IN THE COURT OF APPEALS OF IOWA

No. 0-459 / 09-1411
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUDITH RENAE UTTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Jones County, Douglas S. Russell, Judge.

Defendant appeals from the judgment and conviction entered following her guilty plea to supplying alcohol to a person under the legal age. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley Bender, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Phil Parsons, County Attorney, Connie S. Ricklefs, County Attorney, and Emily Stork, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J. takes no part.

SACKETT, C.J.

The defendant, Judith Renae Utter, appeals the judgment and conviction entered after she pleaded guilty to supplying alcohol to a person under the legal age, in violation of Iowa Code sections 123.47(1) and (4) (2009). She contends her attorney was ineffective by allowing her to plead guilty to the offense when the State had failed to issue a speedy indictment. We affirm.

I. BACKGROUND AND PROCEEDINGS. On April 3, 2009, a Monticello police officer was dispatched to Utter's residence to investigate a disturbance. Upon arrival, the officer observed an underage drinking party in progress. One of the attendants informed the officer that Utter had supplied the alcohol. A citation and complaint, signed and dated by the officer on April 10, 2009, alleges Utter violated Iowa Code section 123.47 by supplying alcohol to a person under the legal age. It lists a date for Utter to make an appearance on the charge and includes Utter's signature. The citation was filed on April 22, 2009. On May 6, 2009, Utter appeared in court and entered a plea of not guilty. The court set a trial date of June 10, 2009. On June 10, 2009, the court entered an order stating, "Parties appear for trial. This matter is charged as a serious misdemeanor. Trial is cancelled. Defendant was arraigned for an initial appearance on an indictable offense."

The State filed a trial information and minutes of testimony formally indicting Utter on June 12. Utter filed a written arraignment and plea of not guilty on June 26. Trial was originally set for July 27 and then rescheduled to August 24. On August 14, 2009, Utter withdrew her plea of not guilty and entered a plea

of guilty. She waived her right to file a motion in arrest of judgment and requested immediate sentence. The court accepted her plea of guilty, and entered the judgment and sentence.

Utter now appeals. She claims the State failed to abide by Rule of Criminal Procedure 2.33(2)(*a*) requiring an indictment to be found within forty-five days of a defendant's arrest. She asserts the charge should have been dismissed due to this rule violation and she would not have entered a guilty plea had she known her right to speedy indictment had been violated. Utter argues her failure to file a motion to dismiss on this ground was a result of ineffective assistance of counsel. The State claims that by pleading guilty, Utter waived the right to raise this defect because it is not intrinsic to the plea.

II. APPLICABLE LAW. We generally review challenges to a guilty plea for correction of errors at law. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006); *State v. Nosa*, 738 N.W.2d 658, 661 (Iowa Ct. App. 2007). But if a defendant claims her guilty plea was a result of ineffective assistance of counsel, our review is de novo. *State v. Allen*, 708 N.W.2d 361, 365 (Iowa 2006); *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). We favor addressing ineffective assistance of counsel claims in postconviction relief proceedings to give trial counsel an opportunity to defend themselves against the allegations. *Tate*, 710 N.W.2d at 240. We will address the claim only in rare cases where the record on direct appeal is sufficient to resolve the issue. *Id.*; *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To establish her claim, Utter must show by a preponderance of evidence that counsel (1) failed to perform an essential duty, and (2) prejudice

resulted. *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009). To satisfy the prejudice element, Utter must prove "'there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial.'" *Straw*, 709 N.W.2d at 136 (quoting *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203, 211 (1985)).

The general rule is that by pleading guilty a defendant waives all defenses and objections to the conviction which are not intrinsic to the plea. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009); *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000). However, a defendant may "challenge the validity of [her] guilty plea by proving the advice [s]he received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases." *Carroll*, 767 N.W.2d at 642.

> "Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof."

Zacek v. Brewer, 241 N.W.2d 41, 49 (Iowa 1976) (quoting *Tollett v. Henderson*, 411 U.S. 258, 266-67, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973)).

III. MERITS. We first determine whether there is any merit to Utter's claim that the State violated the speedy indictment rule because counsel does not breach an essential duty by failing to pursue a meritless issue. *See State v. Fountain*, ___ N.W.2d ____, ____ (Iowa 2010); *Carroll*, 767 N.W.2d at 645. Utter was arrested on the date of the citation, April 10, 2009. *See* Iowa Code § 805.1(4) ("The issuance of a citation in lieu of arrest shall be deemed an arrest for the purpose of the speedy indictment requirements of rule of criminal

procedure 2.33(2)(*a*).”). Utter was indicted on June 12, 2009, when the trial information was filed. *See* Iowa R. Crim. P. 2.5; *State v. Davis*, 525 N.W.2d 837, 839 (Iowa 1994) (“The term ‘indictment’ embraces a trial information for the purposes of [rule 2.33(2)(*a*)].”). The speedy indictment rule requires a person to be indicted within forty-five days of arrest unless good cause is shown or the individual waives this right. Iowa R. Crim. P. 2.33(2)(*a*). Utter was not indicted within forty-five days of her arrest.

Even if the underlying claim appears to have merit, we still do not know the circumstances of the plea and the surrounding details impacting Utter’s decision to plead guilty. We do not know the options and strategies Utter’s counsel considered and conveyed to her. The decision to plead guilty in a criminal case nearly always involves uncertainty and reliance on the advice of an attorney. *See McMann v. Richardson,* 397 U.S. 759, 769-70, 90 S. Ct. 1441, 1448, 25 L. Ed. 2d 763, 772-73 (1970); *Carroll*, 767 N.W.2d at 642. A guilty plea is not necessarily involuntary even when the decision is based on mistaken judgments and strategies of counsel. *See McMann*, 397 U.S. at 769-70, 90 S. Ct. at 1448, 25 L. Ed. 2d at 772-73; *Carroll*, 767 N.W.2d at 642. We conclude the record is inadequate to resolve Utter’s claim. We preserve the claim for postconviction relief proceedings so the facts bearing on Utter’s decision to plead guilty may be fully developed. *See Fountain*, ___ N.W.2d at ____; *Carroll*, 767 N.W.2d at 645-46 (finding record inadequate to address ineffective assistance of counsel claims on direct appeal).

AFFIRMED.