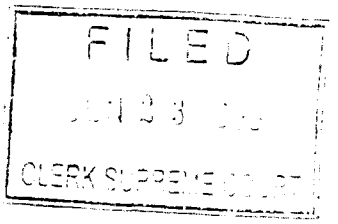
IN THE COURT OF APPEALS OF IOWA

No. 1999-89 (9-276) / 98-1414
Filed June 23, 1999

STATE OF IOWA,

Plaintiff-Appellee,



vs.

McKINLEY LUE,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Charles Pelton, Judge.

Defendant appeals from the sentence imposed following his guilty plea to operating a motor vehicle without the owner's consent. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County Attorney for appellee.

Considered by Huitink, P.J., Mahan, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PER CURIAM.

McKinley Lue appeals his sentence for Operating a Motor Vehicle without Owner's Consent. He claims his counsel was ineffective for failing to have him screened for possible placement in a residential correctional facility. We affirm the sentence because Mr. Lue's extensive criminal history makes it unlikely the judge would have granted placement in such a facility, thus Mr. Lue has not been prejudiced by his counsel's failure to have him screened.

On February 3, 1998, McKinley Lue was in the back seat of a vehicle stopped by police. The vehicle had been reported stolen. Marijuana was also found in the vehicle. Mr. Lue was charged by trial information with second-degree theft, in violation of Iowa Code sections 714.1 and 714.2 (1997), and with possession of marijuana, in violation of Iowa Code section 124.401(5). A plea agreement was filed providing the possession charge would be dismissed and Mr. Lue would plead guilty to the reduced charge of operating without owner's consent. The state agreed to recommend a $500 fine and 240 days incarceration with credit for time served and the balance suspended.

Prior to sentencing, the State learned of Mr. Lue's extensive criminal history. Mr. Lue had several juvenile charges and at one month short of his twenty-first birthday he had already acquired an extensive adult criminal record. His adult criminal record included three convictions for theft in the fourth degree, one conviction for criminal mischief, one conviction for assault with injury, five convictions for driving under suspension, and three convictions for driving while

barred. At the sentencing hearing, the State withdrew its recommendation for the sentence part of the plea. Mr. Lue was given the opportunity to withdraw his plea at this point; however, he chose to proceed with an open plea to the reduced charge. The court sentenced Mr. Lue to an indeterminate term of incarceration not to exceed two years and a fine of $500. The court rejected Mr. Lue's request for placement in a residential correctional facility, noting there had been no screening of Mr. Lue to determine if placement would have been appropriate. Mr. Lue appeals his sentence claiming ineffective assistance of counsel.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

Mr. Lue argues his counsel was ineffective counsel because he failed to have him screened for possible residential correctional facility placement prior to sentencing. The attorney did request placement in a residential correctional facility, but the judge denied the request because Mr. Lue had not been screened for it prior to the hearing. In order to prevail on a claim of ineffective assistance of counsel, the defendant has the burden of proving the following two elements: (1) counsel failed to perform an essential duty; and (2) defendant was prejudice by counsel's error.

State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996); *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996).

In order to prove he was prejudiced by the error, Mr. Lue must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 69. Mr. Lue must prove if he had been screened the judge would have placed him in the residential treatment facility. Mr. Lue argues even though he has a substantial record, most of the convictions have been related to driving. However, in looking at the comments made by Judge Charles Pelton during sentencing we do not agree there was a reasonable probability Mr. Lue would have been placed in the facility. After counsel's request for the placement, Judge Pelton stated,

> Based on his [Mr. Lue's] history, . . . I think they would be hard pressed to take him, frankly. That is an alternative, but I think I would reject it even if it was in front of me here today. I don't know a better way to tell Mr. Lue that you have to change your behavior. You have to follow society's rules or you're going to be taken out of society. There is going to be a consequence for those acts, and it's my job here today to tell you that and to do it.

Judge Pelton also acknowledged the charges were not all driving infractions, some were rather serious offenses. Judge Pelton went on to say, "given the nature of the offense and his significant criminal history, this disposition, I think, is appropriate. . . . He's been given lots of opportunities to try and stay out of trouble, and he's not been successful. So he's going to have to pay the consequences." The court

characterized Mr. Lue's record as "a horrendous criminal history" and "an incredible, incredible criminal history." The comments made by the judge during the sentencing do not demonstrate an outcome any different from the present one even if the screening had been done.

As a condition of probation, a defendant may be placed in a residential treatment facility after consideration of factors including the age of the defendant, criminal record, employment and family circumstances, and the nature of the offense committed. Iowa Code sections 907.3 and 907.5 (1997). Granting probation is a matter of the broad discretion of the trial court. *State v. Ogle*, 430 N.W.2d 382, 383 (Iowa 1988); *State v. Ramirez*, 400 N.W.2d 586, 590 (Iowa 1987). Even if the attorney had Mr. Lue screened it appears to us the judge would not have granted the placement. In looking at the statutory considerations, it is highly unlikely the trial court would have ordered the placement.

Mr. Lue failed to show he was prejudiced by his attorney's failure to request a screening. In looking at the comments made by the trial judge, it is evident the judge would not have given the placement consideration even if it had been an available option. The judge mentioned the young age of Mr. Lue and his four page criminal record. He also stated he thought it was time Mr. Lue faced the consequences of his actions and turn his life around. We affirm the trial court's sentence.

AFFIRMED.

No. 98-1414. [1999-89 (9-276)] STATE v. LUE

Appeal from the Iowa District Court for Scott County, Charles Pelton, Judge. **AFFIRMED.** Considered by Huitink, P.J., Mahan, J., and Hayden, S.J. Per Curiam (5 pages $2.00)

McKinley Lue appeals his sentence for Operating a Motor Vehicle without Owner's Consent. Lue was charged with second degree theft and possession of marijuana. A plea agreement was filed providing the possession charge would be dismissed and Lue would plead guilty to the lesser charge of operating a motor vehicle without owner's consent. The State agreed to recommend a $500 fine and 240 days incarceration with credit for time served and the balance suspended. Prior to sentencing the State learned of Lue's extensive criminal history. He had several juvenile charges and at one month short of his twenty-first birthday he already had thirteen convictions. The State withdrew its recommendation for the sentence part of the plea. Lue was given the opportunity to withdraw his plea, but he chose to proceed with an open plea to the reduced charge. Lue was sentenced to an indeterminate term of incarceration not to exceed two years and a $500 fine. Lue's request for placement in a residential correctional facility was denied by the court noting there had been no screening of Lue

No. 98-1414. [1999-89 (9-276)] STATE v. LUE (continued)

prior to sentencing. Lue bases this appeal on a claim of ineffective assistance of counsel for his counsel's failure to have him screened prior to sentencing. **OPINION HOLDS:** In order to prevail on a claim of ineffective assistance of counsel, the defendant has the burden of proving counsel failed to perform an essential duty and the defendant was prejudiced by counsel's error. Lue had the burden of showing a reasonable probability that, but for his counsel's error of not having him screened, the result of the sentencing would have been different. He must show if he had been screened the judge would have placed him in the residential correctional facility. In looking at the comments made by the trial court judge during sentencing we do not find there was a reasonable probability Lue would have been placed in the facility. The judge noted his doubts as to the likelihood of Lue's placement in such a facility even if the screening had been completed. He spoke of Lue's extensive criminal record and his young age. The judge thought the sentence was appropriate and it was time for the defendant to face the consequences of his actions. The comments made by the judge during the sentencing do not demonstrate a possibility for an outcome any different from the present one even if the screening had been completed. Lue failed to show he was prejudiced by his attorney's failure to request a screening. It is evident the judge would not have given the placement consideration even if it had been an available option; therefore, we affirm the trial court's sentence.