

**IN THE COURT OF APPEALS OF IOWA**

No. 3-115 / 12-1064  
Filed April 10, 2013

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

**vs.**

**CARLOS OLIVAS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Thomas L. Koehler (guilty plea) and Marsha A. Bergan (sentencing), Judges.

A defendant appeals his conviction following his plea of guilty alleging ineffective assistance of counsel. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Jerry Vander Sanden, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**MULLINS, J.**

Carlos Olivas appeals his conviction following a guilty plea to one count of burglary in the third degree and one count of theft in the first degree. He asserts his attorney provided ineffective assistance of counsel when his attorney failed to inform him of the immigration consequences of his guilty plea and when his attorney did not object or file a motion in arrest of judgment based on the court's failure to advise him of the immigration consequences of his guilty plea, as required by Iowa Rule of Criminal Procedure 2.8(2)(b)(3). For the reasons stated below, we affirm Olivas's conviction and sentence but preserve his ineffective-assistance claim for possible postconviction relief proceedings.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

According to the Minutes of Testimony attached to the trial information, Olivas contacted law enforcement authorities seeking to confess to a burglary and theft he had committed over three months prior. Olivas admitted to the officers that he broke into a vacant residence looking for metal and cans, but he ended up finding and taking between \$29,000 and \$30,000 in cash and coins. Olivas was transported to the police station where he provided a videotaped interview detailing his crime.

He decided to plead guilty to the offenses, and the State, in return for the guilty plea, would recommend the sentences be served concurrently. During the plea colloquy, the court did not advise Olivas on the record that his conviction, deferred judgment, or deferred sentence may have an effect on his status under the immigration laws, as required by Iowa Rule of Criminal Procedure

2.8(2)(b)(3). Olivas was represented by counsel during the plea colloquy, but approximately a month later, he requested to proceed pro se. Counsel was allowed to withdraw, and stand-by counsel was appointed for the sentencing.

The court at sentencing extensively questioned Olivas to make sure he wanted to proceed without counsel and advised Olivas that the hearing could be continued to allow him time to file a motion in arrest of judgment if he so wished. Olivas made clear to the court he did not want counsel, did not want to file a motion in arrest of judgment, and wanted to proceed with sentencing.

The Court: . . . Judge Koehler told you that if you wanted to challenge those guilty pleas you had to do it by filing a Motion in Arrest of Judgment. Do you remember him saying that?

The Defendant: Yes, he said within ten days.

The Court: Okay. That motion can be filed within 45 days of the date that you pled guilty but it has to be filed not later than 5 days before your sentencing date, so again those are things about your case that you have told me.

The Defendant: Yeah, just.

The Court: Information that makes me know that you don't know that law.

The Defendant: You Honor, I decided not to file it, I decided not—I had plenty of time, I decided not to file that. I just asked to proceed.

The Court: You decided not to file?

The Defendant: I knew about it.

The Court: The Motion in Arrest of Judgment?

The Defendant: Yes, ma'am.

The Court: Okay. Knowing that you could go to prison for 15 years, you still want to proceed with the sentencing today?

The Defendant: Correct.

The Court: If you wanted to delay the sentencing so that you had time to file a Motion in Arrest of Judgment, I would let you do that. We would schedule it at a later time so that—I would extend the time for good cause for you to file a Motion in Arrest of Judgment if you want to do that. Do you want to have some time to talk with your stand-by counsel before you make a decision?

The Defendant: Your Honor, that would be to plead not guilty instead of guilty?

The Court: It would be to go back into the position of being—having pled not guilty, that's correct.

The Defendant: I'm guilty of that crime, though, so I'm going to plead—I can't plead not guilty because I'm guilty. My circumstances at that time was rough, but I still committed the crime, it's still wrong for stealing but I did do it so I cannot plead not guilty. I plead guilty.

Later, the court again asked him if he wanted more time to file a motion to take back his guilty plea. Olivas refused and said he had had sufficient time, and he wanted to proceed. Olivas went on to request a deferred judgment, stating he did not want a felony conviction on his record because it could interfere with his ability to get future employment and also make it difficult for him to get residency. The sentencing court asked him if he remembered the judge at the guilty plea telling him that his convictions could affect his status under immigration laws. Olivas responded that the previous judge at the guilty plea said it could. However, the transcript of the guilty plea, which we now have on appeal, does not reflect that the advisory was given. The court at sentencing asked Olivas if he wanted “additional time to explore the consequences that might befall you if the court convicts you today and sentences you for these offenses.” Olivas responded, “No, Your Honor. If the court convicts me of these crimes, I must do the time, that's what I do.” Olivas again stated,

I request a deferred judgment to not get in the way of my status here so I can remain here in the United States. Where I'm from, Juarez, Mexico, is extremely dangerous. It would probably be better for me to stay here, that's why I request deferred judgment also for employment reasons. If I have felonies on my record, with the employment history I have, it would be—it would be hard for me to get a job, get back on my feet.

The court sentenced Olivas to five years on the burglary conviction and ten years on the theft conviction. It ordered the sentences to run concurrently and suspended them, placing Olivas on probation for three years. Olivas inquired after the court pronounced the sentence whether a deferred judgment had been granted. The court informed him a deferred judgment was not granted because of his criminal history. He then asked whether the conviction could be expunged, and the court told him Iowa law does not permit the conviction to be expunged. He now appeals.

## **II. INEFFECTIVE ASSISTANCE OF COUNSEL.**

In order to challenge a guilty plea, a defendant must file a motion in arrest of judgment unless the failure to file such a motion resulted from ineffective assistance of counsel. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To prove counsel was ineffective, a defendant must show his counsel failed to perform an essential duty and prejudice resulted from that failure. *Id.* Both elements must be proven by a preponderance of the evidence. *Id.* In the context of a guilty plea, to prove prejudice a defendant must prove “there is a probability that, but for counsel’s errors, he or she would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 138.

Normally an ineffective-assistance claim is preserved for possible postconviction relief proceedings where a more thorough record can be developed and where counsel is given an opportunity to explain his or her conduct. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). However, if we find the record adequate on direct appeal, we resolve the claim rather than preserve

it in order to “preserve valuable judicial resources.” *State v. Weatherly*, 679 N.W.2d 13, 18–19 (Iowa 2004).

Olivas claims that he was denied the effective assistance of counsel when he was not advised that as a consequence of his plea to theft and burglary he would be deported even if judgment and sentence was deferred. We find the record inadequate to address this claim. There is no indication in the record what Olivas’s counsel told him either before or after the guilty plea but before counsel was allowed to withdraw. It is clear the court erred at the guilty plea hearing by failing to advise Olivas that his conviction, deferred judgment, or deferred sentence may affect his status under the immigration laws. However, it is unclear whether counsel provided ineffective assistance in failing to object to the error or file a motion in arrest of judgment following the plea proceeding.

It is true that a defendant cannot claim ineffective assistance after he knowingly and intelligently made an election to proceed pro se. See *State v. Hutchison*, 341 N.W.2d 33, 42 (Iowa 1983). However, the error complained of here resulted when Olivas was represented by counsel, not when he was pro se. His refusal of the sentencing court’s offer to extend the time to file a motion in arrest of judgment may have been based on his prior counsel’s advice. Without a postconviction relief hearing, we will not know whether counsel gave erroneous advice, failed to give any advice at all, or gave correct advice. We will also not know whether Olivas’s decision to plead guilty was based counsel’s advice regarding the immigration consequences.

We therefore affirm Olivas's conviction but preserve his ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

**AFFIRMED.**