

IN THE COURT OF APPEALS OF IOWA

No. 2-511 / 11-1816
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY VIRGIL AXIOTIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Randy Axiotis appeals his convictions and sentencing for unlawful possession of a prescription drug and second-degree harassment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

Randy Axiotis appeals his convictions and sentencing for unlawful possession of a prescription drug and second-degree harassment. He argues that his trial counsel was ineffective for failing to object to the State's breach of the plea agreement. We find the record insufficient to reach this issue and preserve his argument for postconviction proceedings. He also argues that the district court erred in failing to state specific reasons for imposing a consecutive sentence for a conviction of domestic abuse assault. Because Axiotis failed to appeal his conviction of domestic abuse assault, we have no jurisdiction to decide that issue.

I. Background Facts and Proceedings

In June 2011, Axiotis was charged by trial information with unlawful possession of a prescription drug, a serious misdemeanor, in violation of Iowa Code section 155A.21(1) (2011). Also in June 2011 but in a separate trial information, Axiotis was charged with domestic abuse assault resulting in injury, an aggravated misdemeanor, in violation of Iowa Code section 708.2A(3)(b). Finally, in October of 2011, he was charged by trial information with the crime of harassment in the first degree, an aggravated misdemeanor, in violation of Iowa Code sections 708.7(1) and 708.7(2). All three separately docketed matters were set for acceptance of written plea agreements and sentencing on November 1, 2011.

In exchange for amending the harassment charge to the lesser-included offense of harassment in the second degree, a serious misdemeanor, Axiotis

entered an *Alford* plea¹ to the charges of domestic abuse assault and harassment in the second degree. He also pleaded guilty to the charge of unlawful possession. The State agreed to recommend concurrent sentences of thirty days in jail with credit for time served on each serious misdemeanor and 180 days in jail with all but seven of the days suspended, with two years of probation for the aggravated misdemeanor. At the plea and sentencing hearing, the court accepted Axiotis's pleas and granted his request to be sentenced immediately. The State recommended the sentences as per the plea agreement, then immediately recited Axiotis's entire criminal history, including more than twenty violations committed since 1987.

The court sentenced Axiotis to six months in the county jail and a fine of \$315 for each serious misdemeanor, to be run concurrently. The court next sentenced Axiotis to a two-year term of incarceration on the aggravated misdemeanor domestic abuse assault conviction, suspending that sentence and placing Axiotis on probation for two years. The court ordered this sentence to run consecutive to the two serious misdemeanor sentences.

Axiotis timely appealed his convictions for harassment in the second degree and possession of a prescription drug. However, he did not file a notice of appeal for his conviction of domestic abuse assault resulting in injury.

¹ In the case of *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), the United States Supreme court recognized a plea where the defendant may "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

II. Ineffective Assistance of Counsel

Axiotis argues that his counsel was ineffective for failing to object to a breach of the plea agreement by the State. We review ineffective-assistance-of-counsel claims de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Ordinarily, postconviction proceedings are the best forum for resolving ineffective-assistance-of-counsel claims in order to allow counsel the opportunity for a full evidentiary hearing to respond to the defendant's charges. *State v. Johnson*, 445 N.W.2d 337, 339 (Iowa 1989). We will consider such claims on direct appeal if the record is adequate. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). If we determine the record is inadequate, we must preserve the claim for postconviction relief proceedings, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

A defendant's prior criminal history is certainly relevant to a sentencing court. See generally Iowa Code § 901.5 (requiring a judge examine "all pertinent information" before sentencing, specifically including a presentence investigation report containing criminal history). As the three cases proceeded to immediate sentencing, there was no presentence investigation on which the court could rely to discover Axiotis's prior criminal record. On the record before us, it appears that the prosecutor volunteered criminal history information that went beyond the information necessary to communicate the plea agreement to the court. That criminal history information seemed to weigh significantly on the trial court's sentencing decision, which varied substantially from the plea agreement. It is unclear, however, whether in those circumstances when there is no presentence

investigation report, the court had a custom or requirement that the prosecutor recite a defendant's criminal history. It is further unclear whether defense counsel knew at the time of negotiating the plea that the court would thus be informed of Axiotis's criminal record, or had any other reason not to object. Accordingly, we find that the record in this case is insufficient to review Axiotis's claim that the State breached the plea agreement by providing his prior criminal history to the court, or that his attorney was ineffective for failing to object. Therefore, we preserve this claim for postconviction relief proceedings.

III. Consecutive Sentencing

Next, Axiotis claims the district court abused its discretion in ordering his sentence for domestic abuse assault to run consecutively to his sentences for harassment and possession of a prescription drug. However, he did not appeal his conviction for domestic abuse assault resulting in injury.

The jurisdiction of the court of appeals with respect to actions and parties is limited to those matters for which an appeal or review proceeding properly has been brought before the supreme court, and for which the supreme court pursuant to section 602.4102 has entered an order transferring the matter to the court of appeals.

Iowa Code § 602.5103(3). As Axiotis failed to file a notice of appeal in the case that he now challenges, we have no jurisdiction to decide the issue of whether the sentence was proper or not. See *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009) ("A failure to file a timely notice of appeal leaves us without subject matter jurisdiction to hear the appeal."); *State v. Birchall*, 150 N.W.2d 715, 716 (Iowa 1967) (finding the court did not have jurisdiction to hear

the appeal where the defendant attempted to file a notice of appeal more than sixty days after the final judgment). Therefore, we do not reach this issue.

AFFIRMED.