IN THE COURT OF APPEALS OF IOWA

No. 1-214 / 10-1348
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS RAY MACDONALD,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

Dennis Ray Macdonald appeals from the judgment and sentence entered following his guilty plea to possession of marijuana, third or subsequent offense. **AFFIRMED.**

Francis P. Hurley of Phil Watson, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Paul L. Martin, former County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

Dennis Ray Macdonald appeals from the judgment and sentence entered following his guilty plea to possession of marijuana, third or subsequent offense, in violation of Iowa Code sections 124.204(4)(m) and 124.401(5) (2009). He seeks to withdraw his guilty plea, arguing his counsel was ineffective in two respects: (1) in failing to object to object when the prosecutor failed to "comment, support and urge the worthiness" of the sentence agreed upon during plea bargaining, and (2) in failing to object or move to withdraw the guilty plea when the district court did not honor the plea agreement.

Macdonald was arrested on February 16, 2010, when a traffic stop resulted in the discovery of 4.15 grams of marijuana and drug paraphernalia in Macdonald's front pants pocket. Macdonald claims he had found the marijuana in the vehicle and planned to dispose of it. He has prior possession convictions in 1989, 2001, and 2004.

On March 3, 2010, Macdonald was charged with possession of marijuana as a third or subsequent offense. He entered a written guilty plea to the charge and in exchange, the State recommended a suspended sentence and probation. At sentencing, the prosecutor stated:

> The State is recommending the defendant be sentenced to an indeterminate term not to exceed five years; that the sentence be suspended, the defendant placed on probation for a period of three years; that the minimum fine of $750 also be suspended; and that the terms and conditions of probation be whatever is determined appropriate.

In sentencing him, the court stated,

> [Y]ou have a very significant criminal history that is heavy on the substances. And significant also in that large number of charges is your inability to successfully complete probation. For those reasons, I do not think that you're a good candidate for probation.

Instead, the court imposed the maximum sentenced of an indeterminate five year prison term, but suspended the $750 fine.

Macdonald made no objection at sentencing and did not file a motion in arrest of judgment. Failure to file a motion in arrest of judgment bars direct appeal from his conviction. *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006). Instead, we consider Macdonald's allegations the court erred under the rubric of an ineffective assistance of counsel claim. *See id.* at 133 (holding the failure to file a motion in arrest of judgment does no bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel).

We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626

N.W.2d 134, 145 (Iowa 2001). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999). The record is sufficient in this case to decide the issue on direct appeal.

Macdonald first claims counsel was ineffective in failing to file a motion in arrest of judgment because the court failed to provide him with an opportunity to withdraw his guilty plea when it did not follow the State's recommendation on sentencing. Where a plea agreement is conditioned upon the court's acceptance, the trial court must allow the defendant an opportunity to withdraw the plea if it rejects the arrangement. *State v. Barker*, 476 N.W.2d 624, 626 (Iowa Ct. App. 1991). The plea agreement at issue here was not conditioned upon the court's acceptance, and therefore the court had no duty to allow Macdonald to withdraw his guilty plea. The court told Macdonald when it took his guilty plea referring to the sentencing: "Do you know that it's not binding on the court? That means I don't have to follow the plea agreement." Macdonald replied: "Yes." We reject Macdonald's invitation to change the law to allow defendants to withdraw their guilty pleas in any case where the district court fails to honor the plea arrangement. Because we find counsel did not breach an essential duty, Macdonald's claim counsel was ineffective in failing to file a motion in arrest of judgment on this basis must fail.

We also find counsel breached no duty when he did not object to the State's failure to "comment, support and urge the worthiness" of the sentence agreed upon in the plea agreement. The State honored the plea agreement by recommending the sentence agreed upon in the plea bargain. *See State v. Bearse*, 748 N.W.2d 211, 216 (Iowa 2008) (requiring the State to fulfill its promise to make a sentencing recommendation). The State did more than inform the court of the promise it made to the defendant. *Id.* at 215-16. It followed through and made the recommendation as required. *Id.* at 216. Accordingly, counsel did not breach an essential duty in failing to object.

Because Macdonald has failed to prove counsel breached any duty, we affirm his conviction for possession of marijuana, third or subsequent offense.

AFFIRMED.