

IN THE COURT OF APPEALS OF IOWA

No. 3-043 / 11-0493
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH MICHAEL PHELPS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,
Judge.

Keith Phelps appeals from his conviction of operating while intoxicated,
first offense, claiming trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Ralph Potter, County Attorney, and Michael Whalen, Assistant County
Attorney, for appellee.

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

POTTERFIELD, J.

Keith Phelps appeals from his conviction of operating while intoxicated, first offense, claiming trial counsel was ineffective in “failing to vigorously assert defendant’s constitutional right to a speedy trial.” Appellate counsel asserts trial counsel waived the defendant’s speedy-trial rights and concedes that *State v. LeFlore*, 308 N.W.2d 39, 41 (Iowa 1981), allows for counsel to waive a defendant’s statutory ninety-day speedy-trial rights under Iowa Rule of Criminal Procedure 2.33(2)(b). However, he argues that the defendant’s constitutional right to a speedy trial is personal and cannot be waived by counsel, citing case law from California and Guam.

The record before us indicates that Phelps appeared and initially asserted his right to a speedy trial on September 25, 2009. However, in an order dated November 12, there is a notation that “def’t. waives speedy trial.” The record does not disclose whether Phelps personally entered into that waiver. The trial was continued several times. The record does not disclose any objection to the continuances by either the State or Phelps. The State asserts that the defendant “seems not to have attended” several final pretrial conferences; however, the record before us consists of form orders, which indicate nothing of the presence or absence of the defendant. Trial was held within the one-year statutory limit.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010). Generally, we preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings to permit the development of a more complete

record. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). If an ineffective-assistance claim is raised on direct appeal from the criminal proceedings, the court may address it if the record is adequate to decide the claim. *Fountain*, 786 N.W.2d at 263.

We cannot say this record is adequate to decide Phelps's claim. On this record we are unable to determine if the defendant was present for the hearing on the date his speedy-trial rights were waived. If the defendant was present and waived his rights, his ineffectiveness claim necessarily fails. Moreover, if counsel waived his right, other factors not apparent in this record are relevant to the issue of whether the defendant's constitutional speedy trial rights were violated. See *Barker v. Wingo*, 407 U.S. 514, 528-33 (1972) (adopting a balancing test and enunciating four relevant factors). If there was no violation of the defendant's constitutional speedy-trial rights, the ineffectiveness claim fails. We therefore affirm the conviction and preserve the claim of ineffective assistance of counsel for possible postconviction relief proceedings.

AFFIRMED.