

IN THE COURT OF APPEALS OF IOWA

No. 3-121 / 92-588

FILED

MAY 04 1993

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JERALD ROSS GREGG,

Appellant.

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Appeal from the Iowa District Court for Lee County,
James P. Reilly, Judge.

The defendant appeals from his conviction for
first-degree theft in violation of Iowa Code section
714.1(2) and 714.2(1) (1991). **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish & Krudenier,
Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, and Richard J.
Bennett, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

PER CURIAM

This is an appeal by defendant-appellant Jerald Ross Gregg from the judgment and ten-year sentence entered following the defendant's plea to theft in the first degree in violation of Iowa Code sections 714.1(2) and 714.2(1) (1991). The defendant contends he was denied effective assistance of counsel during the pretrial stages of his case and at the time of his guilty plea and the trial court abused its discretion in sentencing him to a term of ten years in prison. We affirm.

Defendant, a law school graduate and practicing attorney, was charged for allegedly having taken funds from a conservator account. Defendant had been named conservator of William Mason. Mason was a disabled veteran of the Viet Nam conflict and received money through the Veteran's Administration. In 1990, the defendant talked to the Veteran's Administration about Mason taking flying lessons and obtained a court order authorizing him to "arrange and pay for the necessary costs of Mason operating and maintaining an aircraft and receiving flight instructions" The defendant took over \$9000 from funds of the ward and put the money in a bank account titled in the name of the Bluebird Flying Club. The Bluebird Flying Club bank account was controlled by the defendant, he received the majority of the benefit from the club and he owned and controlled the club's assets, including an airplane.

In March 1991, it was discovered that the defendant had transferred the ward's money to the flying club. The defendant on being advised of the discovery made incriminating statements. At the time he made the statements, he was not represented by an attorney nor had he been advised of his Miranda rights. A plea agreement was reached between the defendant and the State where the defendant agreed to plead guilty to one count of theft in exchange for the State's agreement to drop perjury charges that also had been filed. The defendant was represented by an attorney during these negotiations but the attorney did not take the depositions of any State witnesses prior to the plea being taken. The attorney also did not seek to suppress the incriminating statements made by the defendant prior to his obtaining counsel and without his being given a Miranda warning.

In the course of entering his guilty plea on January 2, 1992, the defendant indicated his satisfaction with his attorney's performance. He told the trial court that he did not totally agree with some of the factual allegations in the minutes of testimony but he did admit he transferred the ward's funds to the flying club which he controlled. The trial court accepted the plea. No motion for an arrest of judgment was filed.

On March 13, 1992, the district court sentenced the defendant to a ten-year indeterminate term of imprisonment. In imposing the sentence, the court said it

had considered sentencing options and the sentence pronounced was based on the need to provide a maximum opportunity for the defendant's rehabilitation and to protect the community from further offenses. The court also looked to the fact the defendant breached his fiduciary duty, intended to steal from the ward, and harmed the ward.

The defendant first contends he was not effectively represented. The defendant is claiming his constitutional right to effective assistance of counsel was violated, therefore, we make an independent evaluation of all the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). To show that his attorney was so deficient that his conviction should be reversed, the defendant must show not only that the attorney's performance was deficient but also must show that the deficient performance prejudiced the defense of his case. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674, 693 (1974).

We first look to the defendant's challenge that his attorney was not effective because he did not file a motion challenging the factual basis for the defendant's guilty plea. The defendant at the hearing admitted he was conservator of the ward's account and he transferred \$9600 from the ward's fund to a flying club account. He conceded the flying club account was not a conservatorship account and that he was the only person who had access to the flying club's account. The determination of a factual

basis is a condition for the acceptance of a plea rather than a condition for the entry of judgment. State v. Sanders, 309 N.W. 2d 144, 145 (Iowa App. 1981). The purpose of requiring a showing of a factual basis for a plea is to assure the accuracy of the plea and to preclude a conviction for a crime that the accused is not guilty of in looking at the evidence at the plea proceeding. Id.

Iowa Code section 714.1(2) (1989), in part, provides that theft is committed when a person "[m]isappropriates property which the person has in trust . . . by using or disposing of it in a manner which is inconsistent with or a denial of the trust . . ."

There was a basis for the plea and the defendant's counsel was not ineffective in not challenging the factual basis for the guilty plea.

Defendant claims that because his trial attorney did not file discovery motions, depose the state witnesses, or file a motion to challenge the admissibility of defendant's incriminating statements, he was not able to adequately advise the defendant to plead guilty.

The defendant has not shown us what would have been accomplished in such filings or how he was prejudiced by counsel's failure. To be successful in his challenge the defendant must show prejudice. Taylor, 352 N.W.2d at 685.

We consider it relevant also in examining this issue that the defendant had been a practicing attorney who graduated in the top ten percent of his law class at the

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University of Iowa Law School. He, therefore, was much more sophisticated and knowledgeable than the average person using the services of an attorney.

The defendant's last contention is the trial court abused its discretion in not imposing a sentence of probation and the trial court failed to consider the required sentencing factors. When a sentence is within the statutory limits, it will only be set aside if the trial court has abused its discretion in pronouncing the sentence. See State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). The trial court has broad discretion in considering probation as a sentencing alternative and if it would not promote both the defendant's rehabilitation and the protection of the community, then a sentence requiring incarceration is within the trial court's discretion. See State v. Beyer, 258 N.W.2d 353, 359 (Iowa 1977).

The trial court in delivering the sentence said it had considered all possible sentencing options as set forth in Iowa Code section 901.5 (1989). The trial court said it had considered the opportunity for the defendant's rehabilitation and community protection. The trial court said it had considered the fact the defendant breached his trust as a lawyer and an officer of the court, the fact defendant's scheme was calculated to take money from his ward, the fact the defendant had harmed the ward, and the need to protect the community from further offenses. The court did not abuse its discretion. See State v. Pappas, 337 N.W.2d 490, 494-495 (Iowa 1983).

We also reject the defendant's claim the court did not consider required sentencing considerations. The court did not need to detail all the facts that did not convince it to give the defendant probation where it adequately explained the reason the sentence was given. See State v. Russian, 441 N.W.2d 374, 375 (Iowa 1989).

AFFIRMED.