

IN THE COURT OF APPEALS OF IOWA

No. 8-333 / 07-1394
Filed May 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD KEVIN NEWMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Defendant appeals from his convictions for delivery of a controlled
substance as a second or subsequent offender. **AFFIRMED.**

Angela Campbell of Dickey & Campbell Law Firm, Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Donald Newman appeals from the judgment and sentence entered on his guilty plea to delivery of a controlled substance as a second or subsequent offender. We affirm.

I. Background Facts and Prior Proceedings

On April 17, 2007, the State filed a trial information charging Newman with delivery of a controlled substance as a second and subsequent offender. See Iowa Code §§ 124.401(c)(2)(b), 124.411 (2005). The trial information described how Newman had sold cocaine to an undercover police officer on August 25, 2006. Newman requested counsel, and an attorney from the Des Moines Public Defender's office was appointed to represent him these proceedings.

Newman pled not guilty to the charge. The court scheduled a pretrial conference for May 24, 2007. Newman's appointed counsel did not attend the pretrial conference. However, a different attorney in the public defender's office attended the hearing on his behalf. The pretrial conference order set a "status conference" for June 6, 2007. The order also described the following plea offer:

State offers plea to Class C without the second or subsequent offender enhancement, agree to prison with 1/3 minimum, OR plea as charged and argue, open until June 6, 2007 or motions, discovery, etc.

Newman's appointed counsel did not appear at the June 6 hearing, so the court issued an order rescheduling the conference to June 8. Prior to the June 8 conference, Newman drafted a pro se motion for "Termination of current defense counsel and appointment of new counsel." In this motion, Newman stated: "On three prior hearings my defense counsel has failed to appear in Court to

represent me.” Newman went on to state that his appointed counsel was so “overloaded with cases” that he could not devote enough attention to adequately defend him.

On June 8 Newman, his appointed counsel, and the assistant county attorney met for the status conference and informed the court that Newman was prepared to enter a plea. A transcript of the plea hearing indicates the court first addressed Newman’s request for new counsel. The court entered into the following colloquy with Newman:

THE COURT: Mr. Newman, you know, this is obviously a very important case to your life and your future.

THE DEFENDANT: Yes.

THE COURT: I want to make sure you have effective representation and somebody you can communicate with and somebody that will advocate for you. And I have not - - I had not received your letter or motion, and so what is your position on that? Do you want a different attorney? Are you okay with [your appointed counsel]?

THE DEFENDANT: I’m fine.

THE COURT: Have you worked out your problems with him?

THE DEFENDANT: I worked out with him. I’m fine. I would like to withdraw that motion.

THE COURT: Okay. Have you had a chance to visit with him before today about your case?

THE DEFENDANT: Yes.

THE COURT: And I know he has been tied up the last couple weeks in a big case that’s taken a lot of his time. But your case is important, and we want to make sure you have gotten enough attention that you deserve here. So are you all right with - - you’ve had enough time with [your appointed counsel]?

THE DEFENDANT: Yes.

THE COURT: And you’re okay with his advice; are you okay with his representation?

THE DEFENDANT: Yes, I am.

The court granted Newman’s request to withdraw the motion and proceeded to discuss the guilty plea. Newman was informed that the maximum term of

imprisonment for the offense of delivery of a controlled substance was ten years, with a mandatory one-third before he would become eligible for parole. Because he was pleading as a second or subsequent offender, he was also informed that the court could triple the sentence to a term not to exceed thirty years, with a one-third mandatory sentence. At no point during the guilty plea proceeding did the court or the parties discuss the plea offer set forth in the May 24 pretrial conference or indicate that the plea was made pursuant to a plea agreement.

The court ordered a presentence investigation report and set a date for the sentencing hearing. Newman did not file a motion in arrest of judgment. The matter proceeded to a sentencing hearing on July 24, 2007, where the State recommended that Newman be sentenced to twenty years in prison. Newman's substitute counsel argued that probation was a more appropriate sentence. In doing so, counsel made the following reference to a plea agreement:

Your Honor, my - - pursuant to the plea agreement that the parties were free to argue, it is our position that Mr. Newman be given a chance on probation. He acknowledges his extensive prior criminal history. We have known that the majority of the crimes which caused him to be incarcerated or in prison were back in the '70s and early '80s, and we would ask that he would be given a chance to prove himself on probation . . . he is able and willing to try to prove himself and better himself.

Newman also personally addressed the court and discussed his family and the things he had done to better himself. The district court sentenced Newman to a term of incarceration not to exceed fifteen years. The court noted that this sentence was appropriate in light of his prior record, age, and the nature of the offense. The court also stated that a term of probation "would lessen the seriousness of the offense,"

Newman raises two issues on appeal:

I. THE APPELLANT'S CONVICTION VIOLATES THE SIXTH AMENDMENT BECAUSE HIS PLEA OF GUILTY AND RESULTING SENTENCE WERE THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

II. THE DISTRICT COURT EXERCISED ABUSE OF DISCRETION IN APPELLANT'S SENTENCE.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). We review the district court's sentence for the correction of errors at law. Iowa R. App. P. 6.4. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). Sentencing decisions of the district court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

III. Merits

Ineffective Assistance of Counsel. Newman claims his plea was not knowing or intelligent because his trial counsel failed to zealously represent his interests, come to several hearings, and present and discuss the State's plea offer. He also claims his counsel let the plea offer expire without giving him the opportunity to accept it in a timely manner. Finally, Newman claims his attorney should have raised an objection when the district court did not discuss the plea offer during the plea hearing.

In order to prevail on an ineffective assistance of counsel claim Newman must show (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003). Unless the record on direct appeal is adequate to address these issues, a claim of ineffective assistance of counsel is generally preserved for postconviction proceedings to allow trial counsel an opportunity to defend his or her conduct of the trial. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981).

Upon our review of the record, we conclude that postconviction proceedings are necessary to address trial counsel's effectiveness. The record reveals that Newman spoke with his appointed counsel prior to the day of his plea hearing, but there is nothing describing the substance of these discussions. It is not clear whether the county attorney revoked the plea offer when trial counsel did not appear for the June 6 conference. In addition, Newman's appellate brief directly states that he "has additional information that is not part of the record that supplements his arguments." Accordingly, we preserve Newman's ineffective assistance claims for possible postconviction proceedings so the parties can create a full record on these issues.

Abuse of Discretion in Sentencing. Newman also claims the court's sentencing decision was exercised on grounds that were clearly unreasonable because the offense that served as the basis for the sentencing enhancement occurred in 1978.

In determining the proper sentence, the district court should weigh and consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities and chances of his

reform. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). The courts owe a duty to the public as much as to defendant in determining a proper sentence. *Id.* The punishment should fit both the crime and the individual. *Id.*

The presentence investigation report reveals that Newman has an extensive criminal history and has been incarcerated for significant periods of time for numerous crimes in multiple states. Many of his crimes are related to the possession and delivery of controlled substances. Since 2003, he has been sentenced to probation, rather than incarceration, on two occasions.

We conclude the district court provided sufficient reasons for imposing a term of incarceration not to exceed fifteen years. Given his lengthy criminal history and the lack of success of prior efforts to rehabilitate him, we find the sentence handed down by the district court was reasonable and free from any abuse of discretion. Accordingly, we affirm the sentence imposed by the district court.

AFFIRMED.