

IN THE COURT OF APPEALS OF IOWA

No. 1999-566 (9-827) / 99-0214

Filed April 28, 2000

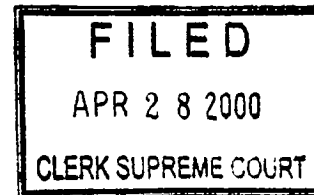
STATE OF IOWA,

Plaintiff-Appellee,

V.

YULONDA AVANT,

Defendant-Appellant.



Appeal from the Iowa District Court for Webster County, Fredrick E.

Breen, Judge.

Defendant-Appellant, Yulonda Avant, appeals her convictions for assault causing injury following a guilty plea. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Ronald R. Robertson, County Attorney, Ricki Williamson, Assistant County Attorney, for appellee.

Considered by Mahan and Hecht, J.J., and Honsell, S.J.*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

Ms. Avant was involved in a fight in a convenience store. Her companion, Sharon Benson, started the fight by throwing a coffee pot at the victim, Marie Cooper. Ms. Avant joined the fray, punching and kicking Ms. Cooper. Ms. Cooper received cuts to her head and neck and suffered pain from the incident. The State charged Ms. Avant with assault causing injury in violation of Iowa Code section 708.2(2) (1997). After plea negotiations, Ms. Avant pled guilty to assault causing injury. Her statements in the plea proceeding concerning the incident included, "That night I was just – I was basically defending myself because some of which the camera didn't catch as far as her hitting me and me hitting her back." The court accepted the plea. Ms. Avant filed a motion in arrest of judgment alleging she had acted in self-defense. At the sentencing hearing Ms. Avant was told if she withdrew her guilty plea the matter would be set for trial. She stated she wanted to withdraw the motion in arrest of judgment and proceed with the plea and sentencing. She then conferred with counsel. After the conference, her attorney stated Ms. Avant wanted to withdraw the motion in arrest of judgment. The court allowed Ms. Avant to withdraw the motion and proceeded with judgment and sentencing. The judgment entry cited Iowa Code section 708.2.

On appeal, Ms. Avant claims her counsel was ineffective in failing to pursue the motion in arrest of judgment because there was no factual basis for her plea. She also claims the judgment entry did not comply with the requirements of Iowa Rule of Criminal Procedure 22(3)(d) because it contained a statutory citation only for the underlying offense of which she was convicted (section 708.2 assault) but did not include the number of the particular code

section under which she was being sentenced (section 903.1(1)(b) sentencing provisions for serious misdemeanors).

I. Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings 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 depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *State v. Pearson*, 547 N.W.2d 236, 241-42 (Iowa App. 1996). Our review is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence trial counsel did not perform an essential duty and prejudice resulted. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice a defendant must prove there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992).

Ms. Avant is correct in her assertion her statements during the plea colloquy do not provide a factual basis for her plea. However, considering the entire record, including the minutes of testimony, we conclude a factual basis exists. See *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999). The minutes of testimony establish that Ms. Benson started the fight. Ms. Avant joined in, punching and kicking the victim. Ms. Avant continued attacking Ms. Cooper even after she was on the floor. During the fight, coffee pots and bottles of juice were thrown at Ms. Cooper, who suffered cuts and pain. Because a factual basis exists, counsel was not ineffective in allowing her plea.

When faced with the choice of continuing with her plea and sentencing or withdrawing her plea and proceeding to trial on a more serious charge, Ms. Avant chose the plea. Counsel was not ineffective in permitting her to withdraw her motion in arrest of judgment. Based on the minutes of testimony and the elements Ms. Avant would have to prove to prevail on a justification defense, it is unlikely she would have been acquitted had she gone to trial. Her claim she received ineffective assistance of counsel fails because she cannot show prejudice.

II. Ms. Avant claims Iowa Rule of Criminal Procedure 22(3)(d) requires the judgment entry to include section 903.1(1)(b), which sets forth the penalty for a serious misdemeanor. The judgment entry cited only Iowa Code section 708.2, concerning assault. The reasoning in *State v. Dawson*, 245 Iowa 747, 63 N.W.2d 917 (1954) resolves this claim. The court in *Dawson* interpreted the phrase "under which a defendant is sentenced" in the statutory predecessor of Rule 22 to mean the code section concerning the offense. *Id.* at 918. The court also determined the language was directory and that any omission of the code section citation would not render the sentence invalid and could be corrected by a *nunc pro tunc* order.

In this case the judgment entry cited the correct code section and need not cite the sentencing provision in addition to the offense provision. The judgment entry complied with the requirements of Rule 22.

AFFIRMED.