

IN THE COURT OF APPEALS OF IOWA

No. 1-429 / 10-1736
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY TERRELL CLAYTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith (Guilty Plea) and Mark D. Cleve (Sentencing), Judges.

A defendant appeals from his conviction of second-degree robbery.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael J. Walton, County Attorney, and James Cosby, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

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

VOGEL, P.J.

Johnny Clayton was charged by trial information, as amended, with first-degree robbery, assault while participating in a felony, and first-degree theft. The trial information alleged that Clayton was an habitual offender, having been convicted twice before of felony burglary in Wisconsin. Attached to the trial information were the court records establishing Clayton's criminal history, including the felony convictions. See Iowa Code § 902.8 (2009) (providing that an habitual offender is any person convicted of a class C or D felony, who has twice before been convicted of any felony in any state or federal jurisdiction).

Pursuant to a plea agreement, Clayton pleaded guilty to second-degree robbery in violation of Iowa Code section 711.3 and assault while participating in a felony in violation of Iowa Code section 708.3, both as an habitual offender pursuant to Iowa Code sections 902.8 and 902.9.¹ The State dismissed the theft

¹ During the plea hearing, the following record was made:

The Court: [For the second-degree robbery charge] . . . you're pleading guilty as a habitual offender, which means that the penalty to be imposed is imprisonment for not to exceed 15 years. . . . Do you understand the penalty which may be imposed as an habitual offender in this case?

The Defendant: Yes.

. . . .

The Court: [For the assault while participating in a felony charge] Again, you're pleading guilty as an habitual offender, and the penalty for habitual offender is incarceration not to exceed 15 years. . . .

The Defendant: Yes, I understand, sir.

The Court: Did you understand the penalty which may be imposed upon your plea of guilty to this offense?

The Defendant: Not all of it, but—

The Court: What part don't you understand?

The Defendant: I'm not understanding how this time is being ran. . . . What I'm asking is—what I'm basically saying is—I mean, is it 15 years or is it 10 years?

The Court: It's 15 years because you're pleading—normally it's 10 years, but since you're pleading guilty as habitual offender, which means you have two prior felonies, the penalty is enhanced or increased

charge and agreed to recommend two fifteen year terms of imprisonment to be served concurrently. The district court accepted Clayton's plea and informed Clayton of his right to file a motion in arrest of judgment pursuant to Iowa Rule of Criminal Procedure 2.24(3)(a).

A sentencing hearing was held, during which the presentence investigation report (PSI) was entered into the record. The PSI set forth Clayton's criminal history, including the prior felony convictions. At the hearing, both the State and Clayton agreed that the report was accurate. The court sentenced Clayton to two terms of imprisonment not to exceed fifteen years, to be served concurrently.

Clayton appeals and raises an ineffective-assistance-of-counsel claim. He argues that because a record of his prior convictions was not made during the plea proceeding as required by Iowa Rule of Criminal Procedure 2.19(9), his trial counsel was ineffective for failing to file a motion "for judgment of acquittal."²

Our review is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Although an ineffective-assistance-of-counsel claim need not be raised on direct appeal, the defendant may do so if he had reasonable grounds to believe the record is adequate to address his claim. *Id.* We may either decide the record is adequate to reach the claim, or preserve the claim for postconviction relief

because of your prior felonies to imprisonment not to exceed 15 years, not 10. Do you understand?

The Defendant: And I would have to serve 70 percent of 15 years?

The Court: Yes. Is there anything else you don't understand that I've read?

The Defendant: No.

² While appellate counsel used the term "motion for judgment of acquittal," the proper procedure to challenge a guilty plea would have been to move "in arrest of judgment." Iowa R. Crim. P. 2.8(2)(d).

proceedings. *Id.* “Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal.” *Id.* To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. *Id.*

We find the record is inadequate to reach Clayton’s claim. Clayton does not argue that he did not commit the prior felony crimes or that the habitual offender statute does not apply. Rather he argues there was a procedural defect in the proceedings, and therefore his counsel was ineffective in failing to move for a “judgment of acquittal.” *Compare State v. Gordon*, 732 N.W.2d 41, 44 (Iowa 2007) (explaining that if a habitual offender status does not apply, then an enhanced sentence based upon the habitual-offender statute is not permitted and is illegal), *with State v. Johnson*, 770 N.W.2d 814 (Iowa 2009) (finding that the issue was preserved for direct appeal and there was procedural error in the habitual offender proceedings, and reversing and remanding for further proceedings). Under Iowa Rule of Criminal Procedure 2.19(9), a trial court is to provide a defendant charged with an habitual offender enhancement an opportunity to admit or deny prior convictions and indicate whether he was represented by counsel on those convictions. A trial court’s abuse of discretion in not complying with rule 2.19(9) does not warrant relief unless it was prejudicial. *State v. Kukowski*, 704 N.W.2d 687, 693–94 (Iowa 2005).

Clayton makes no argument as to how a defect in procedure and his counsel’s alleged failure to move for a “judgment of acquittal” resulted in prejudice. See *Straw*, 709 N.W.2d at 137 (“Under the ‘reasonable probability’

test, the defendant, who has already admitted to committing the crime, has the burden to prove he or she would not have pled guilty if the judge had personally addressed the maximum punishment for his or her crimes.”). Because Clayton’s claim is general and conclusory in nature, we must preserve it for possible postconviction relief proceedings. See *State v. Johnson*, 784 N.W.2d 192, 197 (Iowa 2009) (explaining that regardless of our view of the viability of the claim, we must preserve it for postconviction relief proceedings). We affirm Clayton’s conviction and preserve his ineffective-assistance-of-counsel claim.³

AFFIRMED.

³ Clayton filed a pro se brief, which was stricken by our supreme court as untimely. Following this, he filed a "Petition for Interlocutory Review on Appeal," in which he attempts to raise additional arguments on appeal. We deny his petition.