IN THE COURT OF APPEALS OF IOWA 000385

No. 7-506 / 96-1613

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

DIANE KAY JOHNSON,
Appellant.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Diane Johnson appeals the sentence entered upon her conviction for the offenses of driving while barred and operating while intoxicated, second offense, in violation of Iowa Code sections 321.561 and 321J.2(2)(b) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, until withdrawal, and then John M. Trewet of Rutherford, Trewet & Petersen, Atlantic, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and James P. Barry, County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant Diane Johnson contends her sentence should be reversed because the trial court erred in accepting her waiver of a presentence investigatory report (PSI). She also claims ineffective assistance of counsel for failing to inform her of the consequences of her plea. Because Johnson plead to a aggravated misdemeanor, the court was not in error in accepting her waiver. We affirm.

I. Background & Facts.

Johnson was charged with obtaining prescription drugs by fraud, driving while barred, OWI third offense, driving under suspension (eighth time), and for possession of a controlled substance. Johnson entered a plea agreement where she pled guilty to driving while barred and OWI, second offense. As part of the plea agreement, Johnson was required to complete inpatient chemical dependency treatment and participate in the OWI treatment program in Council Bluffs. The State dismissed the remaining charges.

For OWI, second offense, Johnson was sentenced to the custody of the Iowa Department of Adult Corrections for a term not to exceed two years and a fine of $750. The fine was suspended. Johnson was placed in the Fourth Judicial District Residential Correctional Facility OWI program. For driving while barred, she was committed to the custody of the Iowa Department of Adult Corrections, for a term not to exceed two years. The sentence was suspended and Johnson was placed on probation to the Fourth Judicial District Department of Correctional Services. The

conditions of her probation were that she would reside at the Residential Correctional Facility until maximum benefits were received. The sentences run concurrently. Johnson's driving privileges were suspended for six years.

At the sentencing hearing, the court asked Johnson whether she wanted to waive her right to a presentence investigation. Johnson said she did and the court accepted her waiver. Johnson appeals her judgment and sentence.

II. Waiver of Presentence Investigation Report.

Johnson contends the trial court erred in accepting her waiver of the presentence investigation report. An appellate court's review of a district court's failure to order a presentence investigative report is for errors of law. *State v. Bolden*, 538 N.W.2d 879,880 (Iowa App. 1995). Iowa Code section 901.2 provides for the mandatory preparation of a presentence investigation report upon pleas of guilty to class "B," "C," and "D" felonies. *Bolden*, 538 N.W.2d at 880. The preparation of the presentence report cannot be waived if the plea is to a class "B," "C," or "D" felony. *See id.;* Iowa Code § 901.2. When the plea is to an aggravated misdemeanor, however, the court, in its discretion, *may order* a presentence investigation--it is not mandatory. *See* Iowa Code § 901.2 (1997)(emphasis added).

Johnson pled guilty to OWI second offense and driving while barred. Both of these offenses are aggravated misdemeanors. For this reason, the court did not err in allowing Johnson to waive the presentence report.

Johnson cites *Bolden*, 538 N.W.2d at 880, to support her assertion the court erred when it accepted her waiver to a presentence report when she pled to an aggravated misdemeanor. *Bolden* does not support Johnson's assertion. In *Bolden*, defendant pled guilty to a misdemeanor, reduced from a felony and a class "D" felony. Because Bolden pled guilty to a felony, the presentence investigative report was mandatory.

III. Ineffective Assistance of Counsel.

Johnson contends she received ineffective assistance of counsel because her attorney did not adequately advise her of the consequences of her plea. Specifically, she claims she should have been told she could be immediately transferred to the women's correctional institution if she violated rules at the OWI facility.

Ineffective assistance of counsel claims may be resolved on direct appeal when the record adequately addresses the issues. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994). Where it is alleged that constitutional rights have been denied, we make an evaluation of the totality of the circumstances, which amounts to a de novo style review. *State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988).

The defendant bears the burden of proving by a preponderance of the evidence she received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). She must prove two elements: (1) counsel failed to perform an essential duty; and (2) she 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.* The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result. *Id.*

It is true that counsel's failure to apprise a defendant of the penal consequences of a guilty plea may constitute ineffective assistance of counsel. *See Hawkman v. Parratt*, 662 F.2d 1161, 1169-70 (8th Cir. 1981). Counsel, however, does not have a duty to warn a defendant of collateral consequences of a guilty plea and failure to do so is not ineffective assistance of counsel. *See Saadig v. State*, 387 N.W.2d 315, 324-45 (Iowa 1986). Whether the consequences of a guilty plea are direct or collateral turns on whether the consequence is an immediate and automatic effect of a defendant's punishment. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987).

The basic premise of Johnson's argument is flawed. Johnson's counsel advised her of the maximum penalty for her offenses. She was not informed that violation of the rules of the OWI program could result in her being sent to another facility within the correctional system to complete the term of her sentence. Johnson has not been transferred to another facility. The issue is moot—Johnson cannot show prejudice.

Even if Johnson was transferred because of rule violations at the OWI program, counsel was not ineffective. Being transferred to another facility, which may include prison, is a collateral effect of Johnson's punishment. It is not direct or automatic, but rather, is within Johnson's control. Johnson argues being sent to prison for violating the rules of the OWI program is a direct consequence of her plea. She is mistaken. If she were to violate rules at the OWI facility, there are many possibilities of how a violation would be handled, depending on the seriousness of the violation. Going to another facility is not automatic. Counsel does not have the duty to anticipate and inform a defendant of every collateral consequence of her plea. Johnson's attorney was not ineffectual for not explaining the consequences of her violation of the OWI program's rules.

AFFIRMED.