IN THE COURT OF APPEALS OF IOWA

No. 1-358 / 10-1730
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRAY-VON LEON BUTLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

A defendant contends that the sentencing court erred in denying his request for substance abuse treatment; he also asserts that he received ineffective assistance of counsel in multiple regards. **AFFIRMED.**

Benjamin D. Bergmann of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Salvner, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

Tray-Von Butler entered an *Alford*[1] plea to two class D felonies: possession of an offensive weapon and eluding a law enforcement vehicle. The court deferred judgment and placed Butler on probation for two years, with the proviso that the probation was subject to revocation for noncompliance with its terms.

Several months later, Butler stipulated to violating the terms of probation. At a disposition and sentencing hearing, Butler requested placement at a residential treatment center. The district court denied the request and revoked Butler's probation and his deferred judgment. The court sentenced Butler to a prison term not to exceed five years on the possession of an offensive weapon count and one year on the eluding count.

Less than a week later, the court stayed its order after determining the eluding sentence was based on a misapprehension that the crime was a serious misdemeanor rather than a class D felony. The court entered a superseding order increasing the eluding sentence from one year to a term not exceeding five years, requiring the sentence to be served consecutively with the possession of an offensive weapon sentence, and allowing reconsideration of the sentence no sooner than six months later.

On appeal, Butler contends (1) the sentencing court should have granted his request for substance abuse treatment rather than prison and (2) his plea

[1] When a person enters an *Alford* plea, he or she voluntarily consents to the imposition of sentence notwithstanding the fact that the person is unwilling or unable to admit to commission of the crime. *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970).

attorney was ineffective in failing to object to (a) evolving statements about when he could request reconsideration of the sentence and (b) the lengthening of his sentence.

I. Denial of Request for Substance Abuse Treatment

The district court denied Butler's request to participate in a residential treatment program on the ground that Butler violated several probation requirements including abstention from drug use. The court then stated:

> The second thing I considered is, Hey, I got a lot of people coming through here. And THC is real low on the list, marijuana, because we got people here who are hooked on meth and coke and heroin and oxycodone and hard stuff. Okay? There's only a limited number of beds. So we got to watch out on who we send down there. And a pothead is probably the least on the category of people that need to be in IRTC.
>
> Now, being a pothead is not going to get you anywhere in this world either. I've had a lot of people show up here, and by the time they're in their late thirties, early forties, you know what? They don't even see me. Their eyes are glassed over from years of pot. So if you want to keep doing that, that's up to you.

Butler asserts that the district court impermissibly rejected the treatment option simply because his drug of choice was marijuana rather than a "hard" drug.

We will not draw an inference of improper sentencing factors which are not apparent in the record. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). The impermissible factor cited by Butler is not apparent in the record. The district court denied the treatment option in large part because of Butler's poor performance on probation, as well as other permissible factors. The court did not state treatment was unavailable to Butler as a marijuana user and, indeed, left open the possibility that, upon reconsideration, treatment would be ordered. We discern no error in the court's rejection of the treatment option at this juncture.

See State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000) (reviewing sentence on error and affording strong presumption in favor of sentence).

II. Ineffective-Assistance-of-Counsel Claims

Butler next claims:

> Prior counsel failed to object to the district court continuing to extend the period which Mr. Butler would have to spend with the Iowa Department of Corrections before the district court would consider a motion to reconsider sentence.
>
> Prior counsel also failed to object to the resentencing, at the final hearing held in the district court, when the district court changed Mr. Butler['s] sentence from, in essence, a six year sentence, to, in essence, a ten year sentence.

Iowa Code section 902.4 (2009) addresses and resolves both issues. That provision states in pertinent part:

> For a period of one year from the date when a person convicted of a felony, other than a class "A" felony or a felony for which a minimum sentence of confinement is imposed, begins to serve a sentence of confinement, the court, on its own motion or on the recommendation of the director of the Iowa department of corrections, may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law.

Iowa Code § 902.4. Section 902.4 authorizes the district court to provide for reconsideration of the sentence within any period up to one year from the date a convicted person begins to serve his or her sentence. Accordingly, Butler's trial attorney did not breach an essential duty in failing to object to the district court's ultimate decision allowing reconsideration of the sentence no sooner than six months from the date his sentence commenced. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (requiring proof of breach and prejudice).

Section 902.4 also has been read to allow an upward revision of a sentence on reconsideration. *See Coleman v. Iowa Dist. Ct.*, 446 N.W.2d 806, 807 (Iowa 1989) ("Nor do we believe limitations on increased punishment on resentencing apply to situations where a statute provides that an initial sentence is conditional and subject to review by the sentencing judge within a specified period of time."). For that reason, Butler's trial attorney did not breach an essential duty in failing to object to the district court's reconsideration of his eluding sentence.

AFFIRMED.