

**IN THE COURT OF APPEALS OF IOWA**

No. 7-290 / 06-1659

Filed June 13, 2007

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

**vs.**

**GREGORY JOHN WILLETTE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, John A. Nahra and J. Hobart Darbyshire, Judges.

Gregory John Willette appeals his judgment and sentence for third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and James Tomka, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Jerold Feuerbach and Julie Walton, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**MAHAN, P.J.**

Gregory John Willette appeals his judgment and sentence for third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4) (2005). He argues he received ineffective assistance of counsel when his counsel failed to file a motion in arrest of judgment after the district court failed to properly inform him of the maximum sentence prior to his guilty plea. We affirm.

**I. Background Facts and Proceedings**

On May 4, 2006, Willette was charged with one count of third-degree sexual abuse. Willette entered a plea agreement with the State. He agreed to plead guilty, and the State agreed to both dismiss a second count of third-degree sexual abuse from a separate case and make no recommendations at sentencing. At the plea hearing, the district court asked Willette about the plea agreement. The following exchange also took place:

THE COURT: Other than this agreement, has anyone made any other agreements with you or promises or is anyone forcing you or threatening you which makes you plead guilty today?

WILLETTE: No.

THE COURT: Other than this agreement, has anyone made any predictions to you about what this Court will do at sentencing.

WILLETTE: No.

Later, the court informed Willette of his possible sentence, stating, “[Section 709.4(2)(c)(4)] provides that sexual abuse in the third degree is a Class C felony, punishable by a term of imprisonment of not to exceed ten years and a fine of not to exceed \$10,000.” Willette’s plea was accepted. His attorney did not file any motion in arrest of judgment.

On September 13, 2006, the district court sentenced Willette to a period of imprisonment not to exceed ten years. The court also stated,

In addition, pursuant to section 903—903B.1, this being a class C or greater offense under Chapter 709 of the Iowa Code, you are sentenced to a special sentence committing you to the custody of the Director of the Iowa Department of Corrections for the rest of your life with eligibility for parole as provided by Chapter 906 of the Iowa Code. A special sentence imposed under section 903B.1 shall commence upon the completion of the sentence imposed on you under Chapter 709 of the Code of Iowa, which is the sentence for the underlying criminal offense, and you shall begin the sentence under this subsection upon completion of the sentence under that code section.

Willette appeals, arguing his attorney should have filed a motion in arrest of judgment after the district court failed to inform him of the special sentence under section 903B.1.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004).

## **III. Merits**

In order to show his counsel rendered ineffective assistance, Willette must show (1) his counsel breached an essential duty and (2) that breach resulted in prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate*, 710 N.W.2d 237, 240-41 (Iowa 2006). This practice ensures both that an adequate record of the claim may be developed and that the attorney charged with ineffectiveness may have an opportunity to respond. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002).

The State argues it is possible defense counsel's failure to file a motion in arrest of judgment was a strategic decision. The State takes this position due to

“personal communications” it has had with the Iowa Department of Corrections. These “personal communications” indicate many judges were unaware of 903B.1 when it became effective and efforts to enforce 903B.1 post-sentencing were either largely ineffective or completely absent. Thus, the State argues Willette may have been gambling on the court being unaware of section 903B.1.

We find this argument unpersuasive for three reasons. First, Willette testified no one made any predictions to him about what the sentencing court would do. Second, the State’s “personal communications” are not in the record and are not evidence we can consider. See Iowa R. App. P. 6.10(1); *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 3 (Iowa 2005). Third, we do not consider betting the court is unaware of the law to be reasonable trial strategy. We therefore conclude counsel breached an essential duty. See *State v. Straw* 709 N.W.2d 128, 134 (Iowa 2006); *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2001); *State v. Kress*, 636 N.W.2d 12, 22 (Iowa 2001).

In order to show the breach of duty caused him prejudice, Willette must show there is a reasonable probability that, absent counsel’s errors, he would not have pleaded guilty and would have demanded a trial. *Straw*, 709 N.W.2d at 138. Willette has not made that showing here. See *id.* (noting it would be helpful to the prejudice determination to know whether trial counsel spoke with the defendant about the maximum possible sentence.) We preserve his claim for postconviction relief.

**AFFIRMED.**