IN THE COURT OF APPEALS OF IOWA

No. 6-098 / 95-0705

FILED
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000373

STATE OF IOWA,

Appellee,

vs.

CATHY H. ROBINSON,

Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

The defendant appeals her sentence imposed by the district court following her guilty plea to a charge of engaging in prohibited acts. **AFFIRMED.**

Robert J. Phelps of Phelps & Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Joseph Grubisich and Donald Frank, Assistant County Attorneys, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ.

STREIT, J.

On October 10, 1994, Cathy Robinson presented a prescription for a Schedule III controlled substance (Vicodin) and for a Schedule IV substance (Valium) to a Walgreen's pharmacist. The pharmacist checked with the medical clinic on the prescription form and discovered the doctor whose name appeared had not worked there for more than a year. The pharmacist contacted the police who arrested Robinson as she attempted to pick up the prescriptions.

Robinson was charged with engaging in prohibited acts. In February 1995 Robinson pleaded guilty to the charge pursuant to an agreement wherein the State recommended drug evaluation and treatment rather than incarceration. The district court's concurrence was not a condition of accepting the plea. The district court sentenced Robinson to a term of imprisonment not to exceed ten years.

Robinson appeals claiming the district court abused its discretion in sentencing her to a ten-year prison term. Robinson further contends trial counsel was ineffective for failing to explain the possibility of requiring the court's concurrence as a condition of accepting the plea agreement.

I. Sentencing.

Robinson pleaded guilty to a class "C" felony under Iowa Code sections 155A.23 and 124.401(1)(c)(1995), and was sentenced to a prison term not to exceed ten years. Iowa Code section 902.9(3) provides a class "C" felon shall not be confined

for more than ten years. Robinson's sentence was within the statutory limits. A sentence imposed within the statutory limits will be set aside only for an abuse of discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991); *State v. Gibb*, 303 N.W.2d 673, 687 (Iowa 1981). An abuse will be found only when the discretion exercised by the sentencing court is on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Neary*, 470 N.W.2d at 29. This standard is applied even when the court imposes the most severe sentence available. *State v. Farnum*, 397 N.W.2d 744, 749 (Iowa 1986). When sentencing a criminal, the district court is to consider all pertinent matters including: the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of reform. *State v. Sumpter*, 438 N.W.2d 6, 10 (Iowa 1989).

The district court's decision is supported by the facts and was not an abuse of discretion. The district court acknowledged Robinson did not have a lengthy criminal history, had been in drug treatment for the past week, and had young children. The district court found the above factors to be of questionable validity in the present case. The district court placed greater significance on the fact Robinson had community resources available to her, but chose not to use them until it was too late. The district court determined incarceration would provide the maximum opportunity for rehabilitation in that Robinson would be forced to get her "act cleaned up." Weighing

these factors is within the district court's discretion. *See State v. Wagner*, 359 N.W.2d 487, 490 (Iowa 1984). The court did not abuse its discretion.

Robinson also claims her Fourth Amendment right to due process and her Fourteenth Amendment right of equal protection under the law have been violated. In support of this claim, Robinson asserts there is a sentencing disparity between herself and other similarly situated defendants. We find no support for this assertion in the record and reject her claims.

II. Ineffective Assistance of Counsel.

Robinson claims her attorney was ineffective for not telling her of a possible plea procedure under Iowa Rule of Criminal Procedure 9(2). Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.