IN THE COURT OF APPEALS OF IOWA

No. 1-700 / 01-0215
Filed December 12, 2001

FILED
DEC 12 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL EUGENE SEARCY,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, David R. Danilson, Judge.

Daniel Searcy appeals from the sentence entered upon his guilty plea and conviction for third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Stephen Holmes, County Attorney, and Angelina M. Newman, Assistant County Attorney, for appellee.

Considered by Hayden, Peterson, and Harris, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

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PETERSON, S.J.

The issue for review before this court is limited to whether counsel provided ineffective assistance to the defendant by failing to request that recommendations contained in the presentence investigation report be stricken on the premise the recommendations were based on improper facts.

Daniel Eugene Searcy plead guilty to a criminal charge of sexual abuse in the third degree, a class C felony. A condition of the plea was that the prosecutor concur with the recommendations of the presentence investigator as reflected in the presentence report.

Defense counsel objected to certain contents of the presentence report and the attached psychosexual assessment report that contained detailed references to a prior incident of indecent exposure. That charge had been later amended to an assault charge to which Searcy plead guilty. The summary and recommendation of the presentence report referred to the alleged facts underlying the prior assault charge and the facts surrounding the current charge. The presentence investigator concluded, "The Defendant appears to have significant issues surrounding his inappropriate and criminal sexual behaviors," and recommended incarceration.

The trial court concurred with objections of defense counsel and had references to the prior incident stricken from the presentence report and the psychosexual assessment report. Defense counsel did not specifically request that the recommendation portion of the presentence report be stricken, and it is

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that issue that is raised as the question in the ineffective assistance of counsel claim.

Review by this court of a claim of ineffective assistance of counsel is de novo. *State v. Simpson*, 349 N.W.2d 783, 785 (Iowa Ct. App. 1984). When the assertion by a defendant is a denial of a constitutional right, the de novo review is based on a totality of the circumstances. *Brewer v. State*, 444 N.W.2d 77, 79-80 (Iowa 1989). Ineffective assistance of counsel can be raised for the first time on appeal, *State v. Marti*, 290 N.W.2d 570, 589 (Iowa 1980), and the issue of ineffective assistance of counsel can be an exception to the traditional rules of issue preservation. *State v. Lucas*, 323 N.W.2d 229, 232 (Iowa 1982). If the record is sufficient to do so, a claim of ineffective assistance of counsel can be resolved on direct appeal. *State v. Hildebrant*, 405 N.W.2d 837, 840-41 (Iowa 1987).

To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992); *Hildebrant*, 405 N.W.2d at 841. The defendant has the burden of satisfying both prongs of the test. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Counsel's performance is judged according to the entire record and the totality of the circumstances. *Strickland v. Washington*, 446 U.S. 668, 686, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 692 (1984). The defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. *Id.* at 694; 104 S. Ct. at 2068, 80 L. Ed.

2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Gearing v. State*, 382 N.W.2d 151, 153-54 (Iowa 1986).

In this instance, Searcy fails to sustain his burden to satisfy either prong of the claim of ineffective assistance of counsel. Searcy's counsel alerted the court to the improper materials in the presentence report and the psychosexual assessment report, and the court properly excluded the information. The objection was sufficient to make the court aware of the improper material and its effect on the recommendation of the presentence investigator. Unless the contrary is shown, this court can assume the trial court could discern the implications of the exclusion of the improper materials.

Searcy contends the failure of counsel to request that the recommendation contained in the presentence report and psychosexual assessment report caused the trial court to abuse its discretion by considering the recommendation to the prejudice of Searcy. A court may not consider unproven or unprosecuted offenses when sentencing a defendant unless the (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1988). The decisions of the trial court are cloaked with a strong presumption in their favor, and until the contrary appears, the presumption is that the discretion of the trial court was properly exercised. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). To overcome the presumption of regularity requires an affirmative showing of abuse, and the burden of so showing rests upon the party

complaining. *Id.* The burden is heavy and can only be sustained by showing abuse and prejudice. *Id.*

The trial court articulated its reasons for the sentence imposed, making reference to a number of factors, including information contained in the presentence report and the psychosexual assessment report, but not making specific reference to the excluded materials. The reasons specified by the trial court support the conclusion for the sentence imposed. The record does not support a conclusion that the trial court considered the unprosecuted charges in arriving at the sentence, or that the outcome would have been different if the recommendations of the presentence report had been excluded. Searcy has failed to sustain his burden of establishing the claim of ineffective assistance of counsel. The decision of the trial court is affirmed.

AFFIRMED.