

IN THE COURT OF APPEALS OF IOWA

No. 6-915 / 05-2031
Filed December 13, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW EUGENE LOWE,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, David M. Remley,
Judge.

Andrew Lowe appeals his conviction, following his guilty plea, for sexual
abuse in the third degree. **AFFIRMED.**

John Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kristin Guddall, Assistant Attorney
General, Brent D. Heeren, County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Andrew Lowe appeals his conviction, following his guilty plea, for sexual abuse in the third degree in violation of Iowa Code section 709.4(1) (2003). He claims he was denied effective assistance of counsel in three ways. We affirm his conviction and preserve Lowe's specified claims of ineffective assistance of counsel for a possible postconviction proceeding.

In January 2004, Lowe was seventeen years old and residing in a juvenile residential treatment placement at the Four Oaks sexual offender program in Linn County. During a counseling session Lowe revealed to his sexual offender treatment counselor that he had sexually abused a neighbor's child in July 2003. Lowe alleges his counselor then "ordered" or "coerced" him to tell his juvenile court officer (JCO) about the abuse and he did so. His JCO reported the claim to law enforcement and as a result Lowe was charged with sexual abuse in the second degree. As a result of a plea agreement Lowe pled guilty to the lesser included offense of sexual abuse in the third degree. On November 10, 2005, the district court entered an order adjudicating Lowe guilty of sexual abuse in the third degree. The court sentenced him to ten years imprisonment and suspended the sentence. Lowe appeals, contending his counsel rendered ineffective assistance in three ways.

We review claims of ineffective assistance of counsel *de novo*. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove trial counsel was ineffective the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668,

687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin*, 691 N.W.2d 734, 736-37 (Iowa 2005).

Lowe first claims his counsel was ineffective for failing to pursue a motion to suppress the incriminating statements he made to his JCO about the prior sexual abuse. He argues the comments he made to both his sexual offender treatment counselor and the JCO were communications made in professional confidence and thus protected under Iowa Code section 622.10. He asserts that by “deviously ordering” Lowe to tell his JCO about the past abuse his counselor was able to “circumvent” the protection section 622.10 was meant to provide to such communications. Lowe claims that had his attorney filed a motion to suppress his statements to the JCO based on this code section there is a reasonable probability the communications would have been suppressed, without these communications the State would not have had a case against him, and without this evidence he would not have pled guilty.

Lowe next contends his counsel was ineffective for failing to advise him of the consequences of a no-contact order called for as part of the plea agreement, and had he been fully advised of the consequences of his plea he would not have agreed to plead guilty. Finally, Lowe claims his counsel was ineffective for failing to contest the extent of the no contact order.

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); *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v.*

Lopez, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). “[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can 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.

There is nothing in the record concerning the specifics of the conversation Lowe had with his sexual offender treatment counselor. Without knowing precisely what Lowe said to his counselor and Lowe’s counselor said to him, it is not possible to decide Lowe’s first claim of ineffective assistance. Furthermore, Lowe’s counsel has not been given an opportunity to explain his actions and the trial court has not considered and ruled on the ineffectiveness claims. Under these circumstances, we pass on these issues of ineffective assistance in this direct appeal and preserve them for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

We conclude the record before us is inadequate to address at least Lowe’s first claim of ineffective assistance of counsel on direct appeal. Accordingly, we affirm the conviction and preserve Lowe’s specified claims of ineffective assistance of counsel as set forth above for a possible postconviction proceeding.

AFFIRMED.