

IN THE COURT OF APPEALS OF IOWA

No. 2-965 / 11-2058
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN JOSHUA ZWER,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily,
District Associate Judge.

Defendant appeals his convictions on two counts of indecent exposure.

AFFIRMED.

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Lisa Holl, County Attorney, and Patrick McElyea, Assistant County
Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Ryan Zwer was charged with two counts of indecent exposure, in violation of Iowa Code section 709.9 (2011), a serious misdemeanor. The State alleged Zwer had exposed his genitals by masturbating while standing outside the bedroom window of a teenage girl. After a bench trial, Zwer was convicted of both counts. We affirm, concluding that Zwer's only issue on appeal, ineffective assistance of counsel, should be preserved for postconviction relief proceedings.

Zwer waived his right to a jury trial as part of an agreement concerning sentencing. The court found Zwer guilty of two counts of indecent exposure. Zwer was sentenced to 130 days in jail on each count, and given credit on each for 130 days previously served. For each conviction Zwer was given a ten-year special sentence under section 903B.2, to be served concurrently. He was ordered to pay a fine of \$315 on each count, a thirty-five percent surcharge, and court costs. Zwer was ordered to register as a sex offender.

Zwer now appeals, claiming he received ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).

In general, claims of ineffective assistance of counsel are "reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). If we

determine the record is adequate, we may resolve a claim of ineffective assistance of counsel on direct appeal. *State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012). “Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal.” *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Zwer contends he received ineffective assistance because his defense counsel failed to insure that he made a knowing and voluntary waiver of his right to a jury trial. He claims he was not adequately informed prior to waiving his right to a jury trial that he would be required to pay fines and would have to register as a sex offender. Zwer also contends the State offered a reward, a better sentencing recommendation if convicted, if he would waive his right to a jury trial.

The record shows that prior to the bench trial defense counsel informed the court that the agreement was that Zwer would be sentenced to time served and one ten-year special sentence. The court asked Zwer, “[o]ther than that agreement, has there been any other promises or threats to you to get you to waive your right to a jury trial,” and he replied in the negative. No mention was made at that time of the fines or the requirement that Zwer register as a sex offender.

On appeal, the State surmises that defense counsel might have discussed this matter with Zwer prior to the time he waived his right to a jury trial. There is no evidence in the record, however, to show defense counsel’s discussions with Zwer.

Our supreme court has recited that the in-court colloquy to determine if the defendant had voluntarily waived his right to a jury trial should involve informing the defendant of five subjects:

1. Twelve members of the community compose a jury;
2. The defendant may take part in jury selection;
3. Jury verdicts must be unanimous;
4. The court alone decides guilt or innocence if the defendant waives a jury trial; and
5. Neither the court nor the prosecution will reward the defendant for waiving a jury trial.

State v. Liddell, 672 N.W.2d 805, 813-14 (Iowa 2003). However, these are not “black-letter rules” “nor a checklist,” and the “ultimate inquiry remains the same: whether the defendant’s waiver is knowing, voluntary, and intelligent.” *Id.* at 814.

Here, Zwer claims the prosecutor offered a reward for his waiver of his right to a jury trial. We note that at least one court has found that counsel is not ineffective for participating and advising in, including negotiating, a trade-off from a prosecutor for a waiver of a jury trial. *United States v. Parrish*, 150 F.3d 326, 327-328 (3rd Cir. 1998) (defense counsel was not ineffective for obtaining the prosecutor’s pledge to not seek the death penalty in lieu of a waiver of jury trial). Accordingly, where any such negotiations are fully identified on the record the court may still find that the defendant’s waiver is knowing, voluntary, and intelligent. We have reviewed the court’s colloquy with Zwer, and on this record alone, we cannot say that Zwer did not knowingly, voluntarily, and intelligently waive his right to a jury trial.

However, because Zwer also claims he was not adequately informed prior to waiving his right to a jury trial that he would be required to pay fines and would

have to register as a sex offender, and the record is lacking in this regard, we conclude the issue should be preserved for postconviction relief proceedings to allow full development of the facts surrounding counsel's conduct. See *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). In the event the court concludes Zwer's waiver was not knowing, voluntary, and intelligent after considering all of the circumstances, prejudice is not presumed, but rather Zwer must also prove the second prong of the *Strickland* test before being granted a new trial. See *State v. Keller*, 760 N.W.2d 451, 453 (Iowa 2009) (explaining the standard as but for counsel's failure to ensure a voluntary and knowing waiver, defendant would have insisted on the right to a jury trial).

We affirm Zwer's convictions for indecent exposure.

AFFIRMED.