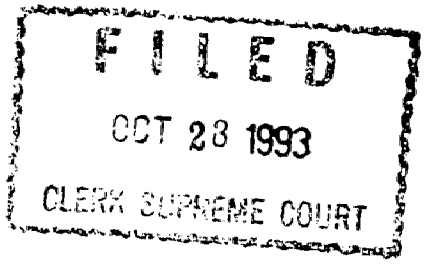
IN THE COURT OF APPEALS OF IOWA

000699

No. 3-488 / 93-646



STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICHARD D. MATHIS,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, Judge.

Mathis appeals from the judgments and sentences entered upon his guilty plea to forgery in violation of Iowa Code section 715A.2 (1991) and fifth-degree theft in violation of Iowa Code sections 714.1(1) and 714.2(5). **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Michael R. Stowers, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Hall, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett, J., and Keefe, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

000700

SACKETT, J.

We are asked to remand a sentence on a class "D" felony for sentencing because the trial court failed to order and the defendant-appellant Richard D. Mathis did not waive a presentence investigation report. We agree with defendant that under the facts of this case the district court should not have sentenced defendant without a presentence investigation report. We reverse and remand for sentencing. Defendant also contends the attorney representing him during his plea was not effective. We affirm defendant's plea, but we reserve defendant's right to bring this claim in a petition for post-conviction relief. Affirmed in part; reversed in part; and remanded.

Defendant was charged with and pleaded guilty to first-degree forgery, a class "D" felony, and fifth-degree theft, a simple misdemeanor. Defendant waived the time period provided in Iowa Rule of Criminal Procedure 22(1) between the plea and sentencing after being informed of his right to file a motion in arrest of judgment. Defendant did not waive a presentence investigation report and the trial court did not order a presentence investigation report.

Immediately after accepting defendant's guilty plea, the district court sentenced defendant to a term not to exceed five years on the felony offense and thirty days on the misdemeanor offense. The district court did not have a presentence investigation report to utilize in its consideration of defendant's sentence.

000701

Defendant contends his Fourteenth Amendment due process rights were violated when the trial court did not order a presentence report.

The State recognizes defendant is correct when he says Iowa Code section 901.2 requires a court to order a presentence investigation report for class "B", "C", and "D" felonies. Iowa Code § 901.2 (1993). The State contends defendant did not preserve error and the district court had the information necessary to sentence defendant, thus a presentence report was not necessary.

The Code also provides the presentence investigation report may not be waived for these felony classes. Iowa Code § 901.2 (1993).

Iowa Code section 901.2 provides:

> [T]he court shall order a presentence investigation when the offense is a class "B," class "C," or class "D" felony. A presentence investigation for a class "B," class "C," or class "D" shall not be waived. The court may order, with the consent of the defendant, that the presentence investigation begin prior to the acceptance of a plea of guilty, or prior to a verdict of guilty. (Emphasis added).

Iowa Code section 901.4, in pertinent part, provides:

> [A]t least three days prior to the date set for sentencing, the court shall serve all of the presentence investigation report upon the defendant's attorney and the attorney for the state, . . .

Clearly the legislature has provided the trial court cannot waive the presentence investigation report. We reject the State's argument in support of its position.

000702

The Supreme Court carved out an exception to the legislative directive that a presentence investigation shall not be waived when the court made a distinction between waiving the presentence report and waiving the trial court's use of the report in the case of State v. Thompson, 494 N.W.2d 239, 241 (Iowa 1992). In Thompson, the district court had ordered the report, but the report had not been prepared and was not available to defendant at the time of sentencing. Id.

In Thompson, 494 N.W.2d at 241, the court said:

> However, Thompson did not want to wait for the report to be completed and chose immediate sentencing. Under the circumstances of the present case, we believe Thompson knowingly and voluntarily waived the use of the presentence report in the sentencing process and cannot now complain of any alleged error.

Thompson is not dispositive of the issue here because in this case the report was not ordered and was not delivered and was not available to defendant. This is true even though in neither case did the trial court have the benefit of the report.

Defendant also maintains his trial counsel rendered ineffective assistance by recommending he accept a plea bargain which provided for the most severe sentence allowed. Defendant asserts the decision to plead guilty was especially inappropriate because the minutes of testimony did not provide any evidence on specific intent or a lack of authority. Ordinarily, our review of post-conviction relief proceedings is for errors of law.

000703

See Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a post-conviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. Id. This is the equivalent of de novo review. Id. We reserve the right of defendant to bring a claim for ineffective assistance of counsel in a petition for post-conviction relief.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.