IN THE COURT OF APPEALS OF IOWA

No. 2-070 / 11-1367
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAO ZHANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn, District Associate Judge.

The defendant appeals following his written guilty plea. **AFFIRMED.**

John G. Martens of Martens Law Office, Ames, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Stephen Holmes, County Attorney, and Jordan Roling, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

The defendant, Chao Zhang, was charged with driving while barred in February 2011.

On June 14, 2011, Zhang filed a written plea of guilty to the charge, an aggravated misdemeanor. The written plea waived the defendant's rights under Iowa Rule of Criminal Procedure 2.8(2)(b); stated in part, "I understand that a criminal conviction, deferred judgment or deferred sentence may affect my status under federal immigration laws"; and stated Zhang had discussed with his attorney that to contest the adequacy of the guilty plea, a motion in arrest of judgment was necessary. No motion in arrest of judgment was filed.

At the August 24, 2011 sentencing hearing, the court noted Zhang had been sentenced for two other convictions of driving while barred on August 18, 2010, and in each case the sentence was two-years suspended plus a fine.

The State submitted evidence of Zhang's driving record, which included—in addition to the two other driving while barred convictions—numerous driving while suspended convictions.

Zhang testified he was a citizen of China and was attending Iowa State University at the time of this offense. Since the time of the current offense, Zhang had enrolled in a college in California; had gotten rid of his car; and had returned to Iowa for sentencing. He stated that on the day in question, he had driven to get medication for his girlfriend.

The State requested Zhang's probation on the two earlier driving-while-barred convictions be revoked due to the instant offense, and recommended a

sentence of 180 days in jail. Zhang's counsel argued Zhang's classes were to begin in California the following week, and a 180-day sentence was too severe.

The court revoked Zhang's probation and sentenced Zhang to ninety days in jail on each of the earlier convictions. The court also imposed a sentence on the current charge of ninety days plus a fine. All sentences were to run concurrently.

Zhang now appeals, arguing (1) the court erred in accepting his written plea, which did not include a statement "that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences" as required by Iowa Rule of Criminal Procedure 2.8(2)(*b*)(5); and (2) trial counsel was ineffective in failing to advise the defendant of potential deportation.

The first claim was waived because Zhang did not file a motion in arrest of judgment. *See* Iowa R. Crim. P. 2.24(3)(*a*) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."). However, Zhang contends trial counsel was ineffective in failing to file a motion in arrest of judgment addressing the issues of deportation. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (explaining that a guilty plea may be challenged where the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel).

> Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules. . . . If a claim of ineffective assistance of counsel is raised on direct appeal from the criminal proceedings, the court may address it if the record is adequate to decide the claim. If the record is not adequate, the defendant may raise the claim in a postconviction action.

State v. Fountain, 786 N.W.2d 260, 263 (Iowa 2010) (internal citations omitted).

In order to prove an ineffectiveness claim, the defendant must prove: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). To show prejudice, the defendant must show that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Straw*, 709 N.W.2d at 136.

The record before us is not adequate to address Zhang's ineffectiveness claims. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) (noting Iowa Code § 814.7(3) gives the appellate court only two choices when an ineffective-assistance claim is raised on direct appeal: (1) "decide the record is adequate to decide the claim," or (2) "choose to preserve the claim for determination under chapter 822"). There is nothing in the record as to whether defense counsel advised Zhang of potential immigration consequences. There is no evidence that Zhang's conviction and sentence will adversely impact his immigration status. Nor does Zhang present evidence that he would not have pleaded guilty had counsel advised him otherwise. Consequently, we preserve his ineffective-assistance-of-counsel claims for possible postconviction relief.

AFFIRMED.