

IN THE COURT OF APPEALS OF IOWA

No. 7-208 / 06-1148
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN DWAYNE FISHBURN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes,
District Associate Judge.

Brian Fishburn appeals from his conviction and sentence for operating
while intoxicated, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, William E. Davis, County Attorney, and Marc Gellerman, Assistant
County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Brian Fishburn appeals from his conviction and sentence for operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2 (2005). Fishburn contends his trial counsel was ineffective for failing to file a motion in arrest of judgment challenging the entry of judgment on the enhanced offense of OWI, third offense. We affirm Fishburn's conviction and preserve his ineffective assistance of counsel claim for possible postconviction relief proceedings.

After the jury found Fishburn guilty of operating while intoxicated, the district court asked, "Mr. Fowler [Fishburn's counsel], Mr. Fishburn's stipulating that was his third offense, right?" Counsel answered in the affirmative, and the court scheduled Fishburn's sentencing without any further discussion of his prior convictions. At sentencing, the court noted Fishburn had "stipulated it was the third offense," and the court asked, "this is the third offense, there is no issue on that?" The court did not directly address Fishburn about his prior convictions at any time during sentencing. The court found Fishburn guilty of operating while intoxicated as a third offender and sentenced him to prison for a term not to exceed five years.

Iowa Rule of Criminal Procedure 2.19(9) states:

After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel.

The rule requires the court to conduct an “inquiry, similar to the colloquy required under rule 2.8(2)^[1], prior to sentencing to ensure that the [defendant’s stipulation to prior convictions] is voluntary and intelligent.” *State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005); *State v. McBride*, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001). Fishburn now claims his trial counsel was ineffective for failing to file a motion in arrest of judgment; he maintains the district court did not take adequate steps to determine he knowingly and voluntarily stipulated to prior operating while intoxicated offenses.

We review ineffective assistance of counsel claims de novo. *State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004). A defendant receives ineffective assistance of counsel when counsel fails to perform an essential duty and prejudice results. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). Usually, we preserve ineffective assistance claims for postconviction proceedings to allow for the full development of the record regarding trial counsel’s actions. *State v. Poyner*, 306 N.W.2d 716, 719 (Iowa 1981).

Even if we assume Fishburn’s attorney failed to perform an essential duty by failing to make a motion in arrest of judgment, the question remains whether that alleged failure prejudiced Fishburn. The minutes of testimony in this case reveal the State would have been able to prove Fishburn had three prior convictions for operating while intoxicated. However, the minutes do not establish whether the State would have been able to prove Fishburn was either represented by counsel or validly waived his right to counsel in the prior

¹ Iowa Rule of Criminal Procedure 2.8(2) outlines the procedure the court employs when accepting a defendant’s guilty plea.

proceedings. We conclude the record is inadequate to address the defendant's ineffective assistance of counsel claim. Accordingly, we affirm Fishburn's conviction and preserve his ineffective assistance of counsel claim for possible postconviction relief proceedings.

AFFIRMED.