

**IN THE SUPREME COURT OF IOWA**

No. 173 / 97-1474

Filed July 29, 1998

**STATE OF IOWA,**

Appellee,

vs.

**MATTHEW AUGUST THIEL,**

Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Defendant appeals judgment and sentence entered on his plea of guilty to third-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Fred H. McCaw, County Attorney, and Tim Gallagher, Assistant County Attorney, for appellee.

Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ.

**PER CURIAM.**

The State alleged that Matthew Thiel wrote two checks to Lowe's Home Center, totaling \$1048, knowing that he had insufficient funds in his checking account. When Thiel failed to cover the amount due, he was charged with second-degree theft in violation of Iowa Code sections 714.1(6) (1995) (defining theft by check) and 714.2(2) (theft of property exceeding \$1000, but not exceeding \$10,000), a class "D" felony. In exchange for a plea of guilty, the State agreed to reduce the charge to third-degree theft—an aggravated misdemeanor under Iowa Code section 714.2(3)—and recommended a deferred judgment.

Thiel pleaded guilty to the reduced charge. At sentencing the district court observed that Thiel's presentence investigation revealed over fifty prior convictions. The court therefore declined the invitation to consider deferred judgment and instead sentenced Thiel to 180 days in jail and a \$500 fine. The court then suspended all but twenty days of the sentence, along with all of the fine.

Thiel appeals. He claims the record reveals his plea was not taken in accordance with Iowa Rule of Civil Procedure 8(2)(b). The State counters that Thiel failed to challenge the adequacy of his plea by motion in arrest of judgment, precluding him from asserting such a challenge on appeal. See Iowa R. Crim. P. 23(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal."); accord *State v. Kirchoff*, 452 N.W.2d 801, 802-03 (Iowa 1990).

The record plainly reveals the district court advised Thiel of his right to file a motion in arrest of judgment and the consequence of his failure to do so. Thiel concedes as much on appeal, ascribing the failure to ineffectiveness of his trial counsel. *See State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). To establish a claim of ineffective assistance, Thiel must prove (1) counsel failed to perform an essential duty and (2) he was prejudiced as a result. *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). The record before us is inadequate to make such a determination. *See Schoelerman*, 315 N.W.2d at 71 (claims of ineffectiveness of counsel ordinarily litigated in postconviction proceedings).

We affirm the judgment and sentence of the district court, preserving to Thiel the right to litigate, in postconviction proceedings, any claim related to the alleged ineffectiveness of his trial counsel.

**AFFIRMED.**