

**IN THE COURT OF APPEALS OF IOWA**

No. 9-288 / 08-1466  
Filed May 6, 2009

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

**vs.**

**MICHAEL WILLIAM BLYTHE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Jasper County, Leo Oxberger,  
Judge.

Michael Blythe appeals the sentence imposed following his guilty plea to  
first offense operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney  
General, Steve Johnson, County Attorney, and Susan Wendel, Assistant County  
Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

On February 13, 2008, Michael Blythe drove his vehicle across the center line of a highway in Jasper County and collided head-on with a car driven by Lucille Jansen. A third vehicle driven by Bradley Zegers was unable to stop and hit Jansen's vehicle. Blythe, Jansen, and Neva Lanser, a passenger in Jansen's car, were all severely injured and transported to hospitals. At the hospital, Blythe's urine sample tested positive for amphetamines. Blythe was charged with operating while intoxicated in violation of Iowa Code section 321J.2 (2007). He pleaded guilty on July 9, 2008.

Before Blythe's sentencing in September 2008, the court heard victim impact statements from Vernon Jansen and Judson Vos, Lucille Jansen's husband and son-in-law. Neither defense counsel nor Blythe appeared at this portion of the sentencing hearing.<sup>1</sup> Vernon spoke in detail regarding the extent of Lucille's injuries. Judson explained the accident's devastating effects on the family. Judson also expressed disappointment with the limitations of the court, but asked that the court impose the maximum sentence "as a small symbol of appreciation for what this family has been through."

Later, when Blythe and his counsel were present, the prosecutor spoke briefly after recognizing "there is really nothing additional that [the State] can add to the statements of Mr. Jansen and Mr. Vos." The prosecutor detailed Blythe's driving and criminal records and summarized Lucille's physical injuries. Defense

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<sup>1</sup> Blythe does not argue on appeal that his absence during the presentation of victim impact statements constitutes error. See Iowa Code § 915.21(1)(b) (allowing a victim to orally present a victim impact statement in the presence of the defendant).

counsel did not advocate for any particular sentence but described Blythe's injuries and reminded the court that the evidence did not show that the accident was caused by any impairment related to the presence of amphetamines. Blythe told the court that he took responsibility for the accident but had no memory of it. The district court sentenced Blythe to the maximum of one year in jail and the minimum fine of \$1250. The court did not make reference to the victim impact statements but rather stated a concern "that public confidence in the court system would be substantially reduced" if the sentence did not take into account Blythe's driving record and criminal record and the fact that he was driving on the wrong side of the road after consuming methamphetamine.

Blythe appeals from his sentencing, arguing that his counsel was ineffective in failing to object to the presentation of victim impact statements by non-victims at his sentencing hearing.

## **II. Standard of Review**

Because Blythe asserts a constitutional violation, we review the totality of the circumstances de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

## **III. Ineffective Assistance of Counsel**

In order to prove that his counsel was ineffective, Blythe must show that: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id.* To satisfy the second prong, prejudice, Blythe "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Ordinarily, such claims are preserved for a possible postconviction relief action unless it can

be determined as a matter of law on appeal that the defendant cannot prove either or both elements of the claim.” *State v. Tesch*, 704 N.W.2d 440, 454 (Iowa 2005).

Vernon and Judson were not entitled to give victim impact statements under Iowa Code sections 915.10 and 915.21. Blythe’s counsel was not present at the sentencing hearing to object to their impact statements, though the sentencing judge stated that counsel indicated he had no objection to the district court hearing the testimony of Vernon and Judson. The State concedes that counsel’s failure to make an objection to the impact statements was a breach of an essential duty. The State asserts, however, that Blythe was not prejudiced by his counsel’s error.

When victim impact statements do not contain “prejudicial information such as unproven crimes or other facts outside the record,” the defendant cannot show prejudice. *Tesch*, 704 N.W.2d at 454. Vernon’s statement primarily detailed the extent of Lucille’s injuries and the medical expenses the family incurred. The record established that Lucille’s injuries were extreme. Vernon’s impact statement did not provide facts outside the record before the sentencing court.

Judson’s impact statement focused on the effect the accident had on the family and on the family’s frustration with the judicial system. Again, this statement did not contain prejudicial information that was not already apparent from the circumstances described in the court file. Just as in *State v. Sumpter*, 438 N.W.2d 6, 9 (Iowa 1989), the impact statements “told the judge little, if anything, that was not already apparent.” A request that the court impose the

maximum sentence is not the type of statement that the court considers unfairly prejudicial. See *Sumpter*, 438 N.W.2d at 9.

The facts of this case, excluding the impact statements, supported the district court's decision to impose the maximum sentence of incarceration on Blythe. The impact statements "did not contain the prejudicial type of information which would not otherwise be available to the judge and which we have held to be prejudicial, such as allegations of unproven crimes or other facts outside the record." *Id.* Because Blythe cannot prove prejudice, he cannot prove his claim of ineffective assistance of counsel.

**AFFIRMED.**