IN THE COURT OF APPEALS OF IOWA

No. 3-1106 / 13-0463
Filed December 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LONISE BERNAE PORTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

A defendant contends her attorney was ineffective in failing to argue for withdrawal of two guilty pleas and in failing to argue the district court was bound to suspend her sentence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Heather R. Quick, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant County Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Lonise Porter pled guilty to (1) second-degree theft as a habitual offender and (2) forgery as a habitual offender. During the plea proceeding, the prosecutor stated that, "at the time of sentencing," there would be a "joint recommendation" for "a 15-year suspended sentence with supervised probation, applicable fines to be suspended for a composite recommendation of 15 years suspended." The district court accepted the plea, declined Porter's invitation to sentence her immediately, and ordered the preparation of a presentence investigation report. At a subsequent sentencing hearing, the prosecutor and defense attorney informed the court of the joint sentencing recommendation. The district court advised Porter the court was "not predisposed to do what has been stated here today . . . for any number of reasons, not the least of which" is Porter's "abysmal criminal record." The court sentenced her to concurrent prison terms not exceeding fifteen years, subject to mandatory minimums of three years.

On appeal, Porter contends her attorney was ineffective in "failing to make any effort to secure withdrawal of two involuntary guilty pleas and . . . failing to argue the district court had bound itself to suspending sentence to which the parties had agreed." *See* Iowa R. Crim. P. 2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."); *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009) ("[T]he failure to file a motion in arrest of judgment will not preclude the claim if the failure was the result of ineffective assistance of counsel."). To prevail, Porter

must show counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

We begin with Porter's assertion that "[t]he pleas themselves were involuntary because there was no understanding by [her], and no explanation to her, that she could be incarcerated as a habitual offender (15 years, 3 years minimum)." *See* Iowa R. Crim. P. 2.8(2)(b)(2) (requiring the court to inform a defendant of "[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered"). In fact, the district court engaged Porter in the following exchange:

> THE COURT: A habitual offender allows the following possible penalties. Imprisonment in the custody of the director of the Department for not to exceed 15 years. There would be a mandatory minimum in the event that you're sentenced to prison of at least three years. Do you understand that?
> THE DEFENDANT: Yes.

See Iowa Code §§ 902.8 (2011) ("A person sentenced as an habitual offender shall not be eligible for parole until the person has served the minimum sentence of confinement of three years."), 902.9(3) ("An habitual offender shall be confined for no more than fifteen years."). Because the court informed Porter of the applicable punishment, her attorney did not breach an essential duty in failing to challenge the plea as involuntary.

We turn to Porter's contention that the district court was bound to accept the joint recommendation for a suspended sentence and her attorney was ineffective in failing to challenge the court's choice of an alternate sentence. In

support of this proposition, Porter relies on rule 2.10, governing "[p]lea bargaining." That rule requires "the disclosure of the [plea] agreement in open court at the time the plea is offered." Iowa R. Crim. P. 2.10(2). The rule also sets forth options the court may pursue "if" or "when" the plea agreement is conditioned upon the court's concurrence in the charging or sentencing concession. Iowa R. Crim. P. 2.10(2), (3). In that context, the rule states:

> If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw defendant's plea, and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Iowa R. Crim. P. 2.10(4).

Porter concedes "[t]he record does not expressly indicate that the plea bargain was conditioned on the court's acceptance." This concession forecloses her argument that counsel was ineffective in "failing to argue that the district court had bound itself to suspending sentence to which the parties had agreed."

Even without Porter's concession, the record furnishes no basis for a finding that the court bound itself to the recommendation of a suspended sentence. The prosecutor took pains to couch the sentencing concession as a "recommendation" that would be forthcoming "at the time of sentencing." He said nothing to suggest the agreement was conditioned on the court's concurrence in the sentencing concession. The defense attorney agreed with the prosecutor's characterization. Most importantly, the district court judge did not express any intent to be bound by the recommendation.

Because the record does not support Porter's assertion that rule 2.10 was violated, Porter's attorney did not breach an essential duty in "failing to argue that the district court had bound itself to suspending sentence to which the parties had agreed."

We affirm Porter's judgment and sentences for second-degree theft and forgery as a habitual offender.

AFFIRMED.