IN THE COURT OF APPEALS OF IOWA

No. 3-299 / 12-1166
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONOVAN SCOTT RASMUSSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Donavan Rasmussen seeks to set aside his guilty pleas. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Janet Lyness, County Attorney, and Jude Pannell, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Donavan Rasmussen seeks to set aside his guilty pleas to two counts of third-offense operating while intoxicated (OWI). The plea agreement reached with the State was that the defendant would plead guilty to each count and the State would recommend on each count a five-year term, with all but thirty days being suspended, and that the thirty-day jail periods would run consecutively. On appeal, Rasmussen contends the plea agreement called for a sentence that could not have been imposed.[1]

Rasmussen does not contest that the district court clearly set out the maximum and minimum punishments, stated it would not be bound by the plea agreement recommendation as to sentence, and entered a sentence which was not illegal. Rasmussen did not file a motion in arrest of judgment and, consequently, his claim must be raised as one of ineffective assistance of counsel. *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006) (concluding that where district court sufficiently discharged its duty under Iowa Rule of Criminal Procedure 2.8(2), the defendant's failure to file a motion in arrest of judgment bars direct appeal of his conviction).

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[1] Rasmussen argues that the plea agreement proposed the prison portion of the sentence run concurrently, but the jail portion of the sentence run consecutively, and there is no basis upon which the court could have ordered only part of the sentence to run consecutively. He contends that he was thus misled as to the penal consequences of the plea and his guilty pleas were not made voluntarily, knowingly, and intelligently. Although the jail sentences could not have been run consecutive, there is no requirement that the mittimus for each jail sentence be issued to begin at the same time. In fact, it is quite common for issuance of a mittimus to be delayed. Although not a suggested practice, the essence of the parties' agreement could have been effectuated by delaying the mittimus on the second case to begin thirty days after mittimus was issued on the first case.

To establish a claim of ineffective assistance of counsel, Rasmussen must demonstrate his trial counsel's performance was constitutionally deficient and prejudice resulted. *See id.* at 133. Rasmussen offers that "[o]n the question of prejudice, [he] can show it if it is necessary." It is necessary, and he has not done so. We therefore affirm.

AFFIRMED.