

**IN THE COURT OF APPEALS OF IOWA**

No. 6-709 / 05-1361  
Filed September 21, 2006

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

**vs.**

**MARK ALLEN MCGONIGLE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley (plea), Alan L. Pearson (application to withdraw guilty plea), and Lawrence H. Fautsch (sentencing), Judges.

Mark McGonigle appeals from his conviction and sentence for third-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Fred H. McCaw, County Attorney, and Ralph Potter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

**EISENHAUER, J.**

Mark McGonigle appeals from his conviction and sentence for third-degree burglary. He contends the district court erred in overruling his motion to withdraw his guilty plea. He also contends his counsel provided ineffective assistance.

McGonigle was charged with first-degree burglary stemming from events occurring in the early morning hours of November 20, 2004. On February 14, 2005, McGonigle entered a plea of guilty to third-degree burglary. Part of the consideration given for the plea was the State's agreement to McGonigle's release from jail on an unsecured appearance bond with pre-trial services. Following the plea, McGonigle was released.

On April 1, 2005, McGonigle moved to withdraw his guilty plea. At the hearing held April 29, McGonigle testified his attorney had never read him the trial information and minutes of testimony or the pre-sentence investigative report. This directly contradicted his statements during his guilty plea. He testified the only reason he pled guilty was to be released from jail. The district court overruled McGonigle's motion on May 5, 2005.

McGonigle contends his guilty plea was not knowingly and voluntarily entered into because he pled guilty only to be released from jail. We review the denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Malone*, 511 N.W.2d 423, 434 (Iowa Ct. App. 1993). Where constitutional rights are implicated, our review is de novo. *In re Detention of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004). To the extent that McGonigle argues his constitutional rights were violated by his pretrial detention, we conclude error was not

preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (holding error is not preserved where issues are not presented and passed upon by the district court).

In denying McGonigle's motion to withdraw his guilty plea, the district court found:

Mr. McGonigle is not an individual worthy of belief. He is willing to say whatever he needs to obtain his personal goals. Truthfulness is not a trait that he aspires to.

At the time of his plea, he told the judge that he had reviewed the charging documents with his attorney and that he did not want his attorney replaced. There is no reason to believe these statements were not accurate. He negotiated with the State for the changed bail making his release possible following the guilty plea. The negotiation was honored. In fact, the Court changed his bail making his release possible. The fact that the defendant was subsequently rearrested and remains in custody on other matters does not change the fact that Mr. McGonigle was not deceived or misled in any way in regard to the plea change negotiations.

Giving due deference to these credibility findings, *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001), we conclude the trial court did not abuse its discretion when it concluded McGonigle failed to demonstrate his plea agreement was not knowingly and voluntarily made.

McGonigle also contends his counsel was ineffective in failing to object to the county attorney's use of pretrial detention concessions as a means to procure pleas of guilty. We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)). Because the record is not developed with respect to this issue, we preserve it for postconviction relief.

**AFFIRMED.**