

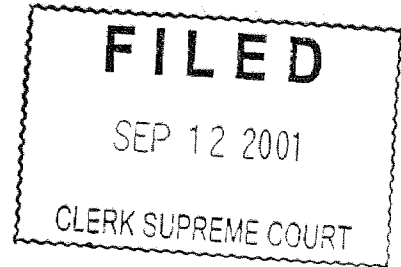
IN THE COURT OF APPEALS OF IOWA

No. 1-574 / 00-2025
Filed September 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN (NMN) HARRIS,
Defendant-Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, III (plea), Timothy O'Grady (motion in arrest of judgment), J.C. Irvin (sentencing), Judges.

Sean Harris appeals from his conviction and sentence for willful injury in violation of Iowa Code section 708.4(2) (Supp. 1999). **CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Richard Crawl, County Attorney, and James Burger, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant Appellant Sean Harris pled guilty and was convicted of willful injury under Iowa Code section 708.4(2) (Supp. 1999). He was subsequently sentenced to a term of incarceration for a period not to exceed five years. The sentence was then suspended and he was placed on probation for two years but ordered to remain in the county jail until a bed became available at the residential correctional facility.

Defendant appeals this conviction and sentence, contending his attorney provided inadequate representation in that he failed to object to (1) an amendment of the trial information, (2) the lack of a factual basis supporting defendant's plea, and (3) the district court's reliance on improper sentencing considerations. We affirm the conviction and remand for resentencing.

We review claims of ineffective assistance of counsel *de novo*. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000); *State v. Carrillo*, 597 N.W.2d 497, 499 (Iowa 1999). To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both ineffective assistance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Oetken*, 613 N.W.2d at 683; *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). Both elements must be proven by a preponderance of the evidence. *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa 2000); *Oetken*, 613 N.W.2d at 683; *Carrillo*, 597 N.W.2d at 499; *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). With these principles in mind we address the issues raised by defendant.

On June 30, 2000, a trial information was filed charging defendant with first-degree burglary and third-degree sexual abuse. The State alleged defendant remained in an occupied structure, inflicted bodily injury on a female victim and sexually abused her against her will.

A plea agreement was entered whereby a new trial information charging defendant with the offense of willful injury was filed. The defendant pled guilty to the charge that forms the basis of this appeal. The original trial information was then dismissed.

Defendant contends his speedy trial rights were violated and his attorney was ineffective in not moving to dismiss the second trial information. Defendant was arrested and booked into the Pottawattamie County Jail on June 20, 2000. His initial appearance following his arrest was on June 21, 2000. He was arraigned on July 31, 2000, pled not guilty, and did not waive his right to a speedy trial or indictment. He remained in jail for five months prior to his sentencing.

Defendant does not contend the first information was not timely filed. Rather he argues that the second trial information charged him with a new and different offense than was charged in the first information. Therefore, because the second trial information was not filed within forty-five days of his arrest, it should have been dismissed under Iowa Rule of Criminal Procedure 27(2)(a).

The State does not deny that the second trial information was not filed in the forty-five day period. The State correctly states that the first trial information was filed within the required period. The State argues (1) the second trial information did not trigger Iowa Rule of Criminal Procedure 27(2)(a) because

defendant had not yet been arrested on the charge in the second information at the time it was filed; and (2) defendant has failed to show he was prejudiced.

Defendant was arrested and incarcerated on the crimes charged in the first information. There was no arrest made on the charges in the second information so as to trigger rule 27(2)(a). *State v. Combs*, 316 N.W.2d 880, 882 (Iowa 1982). Further, the time of arrest for a defendant who is already incarcerated under another charge, even one growing out of the same incident, is the time the new charge is filed. *State v. Eichorn*, 325 N.W.2d 95, 96-97 (Iowa 1982). The rule was not violated. *Combs*, 316 N.W.2d at 882; *State v. Sunclades*, 305 N.W.2d 491, 493-94 (Iowa 1981). Defendant's attorney would have had no basis to raise a speedy trial challenge to the second information and was not ineffective in failing to do so.

Defendant has also failed to show prejudice. The charge was filed as part of a plea bargain where two other charges were dismissed. Defendant derived a benefit from the bargain and has failed to show otherwise.

The defendant next contends there was no factual basis for the plea. The State disagrees, advancing that the minutes of testimony show the victim would testify defendant grabbed her by her left arm, threw her on a couch twice and caused her to hit her head, pinned her arms above her head, and punched her twice in the leg. The minutes further show the victim had head and ankle injuries and bruising on her legs.

In determining if there is a factual basis for a plea we look at the entire record available to the district court. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Bodily injury is defined as physical pain, illness or any impairment of

physical condition. *State v. Canas*, 597 N.W.2d 488, 494-495 (Iowa 1999). There was a factual basis to support the charge. Defendant's attorney was not ineffective in failing to object to the lack of a factual basis.

The defendant next argues his attorney was ineffective when he did not object to the district court's consideration of unprosecuted charges. In imposing a sentence the district court said:

The Court has reviewed this [presentence investigation] report and finds that you do have a prior criminal record. The Court certainly disregards those murder charges back in Minnesota, realizes that there was no finding. That doesn't weigh against you. *You do have some other prior records though, even if they were dropped down from felonies. They started as some more serious offenses.* (emphasis added).

A sentencing court may not rely on additional unproven and unprosecuted charges where no facts before the court show the charges are valid and the defendant does not admit the additional charges. See *State v. Messer*, 306 N.W.2d 731, 732-733 (Iowa 1981). The State argues it is not clear the court's observation as to the defendant's prior record was a reason for the sentence imposed. However, the State recognizes as a reviewing court that we do not speculate on the weight the district court mentally assigned to an improper sentencing consideration. See *Messer*, 306 N.W.2d at 733. The State therefore concedes it is appropriate to remand the case for resentencing.

CONVICTION AFFIRMED, REMANDED FOR RESENTENCING.