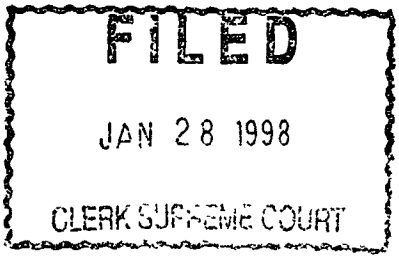
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IN THE COURT OF APPEALS OF IOWA

No. 7-459 / 96-1455
Filed January 28, 1998



STATE OF IOWA,
Appellee,

vs.

COY SHANE LEONARD,
Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen G. Gerard, District Associate Judge.

Defendant appeals the judgment and sentence entered upon his conviction, following a guilty plea, of operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Dennis A. Bjorklund, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Jan C. Waterhouse, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

STREIT, P.J.

Defendant Coy Leonard was convicted of OWI third offense. He claims his attorney for his first OWI conviction was ineffective for not filing his written guilty plea for two and one-half years after his arrest for the charge. As a result, his current conviction for OWI was within six years of his first conviction, making it a third offense with a greater punishment.

I. Background & Facts.

In July 1988, Coy Leonard was arrested for operating a motor vehicle while intoxicated. Although he signed a written guilty plea, wrote a check to cover fines and court costs, and delivered both to his attorney in February 1989, his attorney did not file the guilty plea until nearly two and one-half years later.[1] Judgment of conviction was not entered until August 15, 1991.

In September 1991, Leonard was again arrested for operating a motor vehicle while intoxicated. He was convicted of OWI for the second time in February 1992. In December of 1995 he was arrested a third time for operating a motor vehicle while intoxicated. He pled guilty to this offense and the judgment was entered on August 19, 1996. Leonard was sentenced to an indeterminate term of imprisonment not to exceed five years. All but thirty days of the prison term was suspended and he was placed on probation for two years.

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[1] There is nothing in the record to explain why this case was allowed to linger in the court system for two and one-half years.

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Although he pled guilty to OWI third offense, Leonard maintains if his attorney filed Leonard's guilty plea to his first OWI in a timely manner, the first OWI conviction would not have been within six years of his current conviction. If this were true, he would only be facing a conviction of OWI second offense, instead of third offense. On these grounds, he appeals his conviction.

II. Interpretation and Validity of Section 321J.2.

Leonard argues the circumstances of his case should compel the court to interpret the six-year statute of limitation of 321J.2(3) to run from the date of arrest rather than the date of conviction. Doing so would reduce his conviction for OWI third offense, a class "D" felony, to OWI second offense, an aggravated misdemeanor. In the alternative, he argues the statute is unconstitutional. Both contentions are without merit.

Section 321J.2(3) of the Iowa Code reads:

> No conviction for, deferred judgment for, or plea of guilty to, a violation of this section which occurred more than six years prior to the date of the violation charged shall be considered in determining that the violation charged is a second, third, or subsequent offense.

Iowa Code § 321J.2(3) (1997).

Our scope of review involving the interpretation of a statute is at law. *State v. Haberer*, 532 N.W.2d 757, 758 (Iowa 1995). Leonard asks this court to interpret the statute to mean something it does not. The plain language of the statute and the case law are that in determining if an OWI offense is a first, second, or third offense the

offense is measured from the date the defendant was last sentenced for OWI, not last arrested for OWI. *See* Iowa Code § 321J.2(3); *State v. Chesmore*, 474 N.W.2d 551 (Iowa 1991); *State v. Socarras*, 425 N.W.2d 426, 427 (Iowa App. 1988); *State v. Raim*, 381 N.W.2d 635, 637-38 (Iowa 1986). In effect, Leonard asks us to create an exception to the statute for his factual circumstance. Our task is not to create rules or statutes, but interpret them. *Butler v. Woodbury County*, 547 N.W.2d 17, 20 (Iowa App. 1996). When the language of a rule or statute is clear, we are obligated to accept it as meaning what it says. *Id.* The language of section 321J.2(3) is clear.

Leonard argues the statute is invalid because it is unconstitutionally vague. He did not make this argument to the trial judge. Even constitutional issues must be preserved for appeal. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). The issue has not been preserved for appeal and is waived. *State v. Farnum*, 554 N.W.2d 716, 719 (Iowa App. 1996)("Error which is not preserved is waived").

III. Ineffective Assistance of Counsel.

When a defendant asserts a constitutional violation, such as ineffective assistance of counsel, we resolve the issue by making an independent evaluation of the totality of the circumstances. *Nims v. State*, 401 N.W.2d 231, 233 (Iowa App. 1986). This is equivalent to a de novo review. *Id.* The burden of proving ineffective assistance of counsel by a preponderance of the evidence is on Leonard. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

To establish his claim of ineffective assistance of counsel, Leonard must establish: (1) his counsel's performance did not fall within the range of normal competency; and (2) the deficient performance so prejudiced him as to deprive Leonard of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

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). In this case we do not know why Leonard's attorney waited to file his guilty plea for nearly two and one-half years. There is an inadequate record for us to decide whether counsel was ineffective. This issue is preserved for a postconviction proceedings.

AFFIRMED.