

IN THE COURT OF APPEALS OF IOWA

No. 3-516 / 12-1560
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENDELL LAMONTE McCOY,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

Defendant appeals his conviction alleging ineffective assistance of counsel. **AFFIRMED.**

Jason Gann of Berenstein, Moore, Heffernan, Moeller & Johnson, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Kendell McCoy appeals his conviction, following an *Alford* plea, for possession of a controlled substance—third violation.¹ He alleges ineffective assistance of trial counsel. We preserve McCoy’s claims for possible postconviction relief proceedings.

After a citizen complaint that included a license number for a van and after dispatch informed the responding officers a prior “attempt to locate” had been placed on the van and it could be found “pulled over on a frontage road,” the police officers located the van, McCoy, and eventually, two passengers. McCoy stated he was ill, and an officer noted vomit inside and outside of the van. An officer’s report states: “Mr. McCoy . . . was arrested for Driving While License Barred.^[2] He was placed in the back of” a police vehicle. A drug dog alerted and an officer found “a small baggie of [marijuana] which was [on the] outside [of] the passenger door of the vehicle . . . approximately one foot away from it.” The officer reported reading McCoy his *Miranda* rights and noted McCoy initially denied the marijuana was his. After the officer spoke “with him further,” she reported McCoy stated he threw the plastic bag out the window when he saw the officer coming up the frontage road. The officer’s report states: “Please see [the] in-car recording [referencing] the complete conversation that I had with Mr. McCoy.”

¹ An *Alford* plea allows a defendant to consent to the imposition of a sentence without admitting to participation in the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

² McCoy does not appeal his conviction, following a written guilty plea, for driving while barred.

In this direct appeal, McCoy, who switched trial counsel after his written guilty plea for driving while barred and before his *Alford* plea, argues trial counsel was ineffective in: (1) failing to file a motion to suppress—he claims effective counsel would have reviewed the recording of the *Miranda* waiver, and given McCoy's illness, challenged the statements; (2) failing to file a motion in arrest of judgment; (3) failing to investigate and mount a defense which resulted in uninformed choices by counsel due to inadequate preparation; and (4) failing to adequately present McCoy's background at sentencing.

In response to the suppression issue, the State acknowledges “[i]t is unclear if [the officer] informed [McCoy] he was under arrest and the exact sequence of events that took place prior to [McCoy's] incriminating statements is somewhat ambiguous.” The State also recognizes that if the facts of McCoy's illness and of the officer's report stating his story “didn't make a lot of sense” have bearing on a potential suppression issue, these facts “would have to be developed in a postconviction relief trial, not raised on direct appeal.”

In order to prevail, McCoy must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed “and the attorney charged with providing ineffective assistance may

have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

This is not the "rare case" that allows us to decide McCoy's ineffective assistance claims on direct appeal without an evidentiary hearing. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We affirm his conviction and preserve his claims for possible postconviction relief proceedings.

AFFIRMED.