IN THE COURT OF APPEALS OF IOWA

No. 3-171 / 11-1511
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID RONNELLE JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, District Associate Judge.

David Jones appeals from his sentence following his guilty plea to fourth-degree theft. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Kevin Hathaway, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

David Jones appeals his sentence following a guilty plea to fourth-degree theft. He contends his trial counsel was ineffective in failing to request that the sentencing hearing be reported or that the reasons for the sentence be included in the order. Because Jones cannot affirmatively show he was prejudiced by any failure of counsel, we affirm.

I. Background Facts and Proceedings.

Jones was arrested after a Sears loss prevention employee observed him and Beverly Tarter concealing merchandise valued at $288.98 and attempting to leave the store without paying. On May 23, 2011, Jones was charged with fourth-degree theft and initially pleaded not guilty.

Jones entered a written guilty plea to fourth-degree theft on August 26, 2011. He waived reporting of the plea proceedings. Following a September 9, 2011 sentencing hearing, which was also unreported, Jones was sentenced to 180 days in jail. He appealed on September 12, 2011.

On January 30, 2012, our supreme court ordered Jones's appellate counsel to file a proof brief with the supreme court or a statement of evidence or proceedings with the district court pursuant to Iowa Rule of Appellate Procedure. 6.806.[1] Instead, Jones's appellate counsel filed a "Motion to Recreate the

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[1] This rule states:

> (1) *Statement of the evidence or proceedings.* If no report of the evidence or proceedings at a hearing or trial was made or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be filed with the clerk of the district court and served on the appellee within 20 days after the filing of the notice of

Record of Sentencing" in the district court, asserting she was not part of the sentencing proceedings and asking the parties and the district court to prepare a statement or stipulation as to what occurred at the sentencing hearing. The district court responded by filing a statement with our supreme court, which indicated the judge had no "specific recollection" of the case, but set forth her general sentencing practices. Jones's trial counsel filed a statement in the district court as to his specific recollections of the sentencing hearing. While the statement purported to be a stipulated recollection of the parties, only Jones's trial counsel signed it.

On August 1, 2012, our supreme court entered an order finding Jones's appellate counsel's failed to comply with rule 6.806. Due to the noncompliance, the court held that the parties could not use the statements of the judge or trial counsel filed in February 2012. The court again ordered Jones's appellate counsel to file a proof brief or statement of evidence or proceedings within twenty-one days. On August 29, 2012, Jones's appellate counsel filed a statement of record at sentencing, setting out what trial counsel and Jones recalled from the sentencing hearing. The State filed its response on September

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> appeal if the evidence or proceeding was not reported, or within 10 days after the appellant discovers a transcript of reported evidence or a proceeding is unavailable.
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> (2) *Objections to statement*. The appellee may file with the clerk of the district court and serve on the appellant objections or proposed amendments to the statement within 10 days after service of the appellant's statement.
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> (3) *Approval of statement by district court*. The statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval. The statement as settled and approved shall be filed with the clerk of the district court and the clerk of the supreme court.

Iowa R. App. P. 6.806.

11, 2012, indicating the assistant county attorney had no independent recollection of the proceedings. The State did not object to Jones's statement. On September 13, 2012, the district court filed a settlement and approval order.

Jones raises one issue on appeal. He contends his trial counsel was ineffective in failing to request that the sentencing hearing be reported or that the reasons for the sentence be included in the order to facilitate appellate review.

II. Scope and Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006). While such claims are typically preserved for postconviction relief proceedings to allow trial counsel to defend against the charge, we depart from this preference in rare cases where the record is adequate to evaluate the claim on direct appeal. *Id.* at 240.

III. Analysis.

In order to succeed on a claim of ineffective assistance of counsel, Jones must prove by a preponderance of the evidence that counsel failed to perform an essential duty, and prejudice resulted. *See id.* We need not determine whether trial counsel's performance was deficient before examining the prejudice component of this test. *Id.* In order to satisfy the prejudice requirement, a defendant must show there is "a reasonable probability, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008).

Jones's claims that his trial counsel was ineffective involve the failure to request the sentencing hearing be reported or to have the reasons for the

sentence included in the sentencing order. Jones argues there is no strategy in not ensuring a court reporter makes a verbatim record of the proceedings and not ensuring the district court notes the reasons for the sentence in the sentencing order. However, it is not enough that Jones show counsel failed to perform an essential duty. He must also show he was prejudiced by this failure.

Jones alleges he was prejudiced because the appellate court has no way to review the reasons his sentence was imposed. *If* the court failed to state its reasons or *if* its reasons for the sentence were inadequate, the lack of record impedes our review. It is not enough that Jones shows "the error 'conceivably could have influenced the outcome'" of the proceeding. *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012) (citation omitted). "[T]he effect must be affirmatively proven by a showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (citation omitted). In other words, Jones must show that had the proceedings been reported and the reasons for the sentence stated in the sentencing order, this court would have found the district court abused its discretion in sentencing him. Jones can only speculate that the court committed error. This is insufficient to affirmatively establish prejudice.

Because Jones has failed to establish the prejudice prong of the ineffective-assistance-of-counsel test, we affirm.

AFFIRMED.