

IN THE COURT OF APPEALS OF IOWA

No. 0-460 / 09-1492
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD WARREN FANNON,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Defendant appeals his sentence for sexual abuse in the third degree.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Harold Denton, County Attorney, Jerry Vander Sanden and
Jennifer Clinton, Assistant County Attorneys, for appellant.

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

EISENHAUER, J.

Richard Fannon claims his counsel was ineffective at his sentencing hearing for not objecting to the State's breach of the plea agreement. The only issue at sentencing was whether Fannon's two sentences for sexual abuse in the third degree would be consecutive or concurrent. The State initially indicated it was recommending consecutive sentences. Defense counsel immediately asked for a conference at the bench. The State then asked to "start again," changed its position, and correctly stated the plea agreement recommendation. Next, Fannon's counsel argued for concurrent sentences.

The court then ruled:

I believe the presentence investigation report (PSI) . . . is an excellent report, and . . . you were convicted back in 1984 of . . . Sexual Abuse in the Second Degree You received a ten-year prison sentence in 1984.

Were it not for that, I would think you have a much better argument for concurrent sentences. I think [the PSI] is correct in recommending consecutive sentences, and I'm going to follow that recommendation.

The court sentenced Fannon to ten years in prison on each count and ordered the sentences to be served consecutively.

In order to prevail on his claims of ineffective assistance of counsel, Fannon must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Fannon's inability to prove either element is fatal. See *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id.* Here, the record is adequate to resolve this issue on direct appeal.

Fannon can show neither a breach nor prejudice. Defense counsel immediately brought the misstatement of the prosecutor to the court's attention, therefore fulfilling his duty. Additionally, prejudice is not established due to the court clearly stating its sentencing decision was based on the presentence report, not on any statement made by the prosecutor.

AFFIRMED.