,

Appellant.

FILED
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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Jackson County, Margaret S. Briles, Judge.

The defendant entered guilty pleas to one count of delivery of cocaine and one count of possession of cocaine. He has now appealed the resulting convictions and sentences. **AFFIRMED IN PART AND REMANDED FOR RESENTENCING.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; and Kjas T. Long, County Attorney; for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

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The defendant, Gregory Sawvell, entered guilty pleas to one count of delivery of cocaine and one count of possession of cocaine. He was sentenced to a prison term of up to ten years on the first count and a jail term of one year on the second count, with the two terms to be served concurrently.

Defendant has appealed his convictions and sentences.

The defendant contends his guilty plea was improperly accepted because the district court did not advise him that he was waiving his right to appeal an adverse ruling on an earlier motion to suppress evidence. He also contends his trial attorney rendered ineffective assistance by (1) failing to tell him that his guilty plea waived his right to appeal the ruling on the motion to suppress, and (2) failing to file a motion in arrest of judgment to preserve the challenge to the plea. Sawvell seeks a limited remand, apparently to make a record concerning the performance of his trial attorney.

Defendant also challenges the imposition of sentence. He contends the sentencing court erred by failing to inform him of the "mandatory minimum sentence" provision of Iowa Code section 204.413. (That statute provides that a person convicted of a drug offense must serve one-third of the maximum indeterminate sentence before being eligible for parole.) Sawvell also contends the district court erred by

failing to state on the record why it did not suspend the "mandatory minimum sentence," as permitted by Iowa Code section 901.10.

Our review of criminal appeals is ordinarily on assigned error. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). When a defendant raises issues involving the violation of basic constitutional rights, we make an independent evaluation of the totality of the circumstances. This is the equivalent of a de novo review. Id. Effective assistance of counsel is a basic constitutional right triggering a de novo type review. Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980).

Appellant contends he was denied effective assistance of counsel when his attorney failed to inform him that his right to appeal would be waived if he entered a guilty plea and then subsequently failed to file a motion in arrest of judgment. Any challenge to a plea of guilty, based on alleged defects in the plea proceedings, must be made by way of a motion in arrest of judgment. Iowa R. Cr. P. 8(2)(d).

As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error

results from a due process denial of effective representation. In claims of ineffective assistance of counsel, we are concerned with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

The failure of counsel to either inform his client that he was waiving his right to appeal, and the failure to file a motion in arrest of judgment, could very well constitute ineffective assistance of counsel. However, where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. Koenighain, at 238. This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

Appellant also contends the sentencing judge failed to inform him of the mandatory minimum sentence imposed by section 204.413 of the Iowa Code. Iowa Code section 901.5(7) requires the court to inform a defendant of the mandatory minimum sentence, if one is applicable. Iowa Code section 204.413 provides that a person sentenced

pursuant to section 204.401(1)(a) or (b) is not eligible for parole unless he has served a minimum period of confinement equal to one-third of the maximum indeterminate sentence prescribed by law. The appellant was convicted under Iowa Code section 204.401(1)(a).

The State contends that the judge was not required to inform defendant of the mandatory minimum sentence because Iowa Code section 901.10 allows a sentence for less than the statutory minimum if the defendant is a first offender and the trial court, in its discretion, determines that mitigating circumstances exist. The defendant is a first offender and section 901.10 does apply to him. However, section 901.5 specifically states that the court "shall inform the defendant of the mandatory minimum sentence, if one is applicable." Section 901.10 provides a way for the sentencing judge to avoid imposing the mandatory minimum sentence, but the defendant is still subject to the minimum sentence if the court cannot find mitigating circumstances. The mandatory minimum sentence is therefore still "applicable" to the defendant and the sentencing judge should have informed him of this possibility. There is nothing in the record that shows the defendant was informed, and therefore we must vacate the sentence and remand for resentencing consistent with this opinion.

AFFIRMED IN PART AND REMANDED FOR RESENTENCING.