

IN THE COURT OF APPEALS OF IOWA

No. 9-243 / 98-310
Filed August 27, 1999

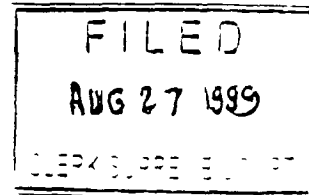
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL WESLEY MOORE,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Walter Rothschild and J.G. Johnson (sentencing), Judges.

Defendant appeals following his convictions for second-offense O W I. and possession of marijuana. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel A. Dalrymple, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Defendant-appellant Michael Wesley Moore appeals his convictions and sentences for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (1995), and possession of marijuana, in violation of Iowa Code section 124.401(3) (1995). We reject this ineffective assistance challenge raised on direct appeal and affirm his convictions and sentences.

On April 26, 1996, Moore was charged by trial information with OWI, second offense, and possession of marijuana. Moore was arraigned on May 14, 1996 and specifically demanded a speedy trial. Trial was set for July 2, 1996.

On the day scheduled for trial, Moore advised the court he planned to plead guilty and that trial was therefore unnecessary. A plea hearing was then scheduled for October 3, 1996.

On October 3, Moore was granted a continuance and the plea hearing was rescheduled for December 9, 1996. On December 9, Moore appeared without counsel and requested additional time to consult with an attorney. His request was granted and the hearing was rescheduled to March 13, 1997. Moore failed to appear for the March 13 hearing and the court reset it for March 27, 1997. The court's order provided that a warrant would issue if the defendant failed to appear. On March 28, Moore was granted a third continuance until April 3, 1997, and the public defender was re-appointed to represent him.

The district court entered an order on April 3, 1997, indicating Moore had advised the court he no longer wished to plead guilty and had requested his case be

set for trial. The district court immediately set the trial date for April 15, 1997. On April 14, Moore withdrew his request for a jury trial and again advised the court he wished to plead guilty. The court thereafter entered an order reflecting that Moore would be entering a plea of guilty and set a sentencing hearing for July 11, 1997. On April 16, Moore filed a written guilty plea to OWI and possession of marijuana.

On June 10, 1997, Moore was granted a continuance for the sentencing hearing because of the unavailability of defense counsel. The hearing was reset for September 25, 1997.

Defendant filed a motion in arrest of judgment on September 22 essentially requesting withdrawal of his previous guilty plea. Hearing on the matter was set for October 2, 1997. The district court found the motion was not properly a motion in arrest of judgment and overruled it. However, it also found Moore's written guilty plea had never been approved or accepted by the court. The court allowed him to withdraw his guilty plea and trial was set for October 14, 1997.

The State requested a continuance on October 10 because an expert witness was unavailable. Moore did not object to the request and trial was rescheduled for October 21, 1997.

Trial commenced as scheduled on October 21. Pursuant to Moore's own pre-trial motion in limine, no evidence was admitted regarding previous OWI convictions. The jury found him guilty of OWI and possession of marijuana. After trial, the district court ordered Moore to file a "written admission or denial of the alleged prior

conviction [of OWI] contained in the [t]rial [i]nformation.” On January 6, 1998, Moore filed a written admission acknowledging the prior conviction.

The district court held a sentencing hearing on February 4, 1998. It imposed a two year term of incarceration for the OWI charge and a \$100 fine plus surcharge for the possession charge.

Moore appeals. He contends his trial counsel was ineffective for failing to move to dismiss for lack of a speedy trial. He also argues his counsel was ineffective for failing to move for a judgment of acquittal based on lack of evidence to support a conviction of the enhanced charge of OWI, second offense.

I. Scope of Review. Because ineffective assistance of trial counsel claims implicate constitutionally guaranteed rights to counsel, we review the totality of circumstances de novo even when raised on direct appeal. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987)

II. Ineffective Assistance. To prevail on his ineffective assistance claims, Moore must prove by a preponderance of the evidence both of the following conditions: (1) trial counsel failed in an essential duty; and (2) prejudice resulted from counsel’s error. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984) *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998); *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To establish trial counsel failed in an essential duty, Moore must show that his attorney’s performance fell outside the normal range of competency. *See State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995). To demonstrate prejudice, Moore must prove

there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *See State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "Because a defendant must prove both incompetent representation and prejudice before succeeding on a claim of ineffective assistance of counsel, a reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice, without deciding whether counsel's representation was incompetent. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). "The object of an ineffectiveness claim is not to grade counsel's performance." *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984) (quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699-700 (1984)). When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *See State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). The applicant must state the specific ways in which counsel's performance was inadequate. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance." *See Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982) (quoting *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980)). Similarly, we will not find trial counsel incompetent

for failing to pursue a meritless issue. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998).

Generally, we do not review claims of ineffective assistance of counsel on direct appeal. *See State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). Such claims are generally preserved for postconviction relief proceedings where an evidentiary record may be developed and a hearing held on counsel's alleged errors. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). However, ineffective assistance claims may be resolved on direct appeal when the record adequately addresses the issues. *See State v. McPhillips*, 580 N.W.2d at 754. We find the record is sufficient to determine Moore's trial attorney did not provide ineffective assistance.

A. Speedy Trial. Moore contends his trial counsel was ineffective for failing to move to dismiss for lack of a speedy trial under Iowa Rule of Criminal Procedure 27(b) and 27(c). The State essentially concedes the ninety day and one year rules found in criminal procedure rule 27 were breached. However, the State counters a motion to dismiss on these grounds would have been meritless because such motion would merely have attempted to use the speedy trial rule as a technicality to escape prosecution. *See, e.g., State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991). The State essentially argues there was good cause for the delays attributable to the defendant's own actions in seeking multiple continuances.

We pass on the State's good cause argument. Rather, we determine a motion to dismiss for lack of a speedy trial would have been meritless because defendant

waived his right to speedy trial. We conclude Moore did not receive ineffective assistance.

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution, as well as Article I, section ten of our Iowa Constitution. *See State v. Olson*, 528 N.W.2d 651, 653 (Iowa App. 1995). The elements of this guarantee have been explicitly delineated in our rules of criminal procedure which provide:

b. If a defendant indicted for a public offense has not waived his or her right to a speedy trial he or she must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

c. All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to R.Cr.P. 8 unless an extension is granted by the court, upon a showing of good cause.

Iowa R. Crim. P. 27(2)(b)–(c). This rule is applicable to charges brought by trial information as well. *See* Iowa R. Crim. P. 5(5); *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997); *State v. Clark*, 351 N.W.2d 532, 534 (Iowa 1984). Thus, a case not brought to trial within ninety days after indictment or filing of the trial information must be dismissed unless: (1) the defendant waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) there is good cause for the delay. *See State v. Finn*, 469 N.W.2d at 694. These parameters, originally outlined in *State v. Petersen*, 288 N.W.2d 332, 335 (Iowa 1980), apply to the one-year rule as well. *See State v. Rodriguez*, 511 N.W.2d 382, 383 (Iowa 1994); *State v. Miller*, 311 N.W.2d 81, 83–84 (Iowa 1981); *State v. Magnuson*, 308 N.W.2d 83, 85–86 (Iowa 1981).

On July 2, 1996, when Moore communicated to the court and the State his desire to plead guilty, he waived his right to trial, and derivatively his right to speedy trial. *See State v. Clark*, 351 N.W.2d 532, 534 (Iowa 1984); *State v. Warmuth*, 532 N.W.2d 163, 165 (Iowa App. 1995).¹ When he later withdrew his guilty plea on April 3, 1997, his speedy trial rights were reinstated, and a new ninety-day speedy trial period was created. *See State v. Clark*, 351 N.W.2d at 535; *State v. Warmuth*, 532 N.W.2d at 165. Moore again waived his speedy trial rights when he informed the district court on April 14 that he had changed his mind and wished to plead guilty. The ninety-day limit began anew on October 2, 1997 when Moore was allowed to withdraw his April 14 guilty plea. Moore ultimately proceeded to trial on October 21, well within the ninety-day window which started on October 2. In accordance with *State v. Clark* and *State v. Warmuth*, we determine a motion to dismiss for lack of a speedy trial under rule 27(2)(b) would have been meritless and trial counsel therefore did not provide ineffective assistance in this respect.

Even though Moore waived his ninety-day right to speedy trial, we must still consider whether he waived his right to trial within one year. *See State v. Mary*, 401 N.W.2d 239, 241 (Iowa App. 1986). Those same factors which demonstrate waiver of the ninety-day statutory right may also demonstrate waiver of the one-year statutory right. *See State v. Magnuson*, 308 N.W.2d 83, 85–86 (Iowa 1981); *State v. Mary*, 401 N.W.2d at 241–242. The right to a speedy trial is a personal right which

¹ It is not necessary for the court to formally accept the defendant's guilty plea before waiver may occur. *See State v. Warmuth*, 532 N.W.2d at 165.

the defendant may forego at his election. *See State v. Magnuson*, 308 N.W.2d at 85. Accordingly, as with our ninety-day analysis above, we determine that when Moore communicated his intent to enter a guilty plea, he waived his right to trial, and therefore derivatively his right to a speedy trial within one year under rule 27(2)(c). Pursuit of dismissal for failure to be brought to trial within one year would have been meritless. Consequently, we determine trial counsel did not provide ineffective assistance.

We note Moore nevertheless argues the State was at fault for failing to seek an extension of time under rule 27(2) and for failing to show good cause for delay. He implicitly argues this failure would have supported a motion to dismiss for lack of a speedy trial. We reject this argument. Once a defendant waives his right to speedy trial under the rule, he cannot later complain of the State's failure to obtain a time extension. *See State v. Magnuson*, 308 N.W. 2d at 85–86. Under the facts of this case, our conclusion trial counsel did not breach any essential duties in not seeking a motion to dismiss for lack of speedy trial is not altered by the fact the court did not grant a formal extension of time under criminal procedure rule 27(2) nor by the fact that the State did not attempt to show good cause for delay.

B. Motion for Judgment of Acquittal. Moore argues his trial counsel was ineffective for failing to move for a judgment of acquittal on the OWI charge because no evidence was presented to the jury regarding the enhancement of the OWI conviction due to it being his second OWI offense. He also argues a motion for

acquittal should have been made because the district court did not properly adhere to Iowa Rule of Criminal Procedure 18(9). We disagree.

Moore's previous conviction for OWI was not an element of Moore's current second offense OWI charge. *See State v. Ridout*, 346 N.W.2d 837, 838 (Iowa 1984) Moore's prior conviction was relevant only to the penalty and sentencing stage of his criminal proceedings, not the trial and conviction stage. *See id.* Proof of Moore's prior OWI conviction was not required to find him guilty on the current charge of OWI. *See State v. Robinson*, 165 N.W.2d 802, 804 (Iowa 1969) (stating "an allegation of prior conviction does not create a separate crime but is made only for the purpose of the penalty imposed"); *cf. State v. Tobin*, 333 N.W.2d 842, 845 (Iowa 1983) (holding "prior convictions are a predicate for enhanced punishment rather than elements of the current . . . charge") (interpreting Iowa Code section 714.2 dealing with second-degree theft). Trial counsel was not ineffective for not seeking acquittal on these grounds.

We have considered Moore's remaining arguments and find them to be without merit. We determine Moore's trial counsel did not provide ineffective assistance. His convictions and sentences are affirmed.

AFFIRMED.