IN THE COURT OF APPEALS OF IOWA

No. 1-738 / 10-1664
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARJORIE JANE STEPP,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, District Associate Judge.

Marjorie Stepp appeals from her conviction for operating while intoxicated.

AFFIRMED.

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Anastasia Hurn, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

On June 18, 2009, Marjorie Stepp was involved in a car accident. An officer who responded to the accident scene noticed Stepp seemed restless and was moving continuously in the rear of the squad car. Stepp denied using any drugs other than prescription medication. The officer administered a breath test, which did not detect any alcohol in Stepp's system. Toxicology testing revealed the presence of zolpidem, diphenhydramine, citalopram, and promethazine.

On July 19, 2010, Stepp pleaded guilty to the charge of operating while intoxicated in violation of Iowa Code section 321J.2 (2009). On August 19, 2010, Stepp filed a timely motion in arrest of judgment asserting, "Since the date of the guilty plea new evidence has come to light that would allow the Defendant to put forth a medication defense pursuant to Iowa Code § 321J.2(7)(a)." In support of her motion, Stepp referenced a letter from a doctor as well as a report of medical expenses from Broadlawns Medical Center, which she asserted would show that her doctor had prescribed medication for her and authorized her to operate a vehicle while using the medication. Neither the letter nor the report was attached to the motion in arrest of judgment.

On September 13, 2010, the court denied Stepp's motion in arrest of judgment and sentenced Stepp. Stepp filed a notice of appeal. In the Iowa Supreme Court, Stepp filed a motion for limited remand and a motion to modify the record pursuant to Iowa Rule of Appellate Procedure 6.807. The two attorneys involved in the hearing on the motion in arrest of judgment filed a statement pursuant to rule 6.807 stating no exhibits were offered at the hearing.

Stepp now appeals, asserting her counsel was ineffective for failing to offer into evidence at the hearing on the motion in arrest of judgment letters relevant to an affirmative defense.

In order to prove counsel was ineffective, Stepp must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). In order to establish the first prong of the test, Stepp must show that counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To satisfy the second prong, Stepp "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Taylor*, 352 N.W.2d at 684.

We review Stepp's claim of ineffective assistance of counsel de novo. *Id.* Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings where an adequate record of the claim can be developed. *Id*.

The dissenting opinion contends we may not consider Stepp's claim of ineffective assistance at all, since our case law dictates that her guilty plea waived all defenses not intrinsic to the plea itself. Stepp's claim is intrinsic to her plea, since the existence of a valid defense made her plea involuntary.

We conclude the record is not adequate to decide this issue on direct appeal. Without reviewing the letters and report in question this court cannot determine whether counsel's failure to offer the letters was prejudicial to Stepp. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) ("[C]laims of ineffective

assistance of counsel should normally be raised through an application for postconviction relief. In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing.").

We find this issue is best preserved for postconviction relief.

AFFIRMED.

Danilson, J., concurs; Vogel, P.J., dissents.

Vogel, P.J. (dissenting)

I respectfully dissent. Stepp does not assert her trial counsel was ineffective for allowing her to enter a guilty plea, when she later claimed she had an affirmative defense. Rather, Stepp asserts her trial counsel was ineffective for failing to offer certain documents to support her motion in arrest of judgment. I would find that even had her trial counsel offered the documents, the motion would not have been granted because this was not an allowable use of a motion in arrest of judgment. *State v. Cole*, 452 N.W.2d 620, 622 (Iowa Ct. App. 1989) (holding that a motion in arrest of judgment cannot be used to raise an affirmative defense).

When Stepp pleaded guilty to the offense, she waived all defenses that were not intrinsic to the plea itself. *Id.* A defendant may file a motion in arrest of judgment to challenge a defect in plea proceedings, but Stepp's motion did not allege such a defect. *See* Iowa R. Crim. P. 2.24(3) (indicating a proper use of a motion in arrest of judgment is to challenge the adequacy of a guilty plea proceeding); *State v Kobrock*, 213 N.W.2d 481, 483 (Iowa 1973) (holding any challenge to the information and minutes of testimony are waived with the guilty plea). Rather, Stepp only raised an affirmative defense, which is not a permitted use of a motion in arrest of judgment. *Cole*, 452 N.W.2d 622. Consequently, regardless of whether Stepp's trial attorney had attached the identified documents, Stepp's motion in arrest of judgment would not have been granted. I would find Stepp's ineffective-assistance-of-counsel claim must fail.