IN THE COURT OF APPEALS OF IOWA

No. 2-1113 / 11-1569
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY DAVID MOONEY JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Dan F. Morrison, Judge.

A defendant appeals from his conviction and sentence for first degree theft. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Lisa Holl, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

The defendant, Gary David Mooney Jr., appeals from the judgment, conviction, and sentence following a jury trial and a verdict of guilty for the offense of theft in the first degree in violation of Iowa Code sections 714.1 and 714.2(1) (2011). He claims his attorney provided him ineffective assistance for failing to object to certain evidence, the district court erred by not allowing his attorney to make a statement at sentencing, and the district court imposed an illegal sentence by ordering him to pay reimbursement of attorney fees in an amount exceeding the fee limitation, in violation of *State v*. *Dudley*, 766 N.W.2d 606, 620-22 (Iowa 2009).

I. Background Facts and Proceedings

A reasonable juror could have found the following facts as true: in November 2010, two Cub Cadet brand all-terrain utility vehicles (ATVs)[1] were stolen from Greiner Implement in Ottumwa. The ATVs had a retail value of $12,500 each. Michael Lehenbauer, Mooney's brother-in-law, informed the sheriff's office of a potential location of the stolen ATVs. On November 17, deputies went to the location provided by Lehenbauer, which was the residence of Gary Mooney Sr. and Diane Mooney, Mooney's parents. With permission, the deputies searched a detached garage and found painting equipment, cans of black paint, items with green paint on them, pamphlets for a John Deere Gator, and John Deere stickers. In a nearby trailer, the deputies found a Cub Cadet

[1] Both parties refer to the vehicles in question as "all-terrain vehicles" and "ATVs" throughout. "All-terrain vehicle" is specifically defined by the code. *See* Iowa Code §§ 321.1(4), 321I.1(a). Without determining if the vehicles in question are actually ATVs, we will refer to them as such for simplicity.

ATV that had been disassembled. The main serial number had been removed from the disassembled Cub Cadet ATV. The deputies did not find any John Deere vehicles on the Mooney property.

Also in November 2010, a couple interested in purchasing a car responded to Mooney's radio advertisement. When they went to look at the vehicle at Mooney's parents' home, they also saw an ATV. Mooney assured them the ATV was a John Deere Gator and sold the couple both the car and the ATV.

On November 18, the deputies went to the purchasers' home and after inspecting the ATV, concluded it had been repainted green as the original color could be seen in unpainted areas. The tires on the ATV matched the tire tracks observed outside the detached garage at the Mooney residence. This ATV was also missing its main serial number.

The owner of Greiner Implement contacted Cub Cadet, which had on file the serial numbers for the differential, the transmission, the steering, the engine, as well as the product identification serial number. The owner of Greiner Implement received faxes from Cub Cadet with these various serial numbers for the stolen ATVs and they matched the serial numbers of the recovered ATVs. One of the deputies contacted Mooney on December 22, who indicated he did not steal the ATVs and law enforcement should instead focus its attention on Lehenbauer. Mooney later testified he restored some John Deere Gators for Lehenbauer in November 2010. Mooney also testified the Gator he sold to the couple was Lehenbauer's, but he sold it because he had not been paid by Lehenbauer for his restoration work.

Mooney was charged on January 31, 2011, with theft in the first degree, a class C felony, in violation of Iowa Code sections 714.1 and 714.2(1), and fraudulent practice in the first degree, a class C felony, in violation of Iowa Code sections 714.8(5) and 714.9. The trial information was amended multiple times but the charges remained the same. A jury trial commenced on July 12, and Mooney was found guilty of the theft charge but not guilty of the fraudulent practice charge. A sentencing hearing was held on September 12, and Mooney was sentenced to ten years incarceration and ordered to pay restitution "for attorney fees pursuant to section 815.9, not to exceed $3600, or shall reimburse the State of Iowa for court-appointed attorney's fees in the amount approved. Any costs not know at this time shall be assessed by the Clerk of Court at the time those costs are ascertained." Mooney appeals.[2]

II. Ineffective Assistance

We first turn to Mooney's claim his counsel was ineffective for failing to object to the admission of, and testimony regarding, the State's exhibits sixty-three and sixty-four—the faxes from Cub Cadet with the various serial numbers. Our analysis of an ineffective-assistance claim is de novo. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). To succeed on an ineffective-assistance-of-counsel claim, a defendant must show: "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa

[2] We have noticed a trend in the non-compliance with our rules of appellate procedure dealing with appendices. One common error that was present in this appendix was the violation of Iowa R. App. P. 6.905(7)(e), which mandates: "The omission of any transcript page(s) or portion of a transcript page shall be indicated by a set of three asterisks at the location of the appendix page where the matter has been omitted." These rules aid the court in its review of the issues, which ultimately benefits the litigants.

2008). "[W]e measure counsel's performance against the standard of a reasonably competent practitioner." *Id.* In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy. *Fullenwider v*. *State*, 674 N.W.2d 73, 75 (Iowa 2004). If the defendant requests the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction relief proceeding, regardless of the court's view of the potential viability of the claim. *Id.* The record before us on direct appeal is sufficient to address the issue.

Mooney claims his trial counsel was ineffective for failing to object to the admission of the faxes as they were inadmissible hearsay. Mooney claims the exhibits and the testimony surrounding the exhibits were offered to prove the truth of the matter asserted and the foundational elements to admit the exhibits as business records under the exception of Iowa Rule of Evidence 5.803(6) were not present. The State concedes the record does not show the foundational requirements of rule 5.803(6) were met when exhibits sixty-three and sixty-four were introduced. However, it claims this omission alone does not establish counsel breached a duty if counsel determined an objection was unnecessary as it did not impact the defense theory of the case. We agree with the State.

Mooney was adamant throughout his testimony he did not steal the ATVs nor did he know the ATVs he was working on for Lehenbauer were stolen. Naming several clients, he asserted he had a legitimate body-shop business, and

it was customary for clients to bring various types of vehicles to him, whole or disassembled, for repair and paint work. He claimed Lehenbauer was going to pay him $1000 to repair/repaint each ATV, but when he finished the work on one and was not paid, decided to sell that one. At no time during the trial was the issue whether the ATVs were stolen, such that an objection to the introduction of the exhibits identifying the serial numbers would have been warranted. We do not find counsel breached an essential duty.[3]

III. Right of Allocution

Mooney next claims the district court erred when it did not allow his trial counsel the opportunity to make a statement prior to sentencing. Our review of sentencing procedures is for an abuse of discretion. *State v*. *Craig*, 562 N.W.2d 633, 634 (Iowa 1997). Such abuse will be found only if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

A sentencing court is required under Iowa Rule of Criminal Procedure 2.23(3)(a) to ask the defendant whether he or she "has any legal cause to show why judgment should not be pronounced against" him or her. The rule continues on in paragraph (d) to require that prior to the court's rendition of judgment "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." Together these requirements are referred to as a defendant's right

[3] The State further argues had Mooney's attorney made an objection to the introduction of the exhibits, the State would have been able to lay the proper foundation through the owner of Greiner Implement. Because we find an objection was unnecessary, we do not address this response of the State.

to allocution. *State v*. *Nosa*, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007). The right to allocution is mandatory but may be met with substantial compliance. *State v*. *Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999).

At sentencing, the district court first asked the State if it "has anything on sentencing." The State urged the court to follow the presentence investigation report, recommending incarceration. The district court then directed its attention to Mooney's counsel who called Mooney to the stand. Mooney's counsel questioned him at length regarding his past criminal behavior, leaving a life of drugs behind several years earlier, his general maturation, and ultimately his request for probation. Mooney's counsel also called Mooney's mother, who testified as to her son's improved behavior, and to his helpfulness to herself and her ailing husband. Mooney's counsel then informed the court she had no further evidence. The court asked Mooney if there was anything else he would like to say, and Mooney responded by engaging in a lengthy dialog with the court. He again denied he stole the ATVs but stated he was taking "responsibility because what else can you do but do what you have to do and go on." He pleaded with the court to be given another chance, asserting he was "an honest person" and "did not do this," had been drug-free since 2005, was earning a living, and "not a danger to society." The court, prior to imposing sentence, stated, "the jury just simply didn't believe you."

Mooney claims "a defendant may benefit from having counsel who is not personally involved in the case to make the arguments regarding appropriate punishment." Counsel was given the opportunity to provide the court with reasons to mitigate punishment through the testimony of the witnesses called to

testify. Counsel was never denied the opportunity to present an argument in favor of probation rather than the sentence recommended by the State. We believe the district court, hearing the witnesses called by counsel as well as engaging in dialog with Mooney, substantially complied with the requirements of our rules of criminal procedure.

IV. Attorney Fees

Finally, Mooney contends the district court erred in ordering Mooney to pay reimbursement of attorney fees in an amount exceeding the fee limitation for a class C felony. We review challenges to an illegal sentence for correction of errors at law. *State v*. *Maxwell*, 743 N.W.2d 185, 190 (Iowa 2008). In his initial brief Mooney requests we vacate the portion of Mooney's sentence that requires payment of reimbursable attorney fees in excess of $1800 and remand to set the fee in an amount not to exceed $1800.[4]

The State concedes Mooney cannot be ordered to pay more than $1800 for attorney fees for a class C felony. *See Dudley*, 766 N.W.2d at 622 (holding all defendants, whether represented by the public defender or other court-appointed counsel, and whether acquitted or convicted, are entitled to the benefits of the statutory fee limitations); *see also* Iowa Admin. Code r.493-12.6(1)

[4] In his reply brief Mooney, agrees with the State that no district court has ordered any attorney fees be paid. He calls our attention to the Iowa Court Information System, which referred to the assessment of attorney fees as "Order Setting Attorney Fees." Because of this confusion, he requests we suspend any "assessment" of attorney fees by the clerk and we remand this case to the district court so the district court may issue a supplemental restitution order formally setting the amount of restitution due for attorney fees, not to exceed $1800. He also contends in his reply brief he has suffered harm because of this "assessment." We find the issue reframed in his reply brief claiming harm from the clerk's entrance of the receipt of a report from the public defender's office as an "order" is a new issue not raised in his initial brief and therefore not appropriate for review. *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992).

(providing the fee limit for a class C felony is $1800). Here, the district court incorrectly entered an order ordering Mooney repay attorney fees "pursuant to section 815.9, not to exceed $3600, or shall reimburse the State of Iowa for court-appointed attorney fees in the amount approved."

Until such time the district court orders Mooney to pay attorney fees in excess of applicable limits, his *Dudley* challenge is premature. *See* 766 N.W.2d at 622. From our review of the record, what Mooney claims were "orders" in excess of the statutory amount were not orders of the court, but rather filed reports of the public defender's office regarding attorney fee claims. Contrary to Mooney's contention, the district court has not "ordered" Mooney to pay fees in excess of $1800, as no such order has been entered. The district court has not approved the amounts entered by the clerk's office. Should Mooney be ordered to pay more than $1800 in fees, he may challenge the order at that time.

V. Conclusion

Mooney's counsel was not ineffective when she allowed testimony and admission of the State's exhibits. He was not denied his right of allocution at sentencing when his attorney did not make any statements independent of her questioning of Mooney and his mother. Lastly, while the district court did err in stating the amount of attorney fees could not exceed $3600, Mooney's *Dudley* argument is premature because he has not been ordered to pay any amount over the proper amount of $1800.

AFFIRMED.