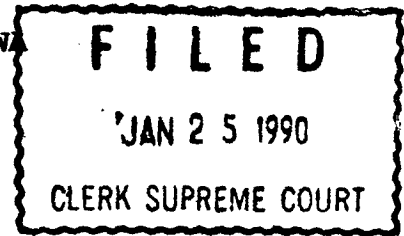


IN THE COURT OF APPEALS OF IOWA

No. 9-455 / 88-1802



STATE OF IOWA,

Appellee,

vs.

TAMMY JO WARREN,

Appellant.

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Appeal from the Iowa District Court for Muscatine County, Max R. Werling and James E. Kelley, Judges.

The defendant appeals from her conviction and sentence, following a guilty plea, for the crime of possession of cocaine with intent to deliver. **AFFIRMED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant State Public Defender, for the appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; and Stephen J. Petersen, Muscatine County Attorney, for the appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant appeals from her sentence, following a guilty plea, for possession of a controlled substance with intent to deliver. First, she advances a claim of ineffective assistance of counsel, asserting that her attorney failed to preserve for appeal the issue of whether the trial court erred in not informing her of the applicability of Iowa Code section 204.413. Defendant also claims the district court abused its discretion in sentencing her to a term of imprisonment rather than probation. We affirm.

Defendant entered a guilty plea to a charge of possession of a controlled substance with intent to deliver. The district court sentenced her to a term of imprisonment not to exceed ten years. In doing so, the trial court declined to depart from the parole eligibility limitation contained in Iowa Code section 204.413.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence

that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

In order to prove ineffective assistance of counsel in a guilty plea case, defendant must show that her attorney's actions were "not within the normal range of competency demanded of attorneys in criminal cases." Mott v. State, 407 N.W.2d 581, 582 (Iowa 1987). Key to that determination here is whether the trial court erred in failing to inform defendant of the possible impact of section 204.413 at the time defendant entered her guilty plea. Section 204.413, in relevant part, provides: "A person sentenced pursuant to section 204.401 subsection 1, paragraph 'a' or 'b' shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law."

We note from the record that the defendant at the time of entering her guilty plea acknowledged that she had an opportunity to fully confer with counsel and that she was satisfied with his advice. The record further reveals that the trial court timely and properly advised the defendant of her rights and obligations under a motion in arrest of judgment and the consequences if one was not filed.

At the time of sentencing, the trial court asked counsel if there were any motions pending and counsel replied there were not. As it relates to section 204.401(3), the following colloquy took place during the course of sentencing:

MR. JOHNSON (defense counsel): Also, I'd like to point out that upon sentencing for this offense, if the prison sentence is imposed, section 204.401(3) of the Code requires that there be a mandatory minimum of one-third of the maximum indeterminate sentence. I would also like to point out that section 901.10 of the Code permits the Court to effectively disregard that provision in the case of a first offense under that sentence. I would also like to point out that my client has never received a deferred judgment, and that she is eligible for a deferred judgment.

The very matter defendant complains of in her ineffective assistance of counsel assertion was covered and explained by her attorney without objections during the sentencing process. Under this factual setting, we are unable to find ineffective assistance of counsel.

Defendant also argues that the trial court abused its discretion in sentencing defendant to a term of imprisonment. We find the trial court complied with Iowa Rules of Criminal Procedure 22(3)(d) by stating the reasons for its decision to impose imprisonment as the sentence in this matter. Upon consideration of those reasons, we find no abuse of discretion on the part of the trial court in sentencing defendant to a term of imprisonment.

AFFIRMED.

Habhab and Sackett, JJ., concur; Hayden, J., dissents.

HAYDEN, J. (dissenting)

I respectfully dissent. I would find the impact of section 204.413, which goes to time served to be relevant to punishment and, therefore, the trial court is required to inform the defendant of its consequences.