IN THE COURT OF APPEALS OF IOWA

No. 2-551 / 11-1738
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS ALLEN SINES,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Crystal S. Cronk, District Associate Judge.

Thomas Sines alleges he received ineffective assistance of counsel during the sentencing hearing for his conviction of failure to comply with the sex offender registry, first offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Matthew Oetker, Assistant Attorney General, Larry Brock, County Attorney, and Shawn Showers, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Thomas Sines challenges the sentence imposed following his conviction for failure to comply with the sex offender registry. He alleges his counsel was ineffective for acquiescing in the State's sentencing recommendation rather than advocating for a lesser punishment. Because Sines is unable to show he was prejudiced by counsel's performance at the sentencing hearing, we affirm.

I. Background Facts and Proceedings

Sines is classified as a Tier III sex offender based on his 1997 conviction for sexual abuse in the third degree. Iowa Code § 692A.102 (2000). He is obligated to report any changes in his employment, residence, and any other "relevant information" to the county sheriff within five business days. *See* Iowa Code § 692A.104(5). "Relevant information" includes information about the vehicle operated by the offender. Iowa Code § 692A.101(23)(a)(20).

In the fall of 2010, because the transmission in his truck went out, Sines borrowed coworker Violet Triska's 1987 Dodge Dakota. He drove it mostly for work purposes for the first two weeks of October and continued using it sporadically throughout the month and into November. Triska reclaimed the vehicle around Thanksgiving, but allowed Sines to use it occasionally through December as well.

Washington County Deputy Sheriff Dan Dennler works with individuals required to register and maintain contact with the department. He meets with the offenders on a quarterly basis to verify relevant information. On October 4, 2010, the deputy saw Sines driving Triska's truck, and witnessed him driving the same

vehicle on October 22, 25, and 27. When Sines called to make his quarterly verification on October 28, Sines admitted to Deputy Dennler that he knew he needed to register the vehicle, but that he was busy and was unsure how many days he could wait before registration.

On January 25, 2011, the State filed a trial information alleging Sines failed to comply with the sex offender registry requirements in Iowa Code sections 692A.103, .104, and .111, an aggravated misdemeanor. Sines waived his right to a jury and proceeded to a bench trial on July 6, during which his employer and Deputy Dennler testified.

The district court found him guilty of registry violations and held a sentencing hearing on September 21, 2011. At the hearing, the State recommended Sines be sentenced to two days in jail with a suspended fine of $625. Sines's counsel informed the court that Sines contested the findings of guilt and would be appealing the decision but agreed the suggested sentence would be "appropriate" given his criminal history and the circumstances of the case. The district court accepted the State's recommendation, conditioning the suspended fine on Sines successfully completing a one-year court-supervised probationary period.

II. Scope of Review/Legal Standards

We review 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, Sines 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)).

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). Because we believe the record at hand is adequate to decide Sines's claim, we will address it on direct appeal. *See* 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").

III. Analysis

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." Sines does not contend that this rule creates a duty for an attorney to speak in mitigation in every case. But he asserts that in this case, his attorney "abdicated his responsibility" to argue for a more lenient sentence.

Sines takes issue with his attorney's statements to the court following the State's sentencing recommendation. The prosecution recommended a two-day jail term and a suspended fine based on Sines's criminal history, including a 1990 conviction for operating while intoxicated and his 1997 sexual abuse conviction. The court then engaged with defense counsel and his client:

> THE COURT: Mr. Powell, would you like to be heard on the matter of sentence and punishment?
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> MR. POWELL: Yes, Your Honor. Once again, knowing that Mr. Sines does intend to appeal and contest the Court's findings of guilt, we take no position and believe that the State's recommendation is an appropriate sentence, knowing that we're not really asking Mr. Sines to be sentenced to anything. But I think the Court understands that we believe the State's recommendation is appropriate given his criminal history and the circumstances of this case.
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> THE COURT: Mr. Sines, do you wish to make a statement in mitigation of punishment?
>
> MR. SINES: No.

The court went on to inform Sines that it considered all of the sentencing options and based its judgment on "that which would provide maximum opportunity for your rehabilitation, and at the same time protect the community from further offenses by you and others." The court imposed the two-day jail sentence and suspended fine recommended by the prosecution. The court told Sines it selected the sentence after considering his age, prior criminal record, employment, family circumstances, the nature of his offense, and his need for rehabilitation.

Sines argues that by acquiescing in the State's recommendation and stating he would "take no position" on his client's sentence, his counsel failed to act as a zealous advocate on his behalf. Sines distinguishes the present facts from *State v. Boggs*, 741 N.W.2d 492, 506–07 (Iowa 2007), wherein our supreme court held that because the defendant submitted a statement in support of mitigation, he could not show his counsel's failure to speak resulted in prejudice. Sines reasons that because he declined his right to allocution, the court received

no mitigating evidence, which created an obligation by counsel to advocate on his client's behalf.

The State argues that because defense counsel is not required to present mitigating evidence during sentencing in every case, and no authority suggests mitigating evidence would be required in this situation, counsel did not breach an essential duty. The State also notes the sentencing court was aware of Sines's work record and lack of recent criminal history, and because Sines points to no additional evidence that the court would have viewed as mitigating, counsel's failure to request a more lenient sentence did not prejudice Sines.

We do not find it necessary to decide the breach-of-duty issue in this appeal, because we conclude that Sines is unable to prove he was prejudiced by counsel's performance at sentencing. To establish prejudice, Sines 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).

Sines has not satisfied his burden to show that but for counsel's acquiescence in the State's recommendation, there existed a reasonable

probability that the sentencing court would have opted against imposing jail time and probation in favor of a fine only.[1] The sentencing court was aware of the timing of Sines's prior criminal convictions. The court also heard Sines's boss testify during the bench trial that Sines had been employed as an electrical contractor for around nine years. Sines does not identify any other circumstances particular to his case that would have weighed in favor of a lesser sentence.

We are not persuaded by Sines's effort to differentiate his case from *Boggs*. It is true that in *Boggs*, the defendant presented mitigating evidence to the sentencing court, contrasted with Sines who declined his right to allocution. *See Boggs*, 741 N.W.2d at 498. But in both cases, the defendants had the opportunity to urge the court to impose a lesser sentence. *See id.* at 508. Nothing in *Boggs* leads us to believe that prejudice would arise where a defendant 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).

On appeal, Sines suggests he "may not have recognized the importance of presenting mitigating evidence, but trial counsel should have." Even if Sines did not appreciate the value of speaking in mitigation, *Boggs* makes clear that when a defendant does not specifically claim mitigating evidence exists that was

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[1] Sines admits in his brief that the sentence imposed may seem "relatively lenient" but could have been more so. Sines's counsel also understood the sentencing court could have imposed a harsher sentence, and may have been less inclined to do so in light of counsel's acknowledgement that the State's recommendation was "appropriate."

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. *Boggs*, 741 N.W.2d at 508. Because Sines cites no specific favorable evidence to which counsel should have alerted the court, we do not believe Sines suffered prejudice from his counsel's performance at sentencing.

AFFIRMED.