IN THE COURT OF APPEALS OF IOWA

No. 2-104 / 11-1223
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY SPENCER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes (guilty plea) and Gary D. McKenrick (sentencing), Judges.

Gregory Spencer appeals the judgment and sentence entered following his guilty plea to second-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberly Shepherd, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Gregory Spencer appeals the judgment and sentence entered following his guilty plea to second-degree theft in violation of Iowa Code section 714.2(2) (2009). He alleges his attorney was ineffective in failing to move in arrest of judgment to challenge the guilty plea when the plea-taking court failed to adequately inform him of the trial rights he was waiving. Because we cannot tell from this record that but for counsel's omission, Spencer would have insisted on going to trial, we affirm his conviction and preserve his claim for possible postconviction proceedings.

I. Background Facts and Proceedings.

The Scott County Attorney accused Spencer of taking books valued at more than $4000 from the community college book store and selling them to a local pawnshop. Spencer reached a plea agreement with the State; in return for his admission to the theft, the county attorney recommended against incarceration. At the plea hearing, the following exchange occurred:

> THE COURT: Do you understand by pleading guilty, you give up your right to a jury trial?
> THE DEFENDANT: Yes.
> THE COURT: Because if you wanted a jury trial, you could have one, and you and Mr. Walker could help select the twelve jurors. You could choose not to testify, and no one could say anything that you weren't testifying. You could call witnesses on your own behalf and everything else, but you give up all of those rights by pleading guilty. Is that what you want to do, and do you understand that?
> THE DEFENDANT: Yes.

The court accepted Spencer's guilty plea and sentenced him to an indeterminate term of five years in prison and a fine of $750; the court suspended both the

prison term and the fine. The court placed Spencer on probation, and ordered him to complete programming at the residential correctional facility as a condition of his probation.

II. Scope and Standard of Review.

To challenge a guilty plea, a defendant must file a motion in arrest of judgment. Iowa R. Crim. P. 2.24(3). A defendant's failure to file a motion in arrest of judgment will not bar a challenge to the plea if the failure resulted from ineffective assistance of counsel. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We generally preserve claims of ineffective assistance for postconviction relief actions, but will consider their merits on direct appeal if an adequate record exists. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We review ineffective-assistance-of-counsel claims de novo. *Id*.

III. Analysis.

Ineffective-assistance-of-counsel claims have two elements: (1) counsel's breach of an essential duty and (2) resulting prejudice. *Straw*, 709 N.W.2d at 133. The defendant bears the burden to prove both elements by a preponderance of the evidence. *Id.*

Before accepting a guilty plea, the district court must follow the blueprint established in Iowa Rule of Criminal Procedure 2.8(2)(*b*). The court must address the defendant personally in open court and ensure that he understands the following information:

> (1) The nature of the charge to which the plea is offered.
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
> (4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(*b*). Appellate courts require substantial compliance with this rule. *Straw*, 709 N.W.2d at 134.

Spencer alleges the district court failed to substantially comply with rule 2.8(2)(*b*) before accepting his guilty plea and, therefore, he did not knowingly and voluntarily enter his plea. As a result, he argues counsel had a duty to file a motion in arrest of judgment and failure to do so was ineffective assistance.[1] The State argues that even assuming counsel was constitutionally remiss in handling the guilty plea proceeding, Spencer cannot show he was prejudiced as a result.

To satisfy the prejudice requirement, the defendant must show a reasonable probability exists that, but for counsel's error, the defendant would not have pleaded guilty, but would have insisted on going to trial. *Id.* at 138 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)). The record before us lacks any evidence indicating that had the

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[1] While we question whether the district court complied with Iowa Rule of Criminal Procedure 2.8(2)(*d*) by ensuring the defendant understood the consequences of failing to file a motion in arrest of judgment *see State v. Loye*, 670 N.W.2d 141, 149 (Iowa 2003), the defendant does not challenge that aspect of the plea colloquy. Accordingly, we analyze the question under the ineffective assistance rubric argued by counsel.

court engaged in the full rule 2.8(2)(*b)* colloquy, Spencer would not have pleaded guilty and instead would have opted to stand trial.

Spencer had an incentive to enter a guilty plea; he received a favorable plea agreement from the State. Despite the fact that Spencer was on probation for another theft at the time of the hearing, the State agreed to recommend that he not receive a prison sentence on the current charge of second-degree theft. In his appellate brief, Spencer recites the standard for demonstrating prejudice in the guilty plea context. But he does not outright allege that had the district court been more specific about the rights he was foregoing by entering the guilty plea, he would have insisted on going to trial. Our supreme court has held that a "cursory claim of prejudice" is not a sufficient assertion to satisfy the standard in *Hill*. *See State v. Meyers*, 653 N.W.2d 574, 579 (Iowa 2002) (holding Meyer's perfunctory claim that she "was ready to insist on going to trial" did not prove prejudice).

Relying on *Meyers*, the State argues that because Spencer does not provide a specific explanation of why he would have gone to trial, we should reject his ineffective assistance claim on direct appeal. While this argument is tempting, we note that the procedural posture was different in *Meyers* than in the instant case. Meyers was charged with first-degree murder, and entered a plea of guilty to second-degree murder. *Meyers*, 653 N.W.2d at 576. She filed a motion in arrest of judgment, which the district court denied. *Id*. Meyers had an opportunity to make a record in the district court regarding prejudice, but fell short in doing so. Spencer has not had the same opportunity. Accordingly, we

preserve his claim of ineffective assistance for possible postconviction proceedings. *See Straw*, 709 N.W.2d at 138 ("[I]t is abundantly clear that most claims of ineffective assistance of counsel in the context of a guilty plea will require a record more substantial than the one now before us.").

AFFIRMED.