

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1079 / 11-1275  
Filed January 9, 2013

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

**vs.**

**JAMES ANTHONY OLDS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Stephen B. Jackson Jr., Judge.

James Olds alleges he received ineffective assistance of counsel during the sentencing hearing for his conviction of theft in the second degree.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas Scott, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

**DOYLE, P.J.**

James Olds challenges the sentence imposed following his conviction for theft in the second degree, in violation of Iowa Code sections 714.1(1) and 714.2(2) (2007). He alleges his counsel was ineffective by failing to present a mitigation statement to advocate for a deferred judgment. Because Olds is unable to show he was prejudiced by counsel's performance at the sentencing hearing, we affirm.

In March 2008, Olds was charged by trial information with theft in the second degree, a class "D" felony. He pled not guilty and waived his right to a speedy trial. Olds also waived his right to a trial within one year of his arraignment, and he later waived his right to a jury trial. The matter was tried to the district court in January 2011, and the court found Olds guilty as charged.

A sentencing hearing was held in July 2011. The State recommended the presentence investigation report's sentencing recommendation of a five-year term of incarceration to be suspended and probation for three years. The district court then asked Olds's counsel if he wished to be heard regarding sentencing. Olds's counsel responded in the affirmative and stated:

Your Honor, we would request a deferred judgment. The presentence investigation report indicates that [Olds] is eligible for one, and I think it would be appropriate in this matter. If the court does not feel that is an appropriate sentence, we would request that the court follow the guidance of the presentence investigator and enter a sentence consistent with her recommendation.

Olds was then afforded his right of allocution, but he declined. Olds was then sentenced to an indeterminate term of incarceration not to exceed five years. The court suspended the sentence and placed Olds on probation for three years.

Olds now appeals. He asserts his counsel “failed to act as a zealous advocate on his behalf by acquiescing in the State’s recommendation and failing to advocate for the deferred judgment.” We review his claims of ineffective assistance of counsel de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012).

The Sixth Amendment to the United States Constitution and article I section 10 of the Iowa Constitution serve as the foundation for ineffective-assistance-of-counsel claims. See *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). To prevail, Olds must prove “(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.” *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). “We can affirm on appeal if either element is absent.” *Clark*, 814 N.W.2d at 567. Although we ordinarily preserve such claims for postconviction relief actions, we may address them on direct appeal if we can determine the defendant is unable to prove either element. *State v. Tesch*, 704 N.W.2d 440, 450 (Iowa 2005); see also Iowa Code § 814.7(3) (providing an appellate court discretion to determine the adequacy of the record to decide the claim or “preserve the claim for determination under chapter 822”). Because we believe the record at hand is adequate to decide Olds’s claim, we will address it on direct appeal.

Iowa Rule of Criminal Procedure 2.23(3)(d) provides “counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment.” Olds contends trial counsel has a duty to present mitigating evidence at sentencing

and claims his counsel was ineffective for failing to do so. We do not find it necessary to decide the breach-of-duty issue in this appeal because we conclude that Olds is unable to prove he was prejudiced by counsel's performance at sentencing.

To establish prejudice, Olds must show a reasonable probability exists that, but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. See *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008). To demonstrate prejudice in the context of a sentencing proceeding, a defendant must show a reasonable probability that he would have received a more lenient sentence if not for the alleged deficient performance of counsel. See *Glover v. United States*, 531 U.S. 198, 202-04 (2001). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *State v. Cromer*, 765 N.W.2d 1, 11 (Iowa 2009) (internal quotation marks omitted).

Olds has not satisfied his burden to show that but for counsel's failure to offer any supporting evidence or statements for the requested deferred judgment, there existed a reasonable probability that the sentencing court would have opted against imposing an indeterminate term of imprisonment not to exceed five years, suspended with three years' probation, in favor of a deferred judgment. The sentencing court was aware of Olds's prior criminal convictions. The presentence investigation report shows Olds had been given the benefit of deferred judgments and suspended sentences in the past, yet he still re-offended. Notably, Olds does not identify any other circumstances particular to his case that would have weighed in favor of a lesser sentence. Furthermore,

Olds himself bypassed the chance to speak personally in mitigation of the sentence. In assessing claims of ineffective assistance of counsel, we examine the defendant's own conduct as well as that of his attorney. See *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

*State v. Boggs*, 741 N.W.2d 492, 508 (Iowa 2007), makes clear that when a defendant does not specifically claim mitigating evidence exists that was not before the court, so long as the court was apprised of the defendant's background and other matters relevant to sentencing, no prejudice results. Because Olds cites no specific favorable evidence to which counsel should have alerted the court, we do not believe Olds suffered prejudice from his counsel's performance at sentencing.

**AFFIRMED.**