IN THE COURT OF APPEALS OF IOWA 000499

FILED
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CLERK SUPREME COURT

No. 7-690 / 97-0282
Filed January 28, 1998

STATE OF IOWA,
Appellee,

vs.

BRADLEY JARED TIMM,
Appellant.

Appeal from the Iowa District Court for Fremont County, G.C. Abel and Timothy O'Grady, Judges.

Bradley Timm appeals from his conviction, following a guilty plea, for operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, and Vicki R. Danley, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

The defendant pled guilty to operating a motor vehicle while intoxicated, third offense, pursuant to a plea agreement with the State. The State agreed to dismiss three other charges. The prosecutor also stated:

> It's our understanding that his sentence would be, on his plea of guilty to OWI, Third Offense, one year in the Fremont County Jail, which is mandatory minimum, a $1000 fine, court-appointed attorney's fees, costs, and surcharge, and that in the event Mr. Timm does inpatient alcohol treatment for 30 days, he would receive credit for 30 days for his doing that treatment. Perhaps I didn't say that correct. All but 30 days of the one year would be suspended.

The court, in its questioning of the defendant stated, "Do you understand that the maximum sentence could be a sentence of up to five years in the state penitentiary for this offense, and the State is agreeing to recommend a sentence of one year? Do you understand that?" The court also informed the defendant of the trial rights he was giving up if he chose to plead guilty.

After accepting the defendant's guilty plea, the court set sentencing for a date calculated to give the defendant time to have a substance abuse evaluation and complete any treatment. The initial sentencing date was continued, in part to give the defendant time to complete substance abuse treatment.

When the court was informed at the sentencing date that the defendant had not entered or completed any substance abuse treatment program, nor even participated

in other substance abuse programs, the court sentenced the defendant to five years, plus a fine of $750, costs, and any restitution.

On appeal, the defendant asserts his trial counsel was ineffective in failing to clarify terms of the plea agreement at the time he pled guilty and in failing to move to withdraw the guilty plea at the time of sentencing.

In reviewing a claim of ineffective assistance of counsel, we make our own evaluation of the totality of the circumstances. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997); *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981). We depart from this procedure if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Mulder*, 313 N.W.2d at 890. If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Pearson*, 547 N.W.2d 236, 242 (Iowa App. 1996); *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).

As the State correctly notes, counsel's failure to inquire about the court's acceptance or rejection of the plea agreement was dependent upon counsel's understanding of its terms. Counsel's failure to move to withdraw Timm's plea was

similarly dependent on the same facts. The record does not disclose this information. We conclude there is an inadequate record for us to adjudicate Timm's claim without counsel's explanation. Timm's ineffective assistance of counsel claim is preserved for postconviction relief proceedings.

AFFIRMED.