FILED
FEB 28 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-062 / 94-1139

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEANNA KAY ACKERMAN,

Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Defendant appeals his sentence for forgery in violation of Iowa Code section 715A.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John Fatino, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Paul L. Martin, County Attorney, and Carlyle Dalen, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Deanna Ackerman, was charged by trial information with forgery in violation of Iowa Code section 715A.2 (1993). Ackerman was subsequently arraigned, and on June 6, 1994, she pleaded guilty. The district court sentenced Ackerman to a five-year term of imprisonment. The district court noted Ackerman had been found guilty of previous charges of theft and was on parole at the time of her latest arrest. Ackerman appeals.

I. Sentence. Ackerman contends the district court abused its discretion in sentencing her to a five-year term of imprisonment. She argues probation and placement in a treatment facility would have been a more appropriate sentence under the circumstances.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Ackerman contends the district court failed to consider a number of factors she presented at sentencing through her attorney's argument and through a letter written by her to the court. These factors include her desire for psychiatric treatment, for chemical dependency treatment, for employment, to maintain a connection with her family, and her acceptance of responsibility for her actions.

We find, however, the district court did consider these factors in making its decision. The district court stated:

> I don't think a suspension of that sentence would be appropriate, Ms. Ackerman. I think you should be confined in the penal system as recommended by the Department of Corrections. I don't have to recount here this morning your record. It's extensive and when this incident occurred, you were on parole status. I don't think I'd be doing you or society any favor here this morning by following the recommendation that you've urged. I simply feel that you need more structure than can be provided on a probationary status even with placement at Beje Clark facility. You definitely have to come to grips with an apparent substance abuse problem before you can turn things around and become a productive member of society and I think you need at this stage in your life the structured environment that is recommended by the Department of Correctional Services.
>
> . . .
>
> Ms. Ackerman, I hope that you take advantage of what is offered in the system here and that you can do what's necessary and obtain some support to deal with your substance abuse problem and your other attitudes that for whatever reason have caused reoccurring problems with you in the criminal justice system.

We believe this reasoning of the district court demonstrates a reasonable exercise of discretion in sentencing. The court showed careful consideration of the factors involved in this case. We find there to be no abuse of discretion.

II. Ineffective assistance of trial counsel. Ackerman puts forth two claims of ineffective assistance of trial counsel which she desires to have preserved for possible postconviction proceedings. Ackerman first claims trial counsel was ineffective for allegedly indicating to her that if she provided the names of other individuals

involved in the forgery, the forgery charge against her would be dropped. Ackerman alleges that after she provided the names, the deal was revoked. Ackerman next claims trial counsel was ineffective for allegedly telling her if she pled guilty, she would be placed in treatment and a violator program.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

Ackerman contends her claims of ineffective assistance should be preserved for possible postconviction relief proceedings. In order to preserve these issues, Ackerman must meet the requirements set out in Dunbar v. State, 515 N.W.2d 12 (Iowa 1994). State v. Schultzen, 522 N.W.2d 833, 836-37 (Iowa 1994). Ackerman must make an initial showing on direct appeal of specific ways in which trial counsel's performance was inadequate and identify how compentent representation would have probably changed the outcome at the trial level. Schultzen, 522 N.W.2d at 836; Dunbar, 515 N.W.2d at 15. Further, ineffective assistance claims may be decided on direct appeal if the defendant fails to show one of the two prongs. See State v. Welch, 507 N.W.2d 580, 584 (Iowa 1993).

We begin by finding Ackerman's allegation regarding the alleged offer to drop charges against her must fail and consequently will not be preserved for possible postconviction proceedings. We reach this conclusion since Ackerman has failed to make a sufficient initial showing of inadequate performance. We find trial counsel acted properly in advising the client of all proposed offers made by the prosecution.

We also conclude Ackerman's ineffective assistance claim regarding trial counsel's alleged promise of treatment rather than incarceration should not be preserved

for possible postconviction proceedings. We reach this conclusion since Ackerman has failed to show prejudice. The record of the sentencing proceedings demonstrates Ackerman was fully advised by both her trial counsel and the court as to the possibility of incarceration.[1] We do

---

1. Ackerman's trial counsel made the following statements during Ackerman's sentencing hearing:

> Ms. Ackerman also has pending a parole revocation, which is currently set for hearing . . . . There are no negotiations or discussions relating to that cause, but the court should be aware that she is on parole. I would point out to the court Ms. Ackerman is advised that should the court impose incarceration in this matter, that she understands that her parole . . . . will be automatically revoked. It is not a matter of automatic revocation if she receives probation in this matter.

The following colloquy between the district court and Ackerman at the sentencing hearing further illustrates Ackerman's understanding that incarceration was still a possibility:

> THE COURT: And with regard to your current status, Mr. Byrne's statement with regard to parole, you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that you may face a revocation of parole as Mr. Byrne stated?
>
> DEFENDANT: Yes.
>
> THE COURT: And with respect to the pending criminal charges, Mr. Byrne has accurately set forth those pending criminal charges which are to be dismissed in exchange for your plea here?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you [sic] aware of any other plea bargain negotiations from -- or concessions or

not believe Ackerman could possibly be prejudiced by any alleged promise made by her trial counsel if she, at the same time, was fully aware that incarceration was a still a very real possibility.

Both of Ackerman's claims of ineffective assistance of trial counsel are denied.

AFFIRMED.

---

recommendations for sentencing from the County Attorney's office in exchange for your plea at this time?

THE DEFENDANT: No.

MR. BYRNE [defense counsel]: That's correct, your Honor. I'm not aware of anything else, and at sentencing in this matter, each party will make their own recommendation.