IN THE COURT OF APPEALS OF IOWA

No. 0-076 / 98-2157
Filed April 12, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

QUINCY ELLIS THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Defendant appeals from his conviction for operating while intoxicated. **AFFIRMED; REMANDED WITH DIRECTIONS.**

Richard Kallsen, Sioux City, and Brian Sayer of Waterloo, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Anthony H. Haney and Steven Norby, Assistant County Attorneys, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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ZIMMER, J.

Quincy Thomas appeals his conviction following a guilty plea to operating while intoxicated. We affirm and remand with directions.

On February 25, 1998, Waterloo Police Officers Campbell and Galbraith were dispatched to a shoplifting incident at a Hy-Vee grocery store. Store employees gave a description of the shoplifter and his vehicle. Meanwhile, Officer Larry Thompson observed a vehicle make a sudden over-correction on the road. He watched the car drift right and then make another sudden over-correction to the left. He stopped the vehicle; the defendant, Quincy Thomas, was the driver. Thompson observed that Thomas exhibited mood swings and had a partially consumed bottle of brandy on the floor in the rear of the car.

Campbell and Galbraith heard Thompson had stopped a vehicle matching the description of the shoplifter's car and went to that location. They noticed an odor of alcohol coming from Thomas and administered field sobriety tests, which Thomas failed. Thomas was arrested and taken to the county jail, where a breath test revealed a blood alcohol level of .107.

On April 8, 1998, the State filed a trial information charging Thomas with operating while intoxicated and fifth-degree theft. An attorney from the public defender's office was appointed to serve as his counsel. Thomas pled not guilty and trial was set for June 9, 1998. A pre-trial conference order, filed June 4, 1998, confirmed Thomas would enter a written guilty plea rather than go to trial and scheduled sentencing for July 9, 1998. On June 11, 1998, Thomas filed a written guilty plea, which the district court accepted on June 16. The written plea states the State would recommend a deferred judgment and one year probation

on the OWI charge. The court then granted Thomas' motion to continue his sentencing until August 19, 1998. On that date, sentencing was reset for October 21, 1998, and again until November 6. Finally, on November 6, the district court adjudged Thomas guilty of OWI, dismissed the theft charge, and sentenced him to two days in jail with credit for time served.

Thomas sent a pro se letter to the clerk of court on November 24, 1998, indicating his desire to appeal or file a motion in arrest of judgment. His attorney responded with a motion to withdraw which stated he found no cause to file a notice of appeal. He also requested other counsel be appointed to represent Thomas.

On appeal, Thomas argues: (1) he was entitled to release on his own recognizance or an unsecured appearance bond; (2) the written guilty plea was not knowing, intelligent or voluntary because the plea did not indicate whether the plea agreement would be binding on the court; (3) the district court erred in entering judgment of conviction based on the plea agreement which provided instead for a deferred judgment; (4) he was denied his constitutional and statutory rights to a speedy trial; (5) the probation requirement imposed is invalid; and (6) he was denied effective assistance of counsel.

I. Excessive Bail. At Thomas' initial appearance, his bail was set at $1,500 on the OWI and $500 on the theft charge. He executed a secured bond the day after his arrest and was released from custody. Thomas argues on appeal he had a "right" to be released on his own recognizance and because he was denied that right, he had to use funds on a bail bond which he otherwise would have used to hire private counsel.

We find this argument meritless. The code does not command release on one's own recognizance. *State v. Fletcher,* 554 N.W.2d 568, 570 (Iowa App. 1996) (rejecting argument that Iowa Code section 811.1 mandates pre-trial release of a defendant on his or her own recognizance). Defendant cites no authority to support his contentions. At the time of his incarceration, Thomas did not seek to have his bond conditions reviewed by the district court. In addition, he sought no relief by habeas corpus or certiorari. *See State v. Beyer,* 258 N.W.2d 353, 355 (Iowa 1977) (noting different considerations apply to appellate review in those circumstances). The defendant's bail was not excessive and an attorney represented him at state expense. The fact he committed an offense and used his funds to purchase a bail bond is not a ground for invalidating his conviction. *See id.* (finding trial court bail ruling moot on appeal unless denial of bail handicapped defendant's trial preparation); *see also Fletcher,* 554 N.W.2d at 570 (holding bail issue moot, particularly where defendant received credit for his pre-trial detention against his sentence). Neither the defendant's constitutional nor statutory rights to bail were violated.

II. Validity of Guilty Plea. Thomas and the State had a plea agreement whereby he would plead guilty to OWI in exchange for the State dismissing the theft charge and recommending a deferred judgment on the OWI. Thomas contends his guilty plea was not voluntary and intelligent because it was unclear whether the plea was conditioned upon acceptance of the plea agreement by the district court, pursuant to Iowa Rule of Criminal Procedure 9.[1] He also argues his

[1] Iowa Rule of Criminal Procedure 9 provides in pertinent part:

conviction should be reversed because his trial counsel was ineffective for filing an ambiguous guilty plea and failing to seek withdrawal of his plea by motion in arrest of judgment.

Thomas' guilty plea contains the following pertinent provisions:

> 12. I understand that if this plea agreement is not conditioned upon the court's concurrence, the Judge has the sole discretion in sentencing. However, if this plea agreement is conditioned upon the court's concurrence and the Judge does not accept the agreement, the Judge will allow me to withdraw this guilty plea.
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> 13. This plea agreement IS / IS NOT conditioned on the court's concurrence.

Neither the "IS" nor the "IS NOT" is circled on the form. His plea stated the maximum penalty for the offense, listed the rights he was entitled to if he maintained a not guilty plea, and detailed the procedural requirements of Iowa Rule of Criminal Procedure 8(2)(b). Thomas waived the rule 8(2)(b) procedures including his right to file a motion in arrest of judgment.

Thomas did not file a motion in arrest of judgment to challenge any alleged infirmities in his plea. He also did not seek to withdraw his plea at

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> 2. Advising Court of Agreement. If a plea agreement has been reached by the parties the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon, if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made by the prosecuting attorney, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.
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> 3. Acceptance of Plea Agreement. When the plea agreement is conditioned upon the court's concurrence, and the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement. . . .
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> 4. Rejection of Plea Agreement. If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw defendant's plea, and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. . . .

sentencing when he was not granted a deferred judgment. Normally, this failure means error is not preserved with regard to defects in the plea proceeding. *See State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Nevertheless, this omission will not bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from the ineffective assistance of counsel. *Id.*

To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *Brooks*, 555 N.W.2d at 448. First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.* To show counsel was ineffective in a guilty plea case, the defendant "must show that counsel's advice was not within the normal range of competency demanded of attorneys in criminal cases." *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). In the context of guilty pleas, a defendant may establish the occurrence of prejudice by showing "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995).

We review claims for ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998).

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Our review here is handicapped by the fact we have no transcript of the plea proceeding or sentencing. We conclude there is an inadequate record for us to adjudicate Thomas' claim regarding his guilty plea without counsel's explanation. *See Collins v. State*, 588 N.W.2d 399, 403 (Iowa 1998). Therefore, we preserve Thomas' claim counsel was ineffective for failing to seek withdrawal of his guilty plea for possible postconviction proceedings.

III. Validity of Sentence. Defendant contends his sentence was illegal because it was not based on the plea agreement. We find this claim without merit. The sentence imposed fell within the statutory limitations. *See* Iowa Code §§ 321J.2(2)(a) and 903.1(1)(b).

IV. Other Ineffectiveness Issues.

A. Speedy Trial. Thomas claims that from the date the trial information was filed to sentencing in November of 1998, more than 180 days passed. He points out no waiver of speedy trial exists in the file. He asserts his counsel's failure to file a motion to dismiss based on speedy trial grounds constituted ineffective assistance.

We find this issue meritless. Iowa Rule of Criminal Procedure 27 provides that a defendant must be brought to trial within ninety days of indictment. Thomas filed a written guilty plea on June 11, 1998, less than ninety days after the trial information was filed. By pleading guilty, he waived his right to trial, and derivatively, a speedy trial. *See State v. Belieu*, 314 N.W.2d 382, 384 (Iowa 1982). Therefore, counsel did not fail to perform an essential duty by failing to file a motion to dismiss based on speedy trial grounds.

B. Probation Requirement. Thomas argues the district court improperly

sentenced him to a suspended sentence with probation. We determine the court did not impose a suspended sentence. The district court employed a standardized form at sentencing. The court crossed out most of the language regarding probation, except for the first part of a paragraph that fell on a preceding page. This was clearly an oversight. The district court began reading the paragraph, turned the page, realized it was not applicable, and crossed it out, failing, however, to turn the page back over and cross out that portion as well. This was a clerical error and should be corrected through issuance of a nunc pro tunc order. *See State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995). We remand the case for that limited purpose.

C. Motion to Suppress. Thomas also maintains his trial counsel was ineffective for failing to file a motion to suppress. He urges Officer Thompson did not have probable cause to stop his vehicle.

Thomas' claim fails because he can show neither prong of an ineffectiveness claim. The motion to suppress would have been meritless. Veering or swerving within one's own lane can provide a reasonable suspicion sufficient to justify a vehicle stop. *State v. Tompkins*, 507 N.W.2d 736, 739 (Iowa App. 1993). Furthermore, any prejudice that may have resulted from this failure did not survive the guilty plea. *See State v. Sharp*, 572 N.W.2d 917, 918 (Iowa 1997), *superseded by statute on other grounds as stated in Wyciskalla v. Iowa Dist. Ct.*, 588 N.W.2d 403, 406-07 (Iowa 1998).

We affirm Thomas' conviction but preserve his claim that counsel was ineffective for failing to seek withdrawal of the guilty plea for possible postconviction relief proceedings. We remand for the limited purpose of

permitting the district court to issue a nunc pro tunc order to correct the clerical error regarding probation in the original judgment entry.

AFFIRMED; REMANDED WITH DIRECTIONS.