IN THE COURT OF APPEALS OF IOWA

No. 5-706 / 94-1801

001041

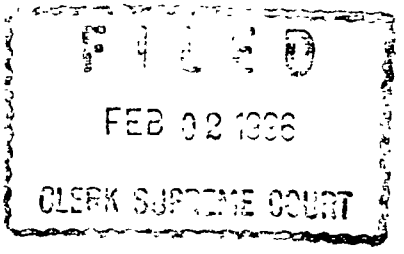
STATE OF IOWA,

Plaintiff-Appellee,

vs.

TYRONE MARTIN-BEY,

Defendant-Appellant.



Appeal from the Iowa District Court for Johnson County, John R. Sladek, Judge.

Tyrone Martin-Bey appeals from his conviction and sentence, following a guilty plea, for operating while intoxicated pursuant to Iowa Code section 321J.2 (1993). **AFFIRMED IN PART; SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Dennis A. Bjorklund, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, J. Patrick White, County Attorney, and Teresa Vens, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

SACKETT, J.

Defendant-appellant Tyrone Martin-Bey appeals from his conviction and sentence, following a guilty plea, for operating while intoxicated pursuant to Iowa Code section 321J.2 (1993). Defendant contends the trial court erred in denying his motion in arrest of judgment in that his defense counsel failed to properly advise him and withdraw from representation when she became ill. Defendant also claims the district court abused its discretion in denying his motion in arrest of judgment because he did not understand his rights or the strength of his case. He further contends trial counsel abused its discretion in denying his motion for continuance of the sentencing because the matter had not been set for hearing and his defense counsel had no notice of the sentencing hearing. Defendant further contends the trial court abused its discretion in sentencing him to a term not to exceed five years and placing him in a treatment facility. We affirm the conviction, vacate the sentence, and remand for resentencing.

Defendant was charged with driving under the influence, third offense. He was represented by attorney Spence (now deceased). A motion was filed to suppress blood test results. The motion was denied. Attorney Spence then recommended defendant enter a guilty plea. He did four days later on July 12, 1994. The sentencing hearing was set for September 9, 1994. Spence became seriously ill and was not able to communicate with defendant. Spence did not withdraw as his counsel. During this time, defendant's sentencing hearing was continued twice through the efforts of his

current attorney. Spence had not withdrawn from defendant's representation. The sentencing hearing was set for September 30, 1994. Spence finally withdrew and on September 27, 1994, defendant's current attorney, Bjorklund, met with him. Bjorklund advised defendant he should not have pled guilty.

Bjorklund immediately filed an application to appoint a new attorney for defendant and appeared as his counsel. Bjorklund wanted to file a motion in arrest of judgment, but the motion should be filed within five days before sentencing and there was not sufficient time. Bjorklund therefore made the motion when he appeared for sentencing on September 30. The trial court asked that a motion in arrest of judgment be filed. One was filed on October 18, 1994, and a hearing was held wherein defendant asserted his desire to withdraw the plea and contended he was not informed of his right to change his plea and the five-days-before-sentencing deadline. Defendant further testified Spence's illness foreclosed communication as to his rights and Spence had not clearly gone over the details of his guilty plea.

The district court denied this motion and found defendant understood the plea and the waiver of his rights by pleading guilty and further understood the factual basis for the charge. The trial court then began to address sentencing. Defendant's attorney contended sentencing had not been set for that particular day and he had not had time to prepare for the hearing. He orally requested a continuance of the sentencing hearing. The trial court denied the motion finding sentencing and a hearing on the motion in arrest of judgment had been set in the same order.

The trial court sentenced defendant to a five-year term, placed him in a treatment facility, fined him $750, ordered him to pay $385.91 in restitution, and had his driving privileges revoked for six years.

Defendant appeals. He contends his first counsel was ineffective in improperly advising him as to the merits of his case and to plead guilty. Defendant also asserts his first counsel should have withdrawn immediately after falling ill instead of neglecting his case for over two months. Defendant next claims the district court should have granted his motion in arrest of judgment because his plea had not been made intelligently due to his first attorney's incompetent recitation of the merits of his case. Defendant further argues his sentencing should have been continued because his new counsel did not have notice it was to be held that day. The district court was mistaken in the belief it had provided such notice in an October order. Finally, defendant contends the court failed to consider the minimum essential factors in sentencing him.

Defendant first contends the motion in arrest of judgment should have been granted because he was not adequately represented by counsel and he was prejudiced because there was a probability his sentence would not have been so severe.

Defendant contends attorney Spence should not have told him to plead guilty merely because the blood test was found to be admissible. Defendant further advances the advice of attorney Bjorklund was that he should not have entered his guilty plea but should have proceeded to trial. He does not advance the reasons why

he would have been successful at trial. Defendant only contends had Spence attempted a plea bargain rather than just having him plead guilty, the result could have been more favorable as to his sentence.

Defendant further alleges he was prejudiced by Spence's illness and her failure to immediately withdraw from representation when she was no longer able to assist him.

The State advances there is a strong case against defendant and the minutes of testimony show witnesses are expected to testify he was involved in an accident while driving a truck and his blood-alcohol level was .234 percent.

Established principles govern our review of defendant's Sixth Amendment claim trial counsel was not effective. Our concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; *Schertz v. State*, [redacted]N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *see State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence (1) counsel failed to perform an essential

duty and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

Defendant has failed to show how, but for his attorney's alleged incompetency, the result would be different. We affirm on this issue.

Defendant next contends the trial court abused its discretion in having sentencing on the same day as the motion in arrest of judgment and the trial court's finding the parties were notified was erroneous.

The State agrees the district court was mistaken in believing the matter was set for hearing on the date of the motion in arrest of judgment but alleges defendant did not show a good reason for a continuation of the sentencing hearing. The State also contends if it were an abuse of discretion defendant cannot show prejudice.

Defendant also contends the trial court abused its discretion by failing to consider the minimal essential factors in sentencing defendant to an indeterminate term not to exceed five years and placing him in a treatment facility.

Defendant contends the trial court did not recognize his first two driving under the influence charges occurred on the same day and had been more than five years past. He says he had already begun to rehabilitate himself and was attending Alcoholics Anonymous meetings. Consequently, the likelihood he would commit another offense or would be a danger to society was substantially diminished.

Defendant also advances the court failed to consider he had abstained from drinking and driving for five years prior to this offense. He contends his sister was murdered in 1994 and these events had triggered a relapse and he had returned to consuming alcohol. Despite the tragedy with his sister, he remained gainfully employed and supported his family and he has not had alcohol since his arrest and has voluntarily attended AA meetings.

The trial court was mistaken when it found the sentencing hearing was set for the same date as the motion in arrest of judgment. At that time, no date for sentencing had been set. We vacate the sentence and remand for resentencing.

Costs on appeal are taxed one-half to the State and one-half to defendant.

AFFIRMED IN PART; SENTENCE VACATED; REMANDED FOR RESENTENCING.