IN THE COURT OF APPEALS OF IOWA

No. 3-502 / 12-0959
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN CAINE CONARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Ryan Conard appeals from his convictions for theft in the second degree, forgery, identity theft, and driving while license was denied or revoked. **AFFIRMED.**

Thomas A. Hurd, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Jim Ward, Assistant County Attorney, for appellee.

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

DANILSON, J.

Ryan Conard appeals from his convictions for theft in the second degree, forgery, identity theft, and driving while license was denied or revoked. On appeal, he maintains that he received ineffective assistance of counsel at trial. He asks that we reverse his convictions and remand to the district court. We conclude Conard's counsel did not provide ineffective assistance at trial, and we affirm.

I. Background Facts.

In January 2012, Conard was charged with driving while his license was barred or revoked. Later the same month the State charged Conard with second-degree theft for stealing a vehicle, a "D" felony, for a separate incident. On March 1, Conard received a plea offer from the State, which encompassed both charges, and stated he would consider it. On March 22, 2012, the State filed an amended trial information, which added a habitual offender sentencing enhancement to the second-degree theft charge. The next day the State filed forgery and identity theft charges against Conard for a third incident. The same day, Conard agreed to enter an *Alford* plea[1] to the second-degree theft charge and to plead guilty to each of the other three offenses he was charged with. As part of the agreement, the State consented to dismiss the habitual-offender enhancement. At the sentencing hearing on May 9, 2012, Conard requested the court grant his motion in arrest of judgment. He maintained that the addition of the habitual-offender sentencing enhancement scared him into pleading guilty

[1] *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

and that he felt "forced into it" since the amendment happened after depositions had been taken. The court rejected Conard's request to withdraw his plea, noting he was no stranger to the system and had "sufficient time and discussion that day of the plea and . . . clearly expressed a complete understanding of what his options were." The court then sentenced Conard. He appeals.

II. Standard of Review.

A defendant may raise an ineffective-assistance claim on direct appeal if he has reasonable grounds to believe the record is adequate for us to address the claim on direct appeal. *State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006). If we determine the record is adequate, we may decide the claim. *Id*. We review claims for ineffective assistance of counsel de novo. *Id*.

III. Discussion.

Conard asserts that counsel provided ineffective assistance by failing to object to the State's amendment of the trial information three days prior to trial. He contends that, had counsel objected to the amendment, the district court would have prevented the sentencing enhancement from being added. He further contends that it was the impermissible enhancement that induced him to plead guilty. The State acknowledges that the record on appeal is adequate to address Conard's claim of ineffective assistance of counsel. We agree.

To succeed on his claim, Conard must show by a preponderance of the evidence that (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To prove that counsel failed to perform an essential duty, Conard must show "counsel's

representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In doing so, he must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Because he pled guilty, in order to show that prejudice resulted, Conard must prove that but for counsel's breach of duty, he would have elected to stand trial rather than accept the plea agreement. *See State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009). We can affirm if either element is absent and need not engage in both prongs of analysis if one is lacking. *See Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010).

In this case counsel did not fail to perform an essential duty if the district court would have allowed the State to amend the trial information over his objection. *See State v. Willis*, 696 N.W.2d 20, 24 (Iowa 2005) (holding counsel was not ineffective for failing to raise an issue that has no merit). The court may allow the State to amend the trial information, either before or during trial, so long as no "wholly new and different offense is charged" and the "substantial rights of the defendant" are not prejudiced by the amendment. Iowa R. Crim. P. 2.4(8), 2.5(5); *see State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997) (interpreting rule 2.4(8) to require a two-part test).

Adding the habitual offender enhancement does not charge "a wholly new and different offense." *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000). "When the State alleges that a defendant is a habitual offender, the State is not charging a separate offense. This is because habitual-offender statutes do not

charge a separate offense; they only provide for enhanced punishment on the current offense." *Id.* (citation omitted).

The question is whether the district court would have prevented the State's amendment to the trial information because it prejudiced Conard's substantial rights. "An amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." *Maghee*, 573 N.W.2d at 6. Conard contends his substantial rights were "prejudiced by an amendment of the trial information on the eve of trial." He claims that the late amendment prevented him from being informed of the charges against him and, as a result, undercut his ability to "investigate new allegations, conduct depositions of additional witnesses, file any discovery, or prepare for trial."

In spite of his claims, allowing the State to amend the trial information to include the sentencing enhancement did not necessitate that Conard change his trial strategy in response. With or without the amendment, Conard's trial strategy would have included denying his participation in and attempting to create a reasonable doubt of his guilt in regards to the charges against him. The State's amendment to the trial information did not affect those charges in any way. *See Woody*, 613 N.W.2d at 217. Furthermore, in this case, the charges and the sentencing would have been adjudicated in a bifurcated trial. *See* Iowa R. Crim. P. 2.19(9)[2]; see *also State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005)

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[2] The rule states:

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one

("When a defendant faces a charge that imposes an enhanced penalty for prior convictions, our law, in turn, imposes a two-stage trial."). The first trial would have dealt solely with the primary offenses he had been originally charged with. *See* Iowa R. Crim. P. 2.6(5); *see also Kukowski*, 704 N.W.2d at 691. The jury would not have learned about the amended sentencing enhancement unless it convicted him of the charges in the initial trial information. *See* Iowa R. Crim. P. 2.6(5) ("A supplemental indictment shall be prepared for the purpose of trial of the facts of the current offense only, . . . it shall make no mention, directly or indirectly, of the allegation of the prior conviction[s], and shall be the only indictment read or otherwise presented to the jury prior to conviction of the current offense."). We also note that Conard does not contend he was unaware of his two prior felony convictions nor does he contend that he needed additional time to challenge the veracity of the alleged prior convictions.

In a very recent decision, our supreme court, in *State v. Brothern*, ___ N.W.2d ___, 2013 WL 2450610, *9 (Iowa 2013), concluded that a defendant may have a claim of ineffective assistance of counsel where counsel did not object to the State's amendment of a trial information, made after the close of evidence,

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> or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. *If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted*. . . . If the offender is found by the jury to be the person previously convicted, or if the offender acknowledged being such person, the offender shall be sentenced as prescribed in the Code.

(Emphasis added.)

adding a habitual offender enhancement, as it may have affected the defendant's plea strategy and his substantial rights. Significantly and unlike the facts in *Brothern*, the State's amendment adding the habitual offender enhancement to Conard's trial information was not during the trial. There is also no record that Conard sought a continuance for additional time to prepare or that any continuance sought was denied. A continuance is the "traditionally appropriate remedy for a defendant's claim of surprise." *State v. Brothern*, ___ N.W.2d ___, 2013 WL 2450610, *6 (Iowa 2013) (quoting *State v. Maghee*, 573 N.W.2d 1, 6 (Iowa 1997)). Here, Conard had notice prior to trial and had sufficient time, albeit three days, to either determine his plea strategy and make an informed plea, seek a continuance of the trial, or proceed to trial. For the same reasons, we decline to conclude Conard's constitutional rights were offended.

Because the State's amendment to the trial information neither charged a wholly new and different offense nor prejudiced the substantial rights of the defendant, any objection to the State's amendment by counsel would have been meritless and overruled by the district court. Conard's attorney had "no duty to pursue a meritless issue." *See State v. Utter,* 803 N.W.2d 647, 652 (Iowa 2011). Since Conard's trial attorney did not breach any essential duty, we need not address the prejudice element of ineffective assistance. *See Everett*, 789 N.W.2d at 159. We affirm.

AFFIRMED.