IN THE COURT OF APPEALS OF IOWA

No. 0-236 / 99-886
Filed May 31, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN RAY WILSON,
Defendant-Appellant.

FILED
MAY 31 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert Bovard, Judge.

The defendant appeals from the judgment and sentence entered upon his guilty plea to serious injury by a vehicle by reckless driving in violation of Iowa Code section 707.6A(4) (1997). **AFFIRMED.**

Richard N. Tompkins, Mason City, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Paul L. Martin, County Attorney, and Denise Timmins, Assistant County Attorney for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

On June 4, 1998, Steven Wilson was driving around Mason City with two passengers, when his car rolled over, resulting in the death of one passenger and serious injuries to the other. Wilson admitted he and the passengers had been drinking alcohol before the accident. The State charged Wilson with "serious injury by vehicle by reckless driving," in violation of Iowa Code section 707.6A(4) (1997). Wilson signed a guilty plea agreement. Under the agreement, the State agreed not to make a sentencing recommendation other than restitution and agreed not to file "homicide by operating while intoxicated" or reckless driving charges against Wilson. The court sentenced Wilson to an indeterminate prison term not to exceed five years. On appeal, Wilson contends the sentencing court impermissibly considered an unprosecuted charge based on his passenger's death. He also asserts his trial attorney was ineffective in (1) failing to object to references to his passenger's death contained in the presentence investigation (PSI) report, and (2) making a statement at the sentencing hearing that may have opened the door to the court's consideration of that death. We affirm.

I. Sentencing Considerations

Generally, we review a district court's sentencing decision for abuse of discretion or for a defect in sentencing procedure. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). A claim that a court impermissibly considered uncharged and unproven crimes implicates a defect in sentencing procedure rather than a court's exercise of discretion. *State v. Mateer*, 383 N.W.2d 533, 537 (Iowa 1986). The district court may not consider unproven or unprosecuted

offenses when sentencing a defendant unless (1) the facts before the court demonstrate the defendant committed the offense or (2) the defendant admits committing the offense. *Gonzalez*, 582 N.W.2d at 516. Where improper factors are considered, a sentence must be vacated and the case remanded for resentencing. *State v. Sinclair*, 582 N.W.2d 762, 765 (Iowa 1982).

Wilson contends the district court improperly considered and relied on the uncharged offense of vehicular homicide. We disagree. In comments at the plea proceedings, defense counsel stated that the incident affected Wilson deeply because he lost his best friend. The court responded,

> I don't question Ms. Flander's statement to me that Mr. Wilson has learned a great deal from this incident. I don't challenge her statement that Mr. Wilson has lost a best friend and is aware of exactly why and how that loss occurred. Consequently, I don't argue with Ms. Flander's conclusion that to impose a suspended sentence would be appropriate in this case becasue you have rehabilitated yourself. But, Mr. Wilson, you and I are not the only people that are sitting in this room. You and I are not the only people that will be aware of the outcome of these proceedings. And, remember, I told you in the first instance that in connection with the deterrent-protective portion of a sentence it's important not only to protect society against the acts of the individual defendant, but it's also important to protect society against the actions and deter other people who might be similarly disposed. There are always people who wonder, what is the Court going to do, what is the result of violations of the law. If the Court simply says, Wilson, old boy, you've learned your lesson, don't do it again, goodbye, there are people out there that will say, he got by with it, no reason why I can't take my chances, to somebody else's pain, suffering. So I'm not just talking to Mr. Wilson; I'm talking to other individuals who are involved.
>
> When I make my decision as to what the sentence should be, I am supposed to -- and I do -- take into consideration as much background information as is available to me. In this particular case the pre-sentence investigation report has been full, comprehensive and voluminous. It tells me your age, it tells me your background, education, your employment situation, your family situation and responsibilities. It tells me about what happened in this particular instance. It tells me the results. It tells me that as

> one of those results an individual was killed. That individual can't be before this Court to explain his position or what happened or what he thinks should be the result. It also tells me that there was a victim who survived the accident and that individual, as part of that report, has furnished a statement to the Court that the Court has read and given very serious consideration to. And it indicates that although your friend may not have existed past the incident, his absence not only is missed by you but is missed by those who are close to and dear to him. It also tells me that the surviving victim of this accident has and will continue to carry not only the financial scars but also the mental scars of what happened.
>
> The seriousness of this particular situation cannot be overemphasized. The conduct that was involved, Mr. Wilson, was wrong. It was wrong from the start. You may have been upset by circumstances that affected you on that particular day or in the immediate past. You may have been mad at others or at things. You decided that you would seek your own solution to that feeling and you were wrong. Whether there was a deer that you tried to avoid or whether there was a production number as far as operating the vehicle is concerned, cowboy antics, is not the point. The point is that the vehicle was not under your control at times and places where it was important that it be in control and, as a result, other individuals were affected. And this Court, after reviewing the file, can come to absolutely no conclusion other than your conduct in operating that vehicle was reckless, without any care, consideration or concern for the rights of other legitimate users of the road and you were wrong in what you did. In our society, Mr. Wilson, people are given the right to be wrong. It's sort of the cover charge or the ante into the game. But the point that you should have kept in mind and the point that I am bringing home to you at this time is that if you decide that you're going to take a wrong course of action that recklessly endangers not only yourself but other people, you are going to have to pay the price for being wrong and for making those decisions.

It is true the district court mentioned the passenger's death. However, this fact formed part of the circumstances giving rise to the offense for which Wilson was charged. In sentencing Wilson, the court particularly focused on Wilson's recklessness and the deterrent effect of a prison term. *Cf. id.* (noting district court expressly referred to four prior arrests and subsequent dismissal of three cases and stated it could consider alcohol-related problems based on those arrests);

Gonzalez, 582 N.W.2d at 516 (noting court expressly stated plea agreement provided for dismissal of "what would probably be easily provable" counts). We conclude the district court did not impermissibly consider uncharged or unproven crimes.

II. Ineffective Assistance of Counsel

Wilson next contends his trial counsel was ineffective in (1) failing to object to portions of the presentence investigation report which referred to his passenger's death; (2) failing to object to a letter from the passenger's family expressing reluctance of the family to prosecute him; and (3) commenting at the sentencing proceeding that the passenger's death affected Wilson deeply. The State counters Wilson received effective assistance of counsel because the PSI report properly contained information regarding the passenger's death, and his counsel's statements regarding the loss of his best friend constituted reasonable trial strategy.

We review an ineffective assistance of counsel claim de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). A postconviction relief applicant must prove by a preponderance of the evidence that (1) trial counsel breached an essential duty, and (2) prejudice resulted. *State v. Ame*, 579 N.W.2d 326, 330 (Iowa 1998); *State v. Osborn*, 573 N.W.2d 917, 922. The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). In the guilty plea context, the second element requires an applicant to show there is a reasonable probability that, but for counsel's errors, the applicant would have insisted on going to trial

rather than choosing to plead guilty. *Id.* at 541. While we generally preserve such claims for postconviction relief, we will resolve them on direct appeal when the record is adequate to address the issues in the case. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

We conclude Wilson's attorney did not breach an essential duty by failing to object to the contents of the PSI report. Iowa Code section 901.3 requires an investigator to inquire into the circumstances of the offense and the harm to the victim. The investigator did so. We cannot conclude the attorney breached an essential duty by failing to object to portions of the report that the investigator was required by law to include. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (noting counsel need not raise meritless objection).

We next turn to counsel's statements during the plea proceedings. Counsel stated:

> Your Honor, we would ask that the Court impose a sentence and suspend that sentence. We believe that Mr. Wilson has learned a great deal from this incident. . . .He has accepted responsibility for this incident. It has affected him deeply because he did lose his best friend. Therefore, we believe that the suspended sentence is appropriate.

It is clear that counsel made this statement to garner sympathy for her client. This was a reasonable strategy under the circumstances. We conclude she breached no essential duty. Accordingly, we reject Wilson's ineffective assistance of counsel claim on the merits.

AFFIRMED.