

**IN THE COURT OF APPEALS OF IOWA**

No. 2-939 / 12-0566  
Filed April 24, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KIKO DEMONT SIMMONS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,  
Judge.

Kiko Demont Simmons appeals from his guilty plea, judgment, and sentence for failure to comply with the sex offender registry and delivery of a controlled substance as a second or subsequent offender. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

**MULLINS, J.**

In this combined appeal, Kiko Demont Simmons challenges his guilty plea, judgment, and sentence in two separate cases—failure to comply with the sex offender registry and delivery of a controlled substance as a second or subsequent offender. Simmons contends counsel rendered ineffective assistance in failing to object to a defect in the plea colloquy and in failing to file a motion in arrest of judgment to ensure his guilty pleas were voluntary and intelligent. Simmons further contends his 180-year sentence constitutes cruel and unusual punishment. We affirm in part, vacate in part, and remand for resentencing with the companion case of *State v. Simmons*, No. 12-0567 (Iowa Ct. App. Apr. 24, 2013).

**I. BACKGROUND AND PROCEEDINGS.**

In July 2011, the State charged Simmons with failure to comply with the sex offender registry. Three months later, in October 2011, the State charged Simmons with delivery of a controlled substance and failure to possess a drug tax stamp. With regard to the delivery of a controlled substance charge, the State alleged Simmons was a second or subsequent offender and a habitual offender.

In December 2011, Simmons submitted a written guilty plea to failure to comply with the sex offender registry. Simmons acknowledged, “I was of sound mind when I committed the crime; I am now of sound mind and not under the influence of any drug or alcohol.” Simmons asserted that “[b]etween 5/2/11 and

6/2/11 I resided in Polk County, IA. I was required to register as a sex offender and did not register my correct address with the sheriff.”

In February 2012, Simmons reached a plea agreement with the State on the October 2011 drug charges. Pursuant to the agreement Simmons pleaded guilty to delivery of a controlled substance as a second or subsequent offender. In exchange the State agreed to dismiss both the habitual offender enhancement and the drug tax stamp violation. Simmons then pleaded guilty in open court. During the plea colloquy the court informed Simmons of his right to go to trial, rights pursuant to trial, and the fact that if he pleaded guilty he would be giving up those rights. The court informed Simmons that he faced up to thirty years in prison and over \$150,000 in fines. The court also informed Simmons that the sentencing judge may impose a thirty-year sentence consecutive to any other sentence. To establish a factual basis for delivery of a controlled substance, Simmons admitted he “sold 7 grams of crack base cocaine to a confidential informant” in October 2011. He then admitted he had a prior controlled substance violation.

In the meantime, in a separate companion case on appeal, No. 12-0567, trial was held in January 2012 in which the State had separately charged Simmons with numerous drug-related offenses. The jury convicted Simmons on several counts. In March 2012, the district court held a combined sentencing hearing on that case and the two cases at issue in the present appeal to arrive at Simmons’s 180-year sentence. The district court sentenced Simmons to 150 years in prison for his convictions based on the jury verdict. See *State v.*

*Simmons*, No. 12-0567 (Iowa Ct. App. Apr. 24, 2013). The court sentenced Simmons to thirty years in prison for delivery of a controlled substance as a second or subsequent offender on the October 2011 drug charges. The court then sentenced Simmons to two years in prison for failure to comply with the sex offender registry on the July 2011 charges. The court ordered Simmons to serve the 150-year sentence consecutive to the thirty-year sentence, but concurrent with the two-year sentence for a total of 180 years in prison. Simmons filed a timely notice of appeal.

## **II. SCOPE AND STANDARD OF REVIEW**

Generally, we review a challenge to a guilty plea for correction of errors at law. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). But when the defendant raises the challenge in an ineffective-assistance-of-counsel context, our review is de novo. *Id.* If a defendant raises an ineffective-assistance-of-counsel claim on direct appeal, “we may decide the record is adequate to decide the claim or may choose to preserve the claim for postconviction proceedings.” *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); see Iowa Code § 814.7(3) (2011). Rarely “will the trial record alone be sufficient to resolve a claim on direct appeal.” *Straw*, 709 N.W.2d at 133. We find the record sufficient to resolve Simmons’s ineffective-assistance-of-counsel claim.

A defendant may raise a constitutional challenge to a sentence for the first time on appeal. See *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). We review constitutional challenges de novo. *Id.*

### III. ANALYSIS

#### A. Ineffective Assistance of Counsel

Simmons contends he was denied effective assistance of counsel when his counsel did not object to alleged defects in the plea colloquy and did not move in arrest of judgment prior to sentencing. He raises an ineffective-assistance-of-counsel claim to his guilty plea on the October 2011 drug charges only. He does not contend counsel was ineffective in advising him to file a written guilty plea to the charge of failing to comply with the sex offender registry.

To establish a claim of ineffective assistance of counsel, the defendant must show by a preponderance of the evidence “(1) counsel failed to perform an essential duty; and (2) prejudice resulted.” *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In the context of a guilty plea, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

First, we review the record to determine whether counsel failed to perform an essential duty by failing to object to the adequacy of the plea colloquy or by failing to file a motion in arrest of judgment. See *Maxwell*, 743 N.W.2d at 195. Simmons argues the district court erred when it did not question him about him about whether or not he was under the influence of alcohol or a controlled substance that was “interfering with or impairing his mental faculties.” Simmons contends there was “reason to be concerned” about his competence and “reason to believe” his decision to plead guilty was not intelligently made because he was

pleading guilty to a drug offense. Alternatively, if counsel did not know about the extent of his drug use, Simmons contends counsel erred in failing to move in arrest of judgment after learning about daily marijuana and cocaine use reported in the presentence investigation report.

Simmons's argument implicates the adequacy of a plea colloquy and his competence at an essential stage of a criminal proceeding. We review plea colloquies for substantial compliance with Iowa Rule of Criminal Procedure 2.8. *State v. Loye*, 670 N.W.2d 141, 150 (Iowa 2003). Rule 2.8 does not specifically require the judge to inquire about whether the defendant is under the influence of drugs or alcohol, but requires that the plea be made voluntarily and intelligently. See Iowa R. Crim. P. 2.8. When a defendant's competency becomes an issue, Iowa Code section 812.3 governs the applicable procedure. Section 812.3 provides, in pertinent part:

If at any stage of a criminal proceeding the defendant or the defendant's attorney, upon application to the court, alleges specific facts showing that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court shall suspend further proceedings and determine if probable cause exists to sustain the allegations. The applicant has the burden of establishing probable cause.

The State argues there was no reason to believe Simmons was under the influence of drugs or alcohol and no reason to believe Simmons was suffering from a mental disorder. Although Simmons reported daily marijuana and cocaine use in the presentence investigation, he was arrested in October 2011 and was incarcerated throughout the remainder of the proceedings. In Simmons's December 2011 written guilty plea, he asserted "I was of sound mind when I

committed the crime; I am now of sound mind and not under the influence of any drug or alcohol.” Simmons’s daily marijuana and cocaine use ostensibly ceased upon his incarceration in October 2011, and he sets forth no facts to suggest otherwise. Further, in January 2012 Simmons was a defendant in a jury trial. At no time before, during, or after that trial did Simmons challenge his competency to stand trial. Given Simmons’s substantial length of incarceration prior to the plea colloquy, his own assertions of not being under the influence of any drug or alcohol in December 2011, and his participation in his January 2012 trial, we find no reason to believe Simmons was under the influence of drugs or alcohol or otherwise lacking competence during the February 2012 plea colloquy. Although a simple inquiry during the plea colloquy about whether Simmons was of sound mind or under the influence of any drugs or alcohol may have insulated the district court from appeal on this issue, under the facts of this case we find the district court’s plea colloquy adequate and find no deficiency in counsel’s performance.

Second, even if we had found counsel failed to perform an essential duty—which we do not—Simmons carries the burden of establishing that counsel’s deficient performance prejudiced his case. See *Maxwell*, 743 N.W.2d at 195. In other words, Simmons must show there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. See *Hill*, 474 U.S. at 59.

Simmons asserts counsel’s failure to object to the alleged plea deficiencies or failure to move in arrest of judgment prejudiced him because

“there is no assurance that his guilty plea meets constitutional muster” and “no assurance that plea was intelligently made.” In exchange for his guilty plea, Simmons negotiated for the State to dismiss the both the habitual offender enhancement and a felony drug tax stamp violation punishable by up to fifteen years in prison. Simmons does not contend that, but for counsel’s alleged errors, he would have pleaded not guilty, forgone the plea agreement, and insisted on going to trial. See *Hill*, 474 U.S. at 59. Thus, Simmons has not carried his burden to establish the prejudice necessary to prevail on an ineffective-assistance-of-counsel claim. See *id.*

#### **B. Cruel and Unusual Punishment**

Simmons contends his 180-year sentence constitutes cruel and unusual punishment. The district court imposed the sentence in this case to run consecutively with the sentence in the case of *State v. Simmons*, No. 12-0567 (Iowa Ct. App. Apr. 24, 2013). In that case, we remanded for re-sentencing based on grounds independent of the issues raised by Simmons in this appeal. Because the sentencing scheme underlying both appeals was inextricably entwined, we must remand this case for re-sentencing as well. Accordingly, we need not reach the claim of cruel and unusual punishment.

#### **IV. CONCLUSION**

We find the record adequate to address Simmons’s ineffective-assistance-of-counsel claim. We find Simmons has not carried his burden to establish that counsel failed to perform an essential duty and that he suffered prejudice as a result. We affirm acceptance of the guilty pleas, vacate the district court’s



sentence, and remand for resentencing with *State v. Simmons*, No. 12-0567 (Iowa Ct. App. Apr. 24, 2013).

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**