IN THE COURT OF APPEALS OF IOWA

No. 6-540 / 95-2089

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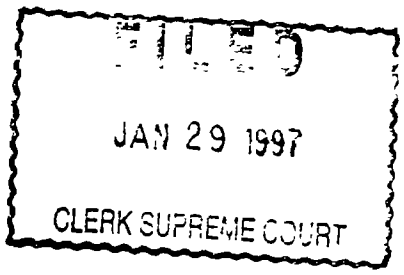
NEIL LAWRENCE HEMINOVER,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles, Judge.

Neil Lawrence Heminover appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Lawrence A. Stumme, County Attorney, for appellee.

Considered by Cady, P.J., Huitink, and Streit, JJ. Sackett, J., takes no part.

CADY, P.J.

Neil Heminover appeals the denial of his application for postconviction relief. On our review, we affirm.

On November 22, 1993, the State charged Heminover with operating while intoxicated, third offense. The State also charged Heminover with driving while his license was suspended and driving while his license was denied or revoked.

Heminover was arraigned on January 14, 1994. At the time of the arraignment, Heminover was incarcerated at Oakdale. He was serving a sentence for operating while intoxicated, second offense following the revocation of his parole. At the arraignment, Heminover pled guilty to operating while intoxicated, third offense, pursuant to a plea bargain in which the State agreed to dismiss the two lesser charges. Further, the State agreed to recommend Heminover receive a five-year sentence to be served concurrently with the sentence Heminover was presently serving.

The court agreed to adopt the parties' agreement. Heminover waived his right to a presentence investigation report and his right to file a motion in arrest of judgment. He asked to be sentenced immediately. The court accepted Heminover's plea and imposed the agreed-upon sentence. No substance abuse evaluation was requested or performed prior to sentencing. Substantially equivalent information was not presented to the court. Heminover's counsel did not object to the court's failure to order the evaluation.

Heminover did not file a direct appeal from his sentence. On October 24, 1994, he did, however, file a "motion for resentence" due to the court's failure to order a substance abuse evaluation prior to sentencing. The district court interpreted the motion as an application for postconviction relief and appointed counsel to assist Heminover with the application.

On October 30, 1995, a postconviction hearing was held on Heminover's application. At the hearing and in his brief in support of his application, Heminover argued the sentencing procedure in his case violated Iowa Code sections 321J.2(2)(c) and 321J.3(1), which mandate a person convicted of a second or subsequent OWI offense must be ordered to undergo a substance abuse evaluation prior to sentencing. *See* Iowa Code §§ 321J.2(2)(c), .3(1) (1993). Heminover asked the court to vacate his sentence and resentence him in light of the court's failure to comply with the mandate. Heminover did not argue he had been denied effective assistance of counsel by his trial counsel's failure to object to the sentencing proceedings.

On November 6, 1995, the court ruled on Heminover's claim. It rejected the claim reasoning that an evaluation would have been superfluous because both parties and the court had agreed in advance concerning the sentence to be imposed. The court also stated:

> If the claim of ineffective assistance of counsel is raised in a postconviction relief proceeding, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (Citation omitted.) Analogizing to the instant action, the court believes that the defendant

> must show a reasonable probability that if a substance abuse evaluation had been ordered, a different sentence would have been imposed. Since the defendant had agreed in advance to the sentence and had also secured the court's agreement in that regard, the defendant is unable to show that a substance abuse evaluation prior to sentencing would have resulted in a different sentence.

Heminover appeals. He asserts he received ineffective assistance of counsel during sentencing because his counsel failed to obtain a substance abuse evaluation or its equivalent prior to the sentencing proceeding, and allowed the court to proceed with sentencing. Heminover argues the substance abuse evaluation is mandatory and cannot be ignored by the sentencing court. Heminover urges the sentencing court may not have agreed to the proposed sentence had a substance abuse evaluation been completed. He maintains an evaluation would have assisted the court in determining his proper rehabilitation.

The State argues Heminover did not preserve the issue of ineffective assistance of counsel because he did not assert the issue in the "postconviction application," the brief, or argument. Alternatively, the State argues Heminover has not proven prejudice resulted from counsel's failure to obtain or request a substance abuse evaluation. He fails to prove there is a "reasonable probability" the sentence would have been different but for counsel's errors.

I. Preservation of Error

Heminover did not raise his ineffective assistance claim in his motion for resentence, his brief in support of the motion, or his argument to the court. He does

not offer a reason for the omission. Typically, this failure would eliminate our ability to consider his ineffective assistance claim on appeal from the trial court's ruling on the application for postconviction relief. *See* Iowa Code § 822.7 (1995). However, in this case the trial court indirectly ruled upon the ineffective assistance of counsel claim sua sponte. Consequently, we consider the issue sufficiently preserved for our review. *See Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991).

II. Ineffective Assistance of Counsel

A defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that, but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Hildebrant*, 405 N.W.2d 839 (Iowa 1987). Our standard of review is to evaluate the claim based on the totality of the circumstances. *Wissing*, 528 N.W.2d at 563.

Based on our review of all the circumstances of this case, Heminover's claims are speculative and insufficient to establish prejudice. Heminover's only argument concerning prejudice is the sentencing court may not have agreed to adopt the proposed sentence had a substance abuse evaluation been completed, and an evaluation would have assisted the court in his proper rehabilitation. Heminover fails, however, to show a reasonable probability a substance abuse evaluation would have justified any sentence other than the one he proposed and received. *See State v. Weber*, 545 N.W.2d 317, 317-18 (Iowa 1996)(failure to order substance abuse evaluation does not compel resentencing where defendant, challenging sentence for OWI third, previously failed to follow through with treatment and had an extensive record of alcohol-related offenses). Moreover, Heminover gives no reason why the court would not adopt the sentence agreed to by both the State and Heminover at the time of sentencing. Heminover has not met his burden to establish prejudice.

AFFIRMED.