IN THE COURT OF APPEALS OF IOWA

No. 0-721 / 99-1985
Filed January 10, 2001

STATE OF IOWA,
Appellee,

vs.

DANA ROBERT CHERRY,
Appellant.

FILED
JAN 10 2001
CLERK SUPREME

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

On appeal from the judgment and sentence entered upon his conviction for felon in possession of a firearm as an habitual offender, defendant contends the court erred in failing to credit him with the number of days served in the county jail. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

VOGEL, J.

On appeal from the judgment and sentence entered upon his conviction for felon in possession of a firearm as a habitual offender, Dana Cherry contends the court erred in failing to credit him with the number of days served in the county jail and that he received ineffective assistance from his trial counsel. We find the trial court did not err in addressing Cherry's time served. We further find Cherry failed to establish any prejudice resulting from the alleged ineffective assistance of his counsel. We affirm.

Background facts. On June 11, 1999, Cherry was charged with robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1999). On September 22, 1999, Cherry entered a plea of guilty to the lesser charge of felon in possession of a firearm as a habitual offender. In exchange for the lesser charge, Cherry agreed to cooperate with the authorities in several investigations. There were no guarantees during the plea process as to what type of sentence would be recommended or ordered in response to Cherry's guilty plea. The trial court discussed both the maximum and the minimum sentences with Cherry during the plea proceeding. The trial court also advised Cherry of his right to file a motion in arrest of judgment after accepting his plea. The court subsequently sentenced Cherry to a term of incarceration not to exceed fifteen years. He now appeals.

Scope of review. 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). We will depart from

this preference if the record on direct appeal is sufficient to evaluate the merits of the claim. *Id.* To prevail on his claim of ineffective assistance of counsel, the defendant must ultimately show that his attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick,* 480 N.W.2d 52, 55 (Iowa 1992); *see Schertz v. State,* 380 N.W.2d 404, 412 (Iowa 1985). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *McKettrick,* 480 N.W.2d at 56.

Ineffective assistance of counsel. Cherry maintains his trial counsel rendered ineffective assistance by advising him that it was impossible to withdraw a guilty plea prior to sentencing. Assuming, without deciding, Cherry's trial counsel failed to perform a necessary duty, we can resolve this case on direct appeal by analyzing the prejudice prong. On appeal, Cherry has failed to make an argument as to how such a failure by his attorney would have affected the outcome of this case. Iowa Rule of Criminal Procedure 8(2)(a) states, "At any time before judgment, the court *may* permit a guilty plea to be withdrawn and a not guilty plea substituted." (emphasis added) The trial court then has discretion to grant or deny the motion. *State v. Ramirez,* 400 N.W.2d 586, 588 (Iowa 1987).

Cherry has failed to assert a basis for withdrawing his plea likely to persuade the trial court to grant his request. Thus, he has not demonstrated how

different advice by his counsel would have changed the outcome of his conviction. It is incumbent upon an appellant to articulate the basis for his argument when making such a claim. *See Cook v. State,* 431 N.W.2d 800, 804 (Iowa 1988); *see also* Iowa R. App. P. 14(a).

Sentencing order. Cherry next contends the trial court erred in failing to credit him with the number of days served in the county jail in the sentencing order. The sentencing order stated, "Defendant is to receive credit for time already served." Cherry claims the record is insufficient to properly and fully credit his prison term with his time already served in the county jail. Recently, the supreme court ruled on this issue, finding the trial court need not specify the amount of credit for time served within a sentencing order. *State v. Hawk,* 616 N.W.2d 527, 530 (Iowa 2000). Therefore, we find the trial court did not err in the sentencing order.

We find Cherry failed to establish prejudice for the alleged ineffective assistance of his trial counsel. We further find the trial court did not err in the sentencing order. Accordingly, we affirm.

AFFIRMED.