

IN THE COURT OF APPEALS OF IOWA

No. 2-932 / 12-0173
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AURR B. DENG,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price,
District Associate Judge.

Defendant appeals her convictions arguing her trial counsel was
ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, John P. Sarcone, County Attorney, and Olu Salami, Assistant County
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

Aurr Deng appeals from her convictions and sentences for assault causing bodily injury and third-degree criminal mischief. Deng argues her attorney rendered ineffective assistance of counsel by failing to object to the State's breach of the plea agreement. We affirm.

I. Background Facts and Proceedings.

On July 7, 2011, Deng entered a joint written plea of guilty in two cases—assault causing bodily injury (SR245849) and third-degree criminal mischief (AG245850). The district court granted deferred judgments, assessed civil penalties, and placed Deng on probation for two years.

On October 12, 2011, a probation violation was reported—Deng was arrested for operating while intoxicated, first offense, on October 10. A November 17, 2011 hearing was continued, and the court ordered Deng to submit to drug testing the next morning. A second probation violation was reported on November 18 when Deng's breathalyzer test showed a blood alcohol concentration of .070.

At a December 13 hearing, the prosecutor asked the court to revoke Deng's deferred judgments and impose prison sentences. No resolution occurred because the hearing was continued in order for an Arabic interpreter to be present to assist Deng.

At a December 27 hearing, defense counsel stated Deng agreed to stipulate to the reports of violation and, in return, the State agreed to join Deng's recommendation to continue the deferred judgments or, alternatively, if the deferred judgments were revoked, a ninety-day concurrent jail sentence with

credit for time served. Deng, through an interpreter, stipulated she violated the terms of her probation by using alcohol in October and November 2011, and the court accepted her stipulation. The prosecutor informed the court:

[T]he State had agreed with counsel's recommendation that [Deng] basically receive contempt time. She's been in since November 17, 2011, and . . . should remain on probation That was the agreement that the defense and I had

I know I'm bound by the agreement we entered into, but I do want to note that, for what it's worth, my only concern now is she may either have to do another evaluation and at least advise whoever is doing the evaluation of what the true issues are so they can afford her the necessary help needed to combat this issue.

. . . .
While the common theme at least in those two charges is alcohol, and so when you're telling your evaluator or whoever is doing the substance abuse evaluation that you don't have an issue, I am concerned about that aspect.

I want to maintain, so the record is clear, I am bound by the agreement I entered into with counsel, and I'm sticking by that agreement. In addition to that, though, any substance abuse evaluation has to be properly addressed with the necessary information given to whoever does the evaluation so they can properly determine if there [is] going to be additional treatment, for what that [is] worth.

Defense counsel argued Deng has no criminal history and she is planning to go to DMACC in the fall. Counsel volunteered Deng is willing to be put on a SCRAM bracelet at the court's discretion to monitor her for alcohol, or ViCAP.

Further:

She hasn't been a repeated nuisance to society through this [alcohol] problem. It seems to be something that's developed since she's picked up . . . this assault and criminal mischief charge.

And I'm not certain what the underlying issues are, but she needs to discuss that with whoever does her substance abuse evaluation, should the Court afford her that opportunity and its mercy to continue her on probation.

The court ruled:

Ms. Deng, I struggle greatly with what to do with you because my initial reaction is to simply send you to prison for two years. On November 17 at about 4 p.m. you left this courtroom with—after I had discussed with you that you cannot use alcohol while you're on probation in any amount and ordered you to drop a UA at your probation officer's office the next morning. On the morning of November 18, you tested positive for alcohol at your probation office. Clearly you can't follow the basic rules.

The court revoked Deng's deferred judgments and sentenced her to a one-year term of incarceration on the assault charge, suspended all but ninety days of the sentence, gave her credit for time served, and fined her \$315. On the criminal mischief charge, the court imposed and suspended a two-year sentence, fined her \$625, gave her credit for time served, and placed her on probation for two years. The court ordered "a new substance abuse evaluation while in jail And I would suggest that you get honest with them and follow through with any recommended treatment." Further:

I'm also ordering you to be on a SCRAM bracelet for a minimum of 120 days following your release from jail. That will be at your expense.

Ma'am, if you continue to use alcohol in any manner or any quantity, you're simply on the road to prison. Be honest with the evaluators, get the help you need, and get your life turned around.

Deng now appeals.

II. Scope and Standards of Review.

"Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution." *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). We review de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

To prevail, Deng must prove by a preponderance of the evidence her trial attorney failed to perform an essential duty and this failure resulted in prejudice.

State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006). Courts always have the option to decide the claim on the prejudice prong without deciding whether the attorney performed deficiently. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). Generally, ineffective-assistance claims are resolved by postconviction proceedings to enable a complete record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Sometimes, the appellate record is adequate to resolve the issue on direct appeal. *Id.* We believe the record is adequate to resolve the issue.

III. Merits.

Deng argues her counsel was ineffective in failing to object to the prosecutor's breach of the plea agreement. She asserts the prosecutor went beyond the plea agreement by recommending another alcohol evaluation. Deng asserts she was prejudiced because if counsel had objected, she would have had the opportunity to withdraw her stipulation to the violations of the terms of her deferred judgments or to schedule a new sentencing hearing.

We conclude Deng cannot establish prejudice. Deng must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Both probation violations involved alcohol with one violation resulting from court-ordered testing. Defense counsel suggested evaluation and monitoring in an effort to avoid a prison sentence. There is no reasonable probability the court would have failed to order a substance abuse evaluation in these circumstances, absent the State's suggestion.

AFFIRMED.