IN THE COURT OF APPEALS OF IOWA

No. 0-814 / 00-388
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ORINTHEO JAMES CAMPBELL,
Defendant-Appellant.

FILED
FEB 07 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, Judge.

The defendant appeals two convictions for driving while barred, two convictions of driving while license suspended, and one conviction of assault causing bodily injury. **CONVICTIONS AFFIRMED, SENTENCES AFFIRMED IN PART AND VACATED IN PART AND REMANDED IN PART FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Defendant, Orintheo James Campbell, appeals from the judgments and sentences entered following his guilty pleas to two counts of driving while barred, in violation of Iowa Code sections 321.560 and 321.561 (1999), two counts of driving while license suspended, as an habitual violator, in violation of Iowa Code sections 321.210(1)(b) and 321.218, and one count of assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2(2).

I. Background Facts and Proceedings. This appeal concerns three separate court files. In the first, file number AGCR083989, the State filed a trial information on March 17, 1999, charging Campbell with one count of driving while barred, as an habitual violator, and one count of driving while suspended, as an habitual violator, for acts occurring on February 3, 1999. In File number AGCR084178, the State filed a trial information on March 25, 1999 charging Campbell with one count of driving while barred, as an habitual violator, and one count of driving while suspended, as an habitual violator, for acts occurring on February 12, 1999. In file number AGCR086607, the State filed a trial information on July 19, 1999, charging Campbell with two counts of assault and one count of false imprisonment for acts occurring on June 5, 1999.

On November 23, 1999, Campbell filed written guilty pleas in AGCR083989 and AGCR084178 admitting that on February 3, 1999, and again on February 12, 1999, he operated a motor vehicle when his license was barred and also suspended because of his status as an habitual violator. On that same date, Campbell appeared personally in court and confirmed his written pleas of guilty.

On December 8, 1999, Campbell filed a written plea of guilty in AGCR086607. The plea was to the offense of assault causing bodily injury, a serious misdemeanor, as charged in Count II of the trial information. The two other related counts were dismissed.

On February 24, 2000, Campbell appeared in court and was sentenced on all three cases. Written judgment and sentence orders were also issued.

In AGCR083989 Campbell received a sentence not to exceed two years on the driving while barred charge. On the driving while suspended count, he received a jail sentence of 365 days and a fine of $250 plus a surcharge of $75.00. The sentences were ordered to be served concurrently with one another, but consecutively to the sentences imposed in AGCR084178.

In AGRC084178 Campbell received a sentence not to exceed two years on the driving while barred charge. On the driving while suspended charge, he received a jail sentence of 365 days and a fine of $250 plus a surcharge of $75.00. These sentences were ordered to be served concurrently with each other, but consecutively to the sentences in AGCR083989.

In AGCR08607, the assault offense, Campbell was sentenced to serve 365 days in jail and fined $250. A $75.00 surcharge was imposed. His jail sentence was ordered to be served consecutively to the two other cases.

Campbell appeals. He contends the district court erred in sentencing him to 365 days in jail on each of the driving while suspended charges because the controlling statute was amended, changing the infraction from a serious misdemeanor to a simple misdemeanor before he was sentenced. The defendant also maintains his counsel provided ineffective assistance in (1) failing

to properly inform him of the maximum fine for driving while suspended, (2) not informing him that the minimum fine of $250 for assault could not be suspended, and (3) not informing him that the court was not bound to follow the State's plea recommendations.

II. The Driving While Suspended Sentence. Campbell first contends the trial court erred in sentencing him to 365 days in jail on each of the driving while suspended charges, as serious misdemeanors, because the controlling statute was amended changing the infractions to simple misdemeanors before he was sentenced.

We review sentencing decisions for corrections of errors at law. Iowa R. App. P. 4. A defendant may assert his sentence is illegal for the first time on appeal. *State v. Austin,* 503 N.W.2d 604, 606-07 (Iowa 1993); *See* Iowa R. of Crim. P. 23(5)(a). At the time Campbell was charged, driving while license suspended, as an habitual violator, was a serious misdemeanor. The law regarding that offense was changed effective July 1, 1999. The infraction became a simple misdemeanor, punishable by incarceration not to exceed thirty days, and a fine of at least $250, but not to exceed $1500. Iowa Code § 321.218(1) (supp. 1999); Iowa Code § 903.1(1)(a) (1999).

Because Campbell had not yet been sentenced when the punishment for his crime was reduced, he was entitled to receive the benefit of the reduction. Iowa Code § 4.13(4) (1999); *Austin,* 403 N.W.2d at 605-06. The State concedes Campbell was sentenced incorrectly for his driving while suspended offenses. We conclude the driving under suspension sentences must be vacated and

remanded for entry of new judgments and sentences that are consistent with the amended statute.

III. Ineffective Assistance of Counsel Claims. Campbell makes three claims of ineffective assistance of trial counsel. First, he contends he was not informed he might receive as much as a $1,500 fine for driving while license suspended. Second, he contends he was not informed the $250 mandatory minimum fine for assault causing bodily injury could not be suspended. Finally, he claims he was not offered an opportunity to withdraw his guilty plea for assault causing bodily injury.

Campbell 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 sentencing. 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. *Id.* 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 of 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 Ct. App. 1998).

With these principles in mind, we address Campbell's claims of ineffective assistance of counsel in turn.

A. Maximum Fine for Driving While License Suspended Offense. In the written guilty pleas Campbell entered in AGCR083989 and AGCR084178, the maximum possible fine for count II driving while suspended, as an habitual offender, a serious misdemeanor, was misstated. The document stated that the maximum possible punishment was 30 days in jail and a $500 fine. In fact, the correct maximum possible punishment for the offense was incarceration not to exceed 30 days and a fine of $1,500 by virtue of a statutory amendment effective July 1, 1999, which made the offense a simple misdemeanor. Iowa Code § 321.218(1) (Supp. 1999); Iowa Code § 903.1(1)(a) (1999). Under the circumstances presented here, we conclude this error does not justify a new trial because Campbell has not shown he was prejudiced by the error.

Our review of the record reveals no hint the promise of a specific fine induced Campbell to plead guilty. *See Stovall v. State,* 340 N.W.2d 265, 267 (Iowa 1993). Campbell was incorrectly informed he might receive a fine of as much as $500 when the statutory allowed maximum fine was $1500. Campbell did not receive a punishment greater than he was informed he might receive. Instead, he received a fine of $250. We would reach a different result if Campbell had received a punishment greater than he was informed he might receive. In that case, prejudice is apparent. *See State v. King,* 500 N.W.2d 100, 101-02 (Iowa Ct. App. 1993). (Sentence reversed where defendant was told maximum punishment was six months and trial court imposed a one year sentence).

We conclude the defendant has not shown he was prejudiced by the misinformation in his written guilty plea.

B. Minimum Fine for Assault Causing Bodily Injury. Campbell next contends his trial counsel was ineffective for allowing him to plead guilty to the assault charge and for not filing a motion in arrest of judgment because he claims he was not informed the minimum fine of $250 could not be suspended. Assault causing bodily injury is a serious misdemeanor. The prescribed fine is at least $250, not to exceed $1,500, and the court may impose incarceration not to exceed one year. The minimum fine may not be suspended. Iowa Code § 903.1(1) (1999).

Campbell pled guilty to the assault charge by way of written guilty plea. His plea waived compliance with Iowa Rule of Criminal Procedure 8(2)(b). As a result, there was no in court colloquy regarding his plea to this charge.

Campbell's written guilty plea correctly stated that the maximum punishment was one year in jail and a fine of $1,500. He also knew the State would recommend a fine of $250. Once again, our review of the record reveals nothing to indicate that a suspended fine formed an inducement for Campbell to plead guilty. We conclude Campbell suffered no prejudice from the court's failure to inform him the fine could not be suspended or by his counsel's failure to raise the matter. Because defendant has not shown prejudice, he cannot show his counsel was ineffective. We conclude the conviction and sentence for assault causing bodily injury should stand.

C. Withdrawal of the Guilty Plea. Campbell contends his guilty plea to assault causing bodily injury was conditioned on the court's concurrence with a plea agreement to a thirty day suspended sentence.

Campbell claims his trial counsel was ineffective for failing to file a motion in arrest of judgment requesting that Campbell be allowed to withdraw his plea because he reasonably believed the district court would be bound by a plea agreement. Campbell refers to portions of the sentencing transcript and his written plea of guilty, which he claims illustrates his plea was conditional. The State contends the record fails to show either Campbell's attorney or the prosecuting attorney shared Campbell's opinion.

We conclude the record in this case is insufficient for us to address Campbell's claim that his plea was conditional without counsel's explanation. We therefore affirm Campbell's conviction for assault, but preserve this portion of Campbell's ineffective assistance of counsel claim for postconviction proceedings.

In summary, we affirm Campbell's convictions. We vacate only his sentences for driving while license suspended. His other sentences are affirmed. We remand for the limited purpose of resentencing on the driving while under suspension offenses. We preserve Campbell's claim that his counsel was ineffective for failing to seek withdrawal of his guilty plea to assault for possible postconviction relief proceedings.

CONVICTIONS AFFIRMED, SENTENCES AFFIRMED IN PART AND VACATED IN PART AND REMANDED IN PART FOR RESENTENCING.