

IN THE COURT OF APPEALS OF IOWA

No. 0-644 / 10-0314
Filed November 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CODY KINZIE DITTMAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt (guilty plea) and Monica Ackley (sentencing), Judges.

Defendant appeals following his guilty plea to theft in the second degree and burglary in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul and Rachel C. Regenold, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Holly Stott, Student Legal Intern, Ralph Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Mansfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.**I. Background Facts & Proceedings**

On December 14, 2009, Cody Dittmar entered a guilty plea to second-degree theft and third-degree burglary. These charges were filed after Dittmar allegedly broke into a store and took an automatic teller machine (ATM). During the plea proceedings, the court questioned defense counsel concerning possible defenses for Dittmar, other than a general denial. Counsel answered in the negative. The district court accepted Dittmar's guilty pleas.

At the sentencing hearing, the State requested the court impose consecutive sentences of incarceration. Dittmar requested concurrent sentences. The presentence investigation report submitted to the court recommended concurrent sentences citing Dittmar's age, eighteen, as a mitigating factor. The report also indicated Dittmar had been released from juvenile detention in April 2009, and began committing new offenses soon after. Dittmar was on pretrial supervision on other criminal charges at the time he committed this offense. The trial court sentenced Dittmar to a term of imprisonment not to exceed five years for each offense, to be served consecutively. On appeal, Dittmar challenges the validity of his guilty plea, claiming ineffective assistance of trial counsel. He also claims imposition of consecutive sentences was an abuse of the trial court's sentencing discretion.

II. Ineffective Assistance

Dittmar contends he received ineffective assistance because defense counsel failed to file a motion to suppress evidence seized following an illegal stop of his vehicle. He cites minutes of testimony stating that officers "observed

what they believed to be a suspicious vehicle parked on the frontage road . . . parked partially on the roadway” Dittmar argues defense counsel should have filed a motion to suppress, and perhaps evidence adduced at the suppression hearing would have shown the stop was illegal and evidence resulting from the stop could have been suppressed.

We review claims of ineffective assistance of counsel *de novo*. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). In a guilty plea proceeding, a defendant must show that but for counsel’s alleged error the defendant would not have pleaded guilty and would have insisted on going to trial. *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006).

Generally, a guilty plea waives all defenses and objections that are not intrinsic to the plea. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). A defendant, however, may “challenge the validity of his guilty plea by proving the advice he received in connection with the plea was not within the range of competence demanded of attorneys in criminal cases.” *Id.* at 642. A defendant may raise a claim of ineffective assistance by claiming defense counsel failed to investigate or file a meritorious motion to suppress. *Id.* at 644. On appeal, we must “determine whether counsel in a particular case breached a duty in advance of a guilty plea, and whether any such breach rendered the defendant’s plea unintelligent or involuntary.” *Id.* A defendant must show that but for counsel’s breach of duty, defendant would not have pled guilty. *Id.*

The record in the present case is completely inadequate to determine whether a motion to suppress would have been successful. See *id.* at 645 (noting counsel has no duty to pursue a meritless issue). It is also not clear what, if any, advice counsel gave to Dittmar on this subject. Furthermore, there is no evidence to show that but for the alleged breach of duty, Dittmar would have decided not to plead guilty. We conclude we are unable to address this issue at this time. The issue could possibly be raised in postconviction proceedings. See *id.* at 646 (preserving issue for possible postconviction proceedings).

III. Sentencing

Dittmar asserts the district court abused its discretion by sentencing him to consecutive, rather than concurrent, terms of imprisonment. He admits he had a prior criminal history, but points out that he was quite young. Dittmar states he had not had any felony convictions, and was eligible for a deferred judgment.

We review a sentencing decision for an abuse of discretion. *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). An abuse of discretion will be found if the court acts on grounds clearly untenable or to an extent clearly unreasonable. *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). In applying its discretion, the court should weigh and consider all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensity and chances for reform. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999).

The district court considered the appropriate factors and determined Dittmar should serve consecutive sentences. We find no abuse of discretion in

the court's decision. Although Dittmar was quite young, he had been engaging in criminal activity for quite some period of time. He was on pretrial supervision on other charges at the time of the present offense.

We affirm Dittmar's convictions and sentences.

AFFIRMED.