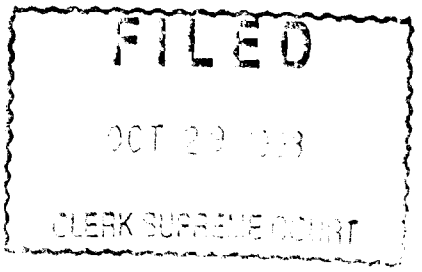
IN THE COURT OF APPEALS OF IOWA

No. 8-472 / 97-1562
Filed October 29, 1998



STATE OF IOWA,

Appellee,

vs.

RYAN MICHAEL PORTER,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Chief Judge.

Ryan Porter appeals from his convictions, following guilty pleas, for two counts of incest. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P.J.

Ryan Porter appeals from his convictions, following guilty pleas, for two counts of incest in violation of Iowa Code section 726.2 (1997). Porter contends he was denied effective assistance of counsel and the district court erred in failing to continue sentencing and to state reasons for imposing consecutive sentences. We affirm.

Porter plead guilty to two counts of incest. He was eighteen years old at the time of the pleas and sixteen and seventeen years old when he sexually abused his four-year-old niece. After a lengthy but unsuccessful search to locate a local sexual abuse treatment program, Porter requested a continuance at sentencing in order to conduct a further search. In denying the request, the district court found no prospect Porter could obtain treatment in the community. The court sentenced Porter to two indeterminate five-year prison terms to run consecutively, providing maximum opportunity for Porter's rehabilitation and maximum protection for the community.

On appeal, Porter contends his trial counsel was ineffective in failing to request a transfer of his case to juvenile court where there were more appropriate options for him. Porter also contends the district court erred in failing to: (1) grant his request for a two week continuance to find an appropriate program to treat him for sexual abuse issues; and (2) state sufficient reasons on the record for imposing consecutive sentences.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 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). However, the Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The court quoted *Strickland v. Washington*:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that

> ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699-700). Pursuant to *Taylor v. State*, we may affirm applicant's conviction because he has failed to prove prejudice without deciding whether there was a failure of duty. *See Taylor*, 352 N.W.2d at 685.

Porter alleges his trial counsel was ineffective in failing to request a transfer of the case to juvenile court. Iowa Code section 803.5(1) provides, "An adult who is alleged to have committed a criminal offense prior to having reached the age of eighteen may be transferred to juvenile court for adjudication and disposition as a juvenile, . . ." Porter argues if the transfer had been requested, "[t]he court would have considered factors such as, the defendant's past contacts with the juvenile system, the nature and circumstances of the charge, and the rehabilitation and treatment available in the adult and juvenile systems." *See* Iowa Code §§ 232.45(6)(c) and 232.45(7).[1] Given the limited period of time a juvenile court would

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[1] Those sections provide:

> c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community.
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> 7. At the conclusion of the waiver hearing and after considering the best interests of the child and the best interests of the community the court may, in order that the child may be prosecuted as a youthful offender, waive its jurisdiction over the child if all of the following apply:

have had jurisdiction, the limited treatment locally, as well as the expressed need by the sentencing court to protect the community, we find Porter was not prejudiced by proceeding in district court rather than juvenile court. It is not reasonably likely the district court would have transferred the case to juvenile court. Because Porter cannot demonstrate prejudice, his claim of ineffective assistance of counsel must fail. We affirm on this issue.

Porter next claims the district court abused its discretion in denying his request for a continuance and in sentencing him to serve consecutive sentences without giving specific reasons for consecutive, as opposed to concurrent, sentences. We review the denial of a request for a continuance for an abuse of discretion. *State v. Miller*, 480 N.W.2d 894, 895 (Iowa 1992). "A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained." Iowa R. Civ. P. 183(a) (made applicable to criminal cases by Iowa Rule of Criminal Procedure 20(1)). Porter had

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a. The child is fifteen years of age or younger.

b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute a public offense under section 232.8, subsection 1, paragraph "c", notwithstanding the application of that paragraph to children aged sixteen or older.

c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child, prior to the child's eighteenth birthday, if the juvenile court retains jurisdiction over the child and the child enters into a plea agreement, is a party to a consent decree, or is adjudicated to have committed the delinquent act.

the burden of showing that substantial justice would more nearly be obtained if the court granted the request. *State v. Miller*, 480 N.W.2d at 895; *State v. Ware*, 338 N.W.2d 707, 714 (Iowa 1983). The district court reviewed the lengthy history of this case on the record when it overruled Porter's motion for continuance. It determined Porter had been permitted adequate time to find local treatment. He was evaluated and rejected by the Residential Treatment Facility. He waited over a month before interviewing with another prospective counselor. We conclude the court did not abuse its discretion in denying Porter's motion for continuance.

Finally, Porter claims the district court did not adequately state a reason for imposing consecutive, rather than concurrent sentences. We review sentencing for an abuse of discretion. *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982). A court is to give a reason for imposing consecutive sentences. Iowa R. Crim. P. 22(3)(d); *State v. Carberry*, 501 N.W.2d 473, 477-78 (Iowa 1993). Porter argues his situation is similar to that in *State v. Uthe*, 542 N.W.2d 810 (Iowa 1996), in which the supreme court determined the sentencing court failed to give "even a terse explanation" why it imposed consecutive sentences. We disagree. In Porter's sentencing hearing, the court announced the two terms of incarceration, and indicated they would run consecutively. It then detailed the reasons for the sentence, including the lack of local resources, the attempts Porter made to locate a local program, the serious nature of the crime involving a very young child, the necessity of a longer sentence to protect the

community, and the court's observations of Porter during the sentencing hearing. In contrast to *Uthe*, the reason for the consecutive sentence can be found in the district court's expressed belief that the community would not be adequately protected if a "lesser sentence" were imposed. Nothing more is required to enable us to perform our duty in reviewing the sentence imposed. *See State v. Uthe*, 542 N.W.2d at 816; *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App.1994); *State v. Taggart*, 525 N.W.2d 877, 882 (Iowa App.1994). We conclude the court did not abuse its discretion in imposing consecutive sentences.

AFFIRMED.