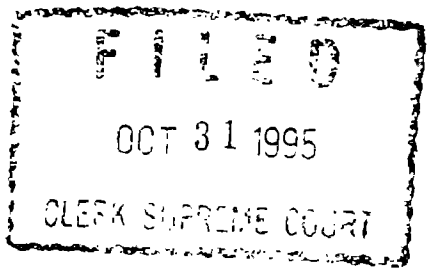
IN THE COURT OF APPEALS OF IOWA



No. 5-492 / 94-1926

STATE OF IOWA,

Appellee,

vs.

LETRON P. SMITH,

Appellant.

Appeal from the Iowa District Court for Scott County, Max R. Werling, Senior Judge, and John A. Nahra, Judge.

Smith appeals the judgment and sentence imposed on his guilty plea to failure to affix a drug tax stamp. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Joseph Grubisich, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

Letron Smith appeals his conviction for violating the drug tax stamp requirements of Iowa Code section 453.12 (1993). We affirm.

The minutes of testimony indicate Smith was approached by a police officer as he stood next to a car parked in a private driveway. Smith ran away from the approaching officer and was seen to discard a small plastic bag. Officers detained Smith and recovered the small plastic bag he discarded. The bag contained 6.77 grams of a rock-like substance with a cocaine base.

Smith was charged with one count of possession with intent to deliver cocaine and one count of tax stamp violation. Smith agreed to plead to the tax stamp violation in exchange for the dismissal of the possession with intent to deliver cocaine charge.

The district court accepted Smith's guilty plea after engaging Smith in a personal colloquy. The record of the plea proceeding does not indicate the court informed Smith of the maximum possible punishment for the offense to which the plea was offered. Although the plea agreement was reduced to writing, the details were not announced as part of the plea proceedings. At the conclusion of the plea proceeding the district court informed Smith of his right to file a motion in arrest of judgment, the time in which it had to be filed, and the consequences of failing to file a motion in arrest of judgment.

No motion in arrest of judgment was filed, and the matter proceeded to sentencing before another judge at a later date. Smith was sentenced to a term not to exceed five years.

On appeal, Smith claims he was denied effective assistance of trial counsel. He cites counsel's failure to alert the district court to obvious errors in the plea proceedings and counsel's failure to preserve these errors for appeal by filing a motion in arrest of judgment.

Smith's failure to file a motion in arrest of judgment precludes any challenge to the adequacy of his guilty plea on direct appeal unless this failure resulted from ineffective assistance of counsel. Iowa R. Crim. P. 23(3)(a); *State v. Schoelerman*, 315 N.W.2d 67, 71 (1982). Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference, however, in cases where the record is adequate to evaluate an appellant's claim. *Id.*

Smith has the burden to establish counsel failed to perform an essential duty and prejudice resulted therefrom. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *State v. Yaw*, 398 N.W.2d 803, 805-06 (Iowa 1987). In order to establish prejudice, Smith must show "there is a reasonable probability that, but for counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 211 (1985).

We are unable to make the required determinations on the basis of Smith's unsupported assertions regarding his guilty plea or without counsel's explanation for not filing a motion in arrest of judgment. Since we find the record insufficient, Smith's conviction is affirmed and his ineffective assistance of counsel claim is preserved for postconviction review.

AFFIRMED.