IN THE COURT OF APPEALS OF IOWA

No. 7-660 / 07-0308
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VALERIE RAE KRAFKA,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals her guilty pleas and sentence on two counts of felonious misconduct in office. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Cook, Parrish, Gentry & Fisher, L.L.P., for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John Sarcone, County Attorney, and George Karnas, Justin Allen and Jaki Livingston, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Miller, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SCHECHTMAN, S.J.

I. Background Facts & Proceedings

Valerie Krafka was charged with three counts of felonious misconduct in office, in violation of Iowa Code sections 721.1(1) and 721.1(3) (2005), and three counts of identity theft, in violation of sections 715A.8(2) and 715A.8(3). Krafka was employed as a driver's license clerk by the Iowa Department of Transportation. The State alleged Krafka had knowingly entered false data to issue driver's licenses to three separate persons.

On November 8, 2006, Krafka agreed to plead guilty to one count of felonious misconduct and two counts of identity theft. The court established Krafka was entering her plea freely, without any duress, threats or coercion. She was advised of the rights she was waiving by entering the guilty plea. The court informed her of the maximum and minimum punishments, including deferred judgments which carry a civil penalty equal to the minimum fine of $750 for a felony. A factual basis for the charge of felonious misconduct was established. The district court, however, determined a factual basis for the charges of identity theft was not established. The plea court refused to accept Krafka's pleas to identity theft, adjourned the plea hearing, and kept the record open.

The plea hearing was reconvened on December 7, 2006. Krafka agreed to plead guilty to two counts of felonious misconduct. In return, the State agreed to dismiss the other four counts and not resist a deferred judgment, pending review of the presentence investigation report (PSI). The court stated it would be "more than happy to start all over again," but Krafka stated she remembered the

discussion about her rights from the November hearing. In response to an inquiry, she acknowledged that she fully understood those rights. The court explained the maximum punishment, as it had changed, and acknowledged a minimum penalty. The court confirmed Krafka had previously established a factual basis for one count of felonious misconduct. A factual basis for the second count was completed. The court accepted Krafka's guilty plea to two counts of felonious conduct and set January 23, 2007, as the date for sentencing. Krafka was advised of her right to file a motion in arrest of judgment.

On the latter date, the court sentenced Krafka to a five-year prison term on each of the two counts, to run concurrently, and imposed minimum fines of $750 on each. The court suspended the sentences and fines, and placed Krafka on probation for period of two years, to include 250 hours of community service. Krafka's request for a deferred judgment was denied "because of the nature of the offense and your attitude since then." Krafka appeals, contending (1) denial of effective assistance of counsel, and (2) an abuse of discretion by the sentencing court.

II. Ineffective Assistance

Krafka asserts she received ineffective assistance of counsel during the guilty pleas and sentencing proceedings. We review constitutional claims, including ineffective assistance of counsel, de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). Krafka may, but is not required to, raise an ineffective assistance claim on her direct appeal if she has reasonable grounds to believe the record is adequate to address it. Iowa Code § 814.7(2).

Ordinarily, these claims are preserved for postconviction proceedings in order to allow full development of the facts surrounding the conduct of counsel. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). A lawyer should be allowed to counter the contentions when the lawyer's professional judgment is maligned. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Notwithstanding, after full perusal of the record herein, we conclude the record is adequate to resolve these claims on direct appeal, pursuant to section 814.7(3).

A. Krafka contends defense counsel should have filed a motion in arrest of judgment to challenge improprieties during the guilty plea proceedings. Failure to move in arrest of judgment does not bar a direct appeal of her convictions if that failure arose from ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

During the original guilty plea proceeding, the court explained the maximum and minimum punishment with Krafka, including a deferred judgment. At the outset of the continuation of the guilty plea proceeding, the court noted that the plea agreement was the dismissal of the remaining charges, and the State would not resist a deferred judgment. The court then reviewed the maximum punishment, because it had changed. The court remarked, "the minimum penalty is still the same as we talked about. It would still be a deferred judgment except on two counts instead of three."

Krafka claims the court's statement, "[i]t would still be a deferred judgment," caused confusion and led her to believe she would receive a deferred judgment if she pled guilty. Looking at the transcript as a whole, we determine it

is clear the court was discussing a deferred judgment as a possible minimum punishment. Otherwise, the court's specific statements regarding a possible maximum penalty, would serve no purpose. Also, at the inception, the court made it clear that the plea agreement was not binding on it, and "it is going to be up to the judge alone to decide what your sentence is going to be at a later time. Do you understand that?" Krafka replied, "Yes, I do, your Honor." Krafka did not receive ineffective assistance due to counsel's failure to challenge the guilty plea proceeding on this ground.

B. Krafka raises many other issues she asserts should have been raised in a motion in arrest of judgment. These included the court's alleged omissions to inform her that: (1) a criminal conviction or deferred judgment may affect a defendant's status under the federal immigration laws; (2) she would have compulsory process in securing witnesses to testify for her; and (3) the mandatory minimum fine provided by the statute defining the offense to which the plea is offered is $750, plus surcharge. *See* Iowa R. Crim. P. 2.8(2)(*b*); *State v. Straw*, 709 N.W.2d 128, 133-34 (Iowa 2006). Substantial compliance with the rule is required. *Straw*, 709 N.W.2d at 134.

In the context of guilty pleas, Krafka must prove (1) counsel failed to perform an essential duty, and (2) there is a reasonable probability that, but for counsel's omissions, she would not have pled guilty to the two charges, but would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); *State v. Myers*, 653 N.W.2d 574,

578 (Iowa 2002). We may address the prejudice prong of an ineffective assistance claim first. *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999).

Krafka claims prejudice because the plea court addressed the minimum punishment in the context of a deferred judgment, rather than as a class D felony; that informing her she "would be entitled to subpoena persons to testify on your behalf," without relating its compulsory nature, is defective; and, the court said nothing about federal immigration laws.

As to these alleged defects, the court referenced a civil penalty for a deferred judgment, which equates the minimum fine of $750 on each felony charge, and succinctly advised her of her subpoena power. Each of these constitute substantial compliance. As to the lack of the advisory federal immigration discourse, Iowa Rule of Civil Procedure 2.8(2)(*b*)(3), Krafka has shown no prejudice to her, or that the absence of that admonition would have caused her to not have proceeded with her guilty plea.

C. Krafka also contends that counsel at sentencing should have encouraged her to have addressed the court. She admits she was told by the sentencing court she had the right of allocution, but declined to do so. Though the importance of the right to allocution is recognized, *State v. Craig*, 562 N.W.2d 633, 636-37 (Iowa 1997), it is the defendant's choice. She made that choice, and counsel would have no duty to force her to do so.

Lastly, the appellant claims counsel should have objected to some letters attached to the PSI. We will address this subject more fully in our discussion relating to her allegations concerning an abuse of discretion at sentencing. An

objection, in any event, would have undoubtedly been overruled. *See State v. Hansen*, 344 N.W.2d 725, 731 (Iowa Ct. App. 1983) (noting a court has discretion to permit hearsay evidence at a sentencing hearing). Further, there is no reference by the court that the attached letters played any part in its decision ("[M]y judgment was that you did not deserve a deferred judgment because of the nature of the offense and your attitude since then."). Again, there was no prejudice.

The issue of ineffective assistance was primarily resolved on the grounds that the defendant has failed to prove, by a preponderance of the evidence, that absent ineffective assistance, she would not have pled guilty. This court further concludes that Krafka has failed to show, under these circumstances, that her counsel breached an essential duty. A deferred judgment was being recommended by the State. That was the defendant's focus, though understanding that it was the judge's sole decision to grant it. The defendant knew the minimum fine, as it matched the civil penalty assessed after a deferred judgment; there was no showing that the immigration laws affected this defendant; and a subpoena by it's nature compels a witness's appearance. Krafka disagrees with the court's choice to deny her a deferred judgment. The allegations of error arise from that decision, rather than the alleged failures of defense counsel.

III. Sentencing

Krafka claims the district court abused its discretion during sentencing. Our standard of review for defects in sentencing is correction of errors at law.

State v. Sailer, 587 N.W.2d 756, 758 (Iowa 1998). We will not reverse absent an abuse of discretion or some defect in the sentencing procedure. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Krafka asserts the court considered eight letters of reprimand she received while working for the Department of Transportation. These letters were attached to the PSI. Krafka contends these letters were hearsay and it was improper for the court to consider them at sentencing. Sentencing procedures are governed by different evidentiary rules than a trial. *Hansen*, 344 N.W.2d at 731. A court may consider hearsay evidence at sentencing. *Id.* Under section 901.5, the court may receive and examine "all pertinent information, including the presentence investigation report and victim impact statements, if any." As a practical consideration, a PSI contains an abundance of hearsay. It is manifest that a sentencing judge should not be constrained by rigid rules of evidence. *State v. Cole*, 168 N.W.2d 37, 40 (Iowa 1969).

Krafka also claims the district court improperly relied on only one factor, her failure to accept responsibility, in imposing sentence. *See State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994) (noting no single factor should be determinative). A defendant's lack of remorse is a highly pertinent factor to evaluate her need for rehabilitation and the likelihood of reoffending. *State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005). The record is clear, however, that the court considered other factors. The court stated it took into consideration defendant's age, lack of prior convictions, employment, family circumstances, nature of the offense, financial circumstances, need for rehabilitation, lack of

remorse, protection of the community and "other factors that are set forth in the presentence investigation of the court."

The court commented accordingly:

> I looked seriously at whether or not you should get a deferred judgment or suspended judgment in this case, and my judgment was that you did not deserve a deferred judgment both because of the nature of the offense and your attitude since then.
> You have done nothing to show me that you understand what you did was wrong, and you take responsibility for. I'm not pleased with that and it's reflected in my sentence.

Again, Krafka's lack of remorse is not the sole factor considered by the court in denying her request for a deferred judgment. The nature of the offense was also an important factor, as the court had noted, "the defendant was a public employee and violated the trust of the public in this particular crime."

We find no abuse of discretion in the sentencing in this case.

We affirm Krafka's guilty pleas and sentence.

AFFIRMED.