FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
MILDRED RODICH,	)	9-123 88-996
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 38258 and 38259), A. M. Critelli, Judge.

Defendant appeals her convictions, entered on her pleas of guilty, of first-degree theft and tampering with a record. **AFFIRMED AND REMANDED FOR RESENTENCING.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Deanne Kirvin, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

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PER CURIAM

The defendant was charged with first-degree theft as the result of certain fraudulent banking transactions. In an unrelated case, she was charged with the crime of tampering with a record as the result of her attempt to obtain fraudulent title to an automobile. The defendant entered simultaneous guilty pleas to both of these charges. Defendant appeals from her convictions for first-degree theft and tampering with a record, contending (1) the district court denied her due process by failing to order a competency hearing pursuant to Iowa Code section 812.3 (1987) before accepting her guilty plea, (2) her attorney rendered ineffective assistance by allowing her to plead guilty and to be sentenced, in spite of her alleged mental incompetency, and (3) the sentencing court erred by relying on unproven charges in denying probation. The State acknowledges that the sentencing court erred in this respect.

I. **Preservation of Error.** Initially, we must determine whether defendant's challenge of the acceptance of her guilty plea is properly before this court. Under Iowa Rule of Criminal Procedure 23(3)(a), a "defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal."

Rule 23(3)(a) applies to challenges based on failure to hold a competency hearing under section 812.3. State v. Lucas, 323 N.W.2d 228, 231 (Iowa 1982). Defendant did not file a motion in arrest of judgment in either of the matters before this court. However, "[i]t is fundamental that if the defendant was incompetent [s]he was in no position to preserve error, request a section 812.3 hearing, or avoid a waiver of [her] motion in arrest of judgment." State v. Lucas, 323 N.W.2d at 232. "Thus, a conviction based on an incompetent defendant's failure to observe procedures deprives the defendant of the due process right to a fair trial." Id.

II. Due Process. Defendant asserts a violation of her constitutional due process rights and therefore we base our evaluation on the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986). See also State v. Lucas, 323 N.W.2d at 233. "Relevant factors in determining whether due process requires an inquiry as to competency include (1) defendant's irrational behavior, (2) demeanor at trial, and (3) any prior medical opinion on competence to stand trial. State v. Lucas, 323 N.W.2d at 232, citing Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103, 118 (1975). We conclude, in the totality of the circumstances, the trial court did not deny defendant's due process rights by failing to hold a competency hearing.

Defendant's assertion that a question of competency appeared to the district court at the time of her guilty plea is based on letters allegedly written by defendant. Prior to the entry of her guilty plea on April 20, 1988, Judge Critelli had received three letters signed by Ray Carr, claiming to be her ex-husband, and by a Dr. Ray Furgason, claiming to be her personal physician. These letters, which proclaim defendant's innocence, are threatening and vulgar. Defendant presented no evidence (and did not admit) that she authored those letters.

Defendant also asserts a question of competency existed at the time of her sentencing proceeding on June 2, 1988, based on a psychological report. On May 5, 1988, Judge Critelli received an evaluation report from Shahe Zenian, a clinical psychologist. Shahe Zenian indicated a report had been sent to defendant's attorney April 14, 1988, which concluded defendant was competent. The May 5 report went on to state that defendant was competent to stand trial and had no basis for a mental defense.

Defendant was represented by counsel throughout these proceedings and counsel did not request a section 812.3 hearing. There is no psychological testimony indicating defendant's mental condition should be further evaluated. Although Shahe Zenian's report indicated some mental problems, the report concluded defendant was competent.

Based on defendant's behavior, demeanor, and the psychological evaluation, we conclude no question of competence presented itself at the time of defendant's guilty plea and sentencing proceedings.

III. Ineffective Assistance of Counsel. Defendant claims ineffective assistance of counsel in failing to raise the issue of her incompetency to plead guilty or be sentenced. When a claim of ineffective assistance of counsel is made we allow the suspension of error preservation under rule 23(3)(a). State v. Lucas, 323 N.W.2d at 232. Thus, defendant's failure to raise the claim before the trial court does not preclude our consideration of the claim.

Ineffective assistance claims are generally reserved for postconviction proceedings. State v. Ueding, 400 N.W.2d 550, 553 (Iowa 1987); State v. Lucas, 323 N.W.2d at 232. However, when the record is sufficient to allow us to consider the issue, we resolve it on direct appeal. State v. Ueding, 400 N.W.2d at 553. We find the record inadequately presents the issue of ineffective assistance, and thus reserve the issue for postconviction proceedings. At that time, all the facts, including an explanation of defense counsel's actions or omissions, may be fully developed. State v. Lucas, 323 N.W.2d at 232.

IV. Sentencing. Defendant contends the trial court erred in denying defendant probation in reliance upon unproven charges of her improper activities following

arrest. The specific acts, as set out in the presentence investigative report, include falsifying a Yugoslavian death certificate for her brother, alleging he is her husband, and using it in an effort to obtain his death benefits from Armstrong Tire Company and from the Veterans Administration; writing and delivering threatening letters containing violent and obscene language to various officials and business executives; and using devious methods to attain temporary possession of a new car from a local car dealer. Defendant denied all these allegations at her sentencing hearing.

Imposition of sentences is within the discretion of the trial court. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). However, "[w]e will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." Id. The trial court based its sentence in part on allegations in the presentence investigative report that were neither proven nor admitted. Although these allegations are not the only consideration in sentencing, they formed at least part of the basis for denying parole. We cannot speculate about the weight given to these allegations in sentencing defendant to incarceration. State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981). Since we cannot evaluate the influence these

allegations had on the sentencing decision, we must remand for resentencing. State v. Black, 324 N.W.2d at 316. We do not in the least suggest what the sentence should be. That matter is to be determined by the trial judge.

AFFIRMED AND REMANDED FOR RESENTENCING.