FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

185

STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 30, 1980

vs.)

WILLIAM CHARLES TITUS,) 0-64
63636

Defendant-Appellant.)

Appeal from Johnson District Court - Joseph Thornton, Judge.

Defendant appeals jury conviction of operating a motor vehicle while under the influence of an alcoholic beverage in violation of section 321.281, supplement to the Code 1977, alleging ineffective assistance of counsel and abuse of trial court discretion in failing to assess all available sentencing options. Conviction AFFIRMED and case REMANDED for resentencing.

Philip B. Mears of Iowa City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General; and Lona Hansen, Assistant Attorney General; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, William Charles Titus, appeals jury conviction of operating a motor vehicle while under the influence of an alcoholic beverage in violation of section 321.281, supplement to the Code 1977, alleging ineffective assistance of counsel. He also argues his sentence should be set aside due to trial court's failure to assess properly all available sentencing options. We affirm defendant's conviction, deny review of defendant's ineffective assistance of counsel claim, and remand this case for resentencing.

On January 28, 1979, defendant was arrested in Iowa City and charged with the crime by a Johnson County Attorney's Information. The case was tried to a jury on April 12, 1979, and defendant was convicted. After his motion for new trial was overruled, defendant was sentenced on May 15, 1979, to serve ten days in the Johnson County jail and pay all costs of prosecution.

I. Ineffective Assistance of Counsel. Defendant argues trial court's judgment should be reversed because he did not receive effective assistance of counsel at trial. Specifically, defendant asserts his counsel failed properly to prepare his expert medical witness regarding alcohol metabolism rates and its relationship to intoxication. He also alleges trial counsel failed to present a minimally adequate closing argument.

Review of these allegations requires a determination whether, considering all the circumstances, counsel's performance was within the range of normal competency. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978) (quoting State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978)). To make a determination, however, we must be supplied with an adequate record. State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Since the record before us does not permit an informed resolution of the issue one way or the other, we conclude it is of the type ordinarily requiring an evidentiary, adversarial hearing. See State v. Smith, 282 N.W.2d 138, 143-44 (Iowa 1979). Accordingly, we decline to consider defendant's charges his counsel was ineffective but do so without prejudice to his right to assert his claim in postconviction proceedings. See State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979).

II. Sentencing. Defendant also urges his sentence must be set aside due to trial court's failure to assess properly all available sentencing options. To support his contention, defendant cites State v. Hildebrand, 280 N.W.2d 393 (Iowa 1979), which held the word "shall" in section 321.281 under which defendant Hildebrand was sentenced, as was defendant in the instant case, does not require trial court to impose a mandatory minimum two-day jail sentence. Id. at 397.

We find trial court was under the impression it was required to impose at least a two-day jail sentence on defendant. Hildebrand interprets the legislative intent of the mandatory language of section 321.281 in pari materia with sentencing options available under section 901.5, thereby expanding the judge's options. Because it is impossible for us to determine what effect trial court's belief a minimum jail sentence was required had in exercising its discretion in sentencing, we conclude the administration of justice would be served better if trial court were given the opportunity to sentence defendant under an accurate view of all available sentencing alternatives. For these reasons, we set aside trial court's ten day jail sentence and remand this case for imposition of sentence pursuant to the guidelines set forth in Hildebrand.

Judgment finding defendant guilty of the crime of operating a motor vehicle while intoxicated is affirmed, reserving his claim of ineffective assistance of counsel for postconviction relief. Due to the foregoing reasons, however, this case is remanded for resentencing. Conviction affirmed and case remanded for resentencing.

All judges concur except Donielson, J., who specially concurs.

DONIELSON, J. (concurring in part, dissenting in part)

While I concur in division I and the finding of error in division II, I do not agree with the majority's remand for resentencing. The rationale of the majority's remand appears to be that it is impossible for this court to determine what effect the trial court's belief a minimum jail sentence was required had on the court's exercise of its discretion in sentencing defendant; and, accordingly, the administration of justice would be better served if the trial court were given the opportunity to sentence defendant under an accurate view of available sentencing alternatives. I disagree with the basic premise of this holding.

The trial court's sentencing of defendant for ten days indicates a belief by the court the offense warranted a more severe sentence than one of two days, whether mandatory or not. Because of this longer than two-day sentence, it is difficult to conceive how the court's incorrect belief had any effect on its imposition of sentence. The trial court's error was harmless. With this in mind, I view the majority's remand to the trial court for resentencing to be a futile and unnecessary action. The trial court exercised its discretion in sentencing defendant and a remand for resentencing is uncalled for, see State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977), and a waste of judicial resources.