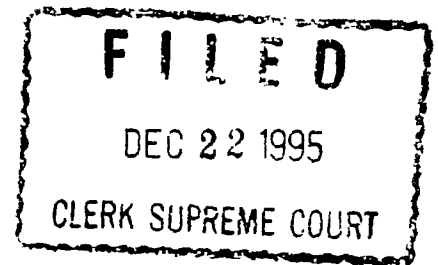


IN THE COURT OF APPEALS OF IOWA

No 5-622 / 95-0411



STATE OF IOWA,

Appellee,

vs.

TROY JOHN MILANI,

Appellant.

Appeal from the Iowa District Court for Boone County. David R. Danilson,
District Associate Judge.

Troy Milani appeals his conviction, following a guilty plea, for operating a
motor vehicle without the owner's consent. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
Steven J. Oeth, County Attorney, and James Robbins, Assistant County Attorney, for
appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Troy John Milani appeals his conviction, following a guilty plea, for operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7 (1995). We affirm.

On December 24, 1994, police in Hays, Kansas, stopped Milani while he was driving a van that had been missing from Boone, Iowa, since mid-December. Six people were with Milani when he was stopped, including a sixteen-year-old runaway from Boone.

Milani was charged with second-degree theft and harboring a runaway child. Pursuant to a plea agreement, Milani pleaded guilty to the lesser charge of operating a motor vehicle without the owner's consent, and the county dismissed the harboring charge. Milani requested immediate sentencing and waived his right to be present at the sentencing. The parties also agreed Milani would be sentenced to a term not to exceed two years which would run concurrently with another sentence Milani was serving in Polk County.

In waiving his right to be present at the sentencing, Milani stated the following:

I ask the Court to proceed to enter judgment and sentence against me without a verbatim record in open court pursuant to the joint sentencing recommendation set forth in the written guilty plea or as set forth below: Two years in prison to run concurrent with Polk County #33470. If to run concurrent with Polk County #33470, he shall be released on this case with time served in full.

The district court sentenced Milani in accordance with the plea agreement. Milani appeals.

On appeal, Milani contends he was denied effective assistance of counsel. As a result, we make our own evaluation of his claim based on the totality of the circumstances. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of de novo review. *Id.*

To prevail on his ineffective assistance of counsel claim Milani must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131. To show prejudice Milani must prove that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 666, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Milani claims his trial counsel incorrectly informed him he would be released from prison when he finished serving his Polk County sentence as reflected in his written waiver. He asserts his counsel should instead have told him his release date would be **determined** by the parole board. He claims that as a result of his attorney's error he did not make an informed decision to accept the plea agreement. He claims his attorney breached an essential duty and that prejudice resulted.

Milani's ineffective assistance of counsel claim comes to us on direct appeal. Generally, we will not decide ineffective assistance claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). 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. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This 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 Milani's claim. Our review of the record reveals a lack of any direct evidence regarding counsel's advice to Milani about the sentencing aspect of the plea agreement. Without any sworn testimony from Milani's attorney about what he told his client or from Milani himself about the extent to which he relied on such advice, Milani cannot satisfy his burden of showing counsel breached an essential duty. We therefore preserve his ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.