IN THE COURT OF APPEALS OF IOWA

No. 8-1036 / 08-0460
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY DAVID BERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Michael R. Stewart, District Associate Judge.

Jeffrey Berry appeals the judgment and sentence following his conviction for indecent contact with a child. **JUDGMENT AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael W. Mahaffey, County Attorney, and Rebecca L. Petig, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Jeffrey Berry lived with his son, daughter-in-law, and two grandsons. He granted permission to an eight-year-old girl, who was a friend of his grandson, to spend the night at his house. When she arrived, Berry was the only person home. The child claimed that she set her things down in the bedroom of one of Berry's grandsons and fell onto the bed. She claims that Berry then came over to her and tickled her on her tummy, then between her legs, then on her toes. She described that Berry tickled her on the "place where she goes pee" but explained that she never took her clothes off.

The child then went into the living room. She sat on the couch to watch television, and Berry lay down on the couch. She stated that Berry put his head on her lap and rubbed his hands between her legs. She left the room to call her mom, but no one answered. Soon after, Berry's grandson came home, and the two children began to play together. She remained at Berry's residence the rest of the night with no further problems.

Berry admitted that he may have touched the child's legs, but insisted that any inappropriate touching was purely accidental. The child had a history of making false allegations, including telling people that a man pointed a gun at her and making a prior report of sexually inappropriate behavior that was unfounded.[1]

[1] The child's mother stated that the child's demeanor in reporting the incident with Berry was significantly different from when she falsely reported other incidents.

Berry was charged with indecent contact with a child in violation of Iowa Code section 709.12 (2005). He filed a written waiver of his right to a jury trial and waived the right to a jury trial in open court. He proceeded to a bench trial on a stipulated record, and the district court found Berry guilty. On February 22, 2008, the district court sentenced Berry to two years in prison but suspended the sentence and placed Berry on one year of probation. On March 14, 2008, the district court entered an amended judgment entry imposing the mandatory special sentence of ten years of parole pursuant to Iowa Code section 903B.2.

Berry appeals from the district court's finding, arguing: (1) his trial counsel was ineffective in failing to ensure a knowing and voluntary waiver of Berry's state and federal constitutional rights to present a defense and to confront witnesses and for allowing the case to be submitted without any meaningful adversarial testing; and (2) the district court erred in imposing a special sentence without setting a new sentencing hearing.

II. Standard of Review

We review Berry's claim regarding his Sixth Amendment right to reasonably effective assistance of counsel de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Generally, we review sentencing procedures for an abuse of discretion. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). We review Berry's claim regarding the legality of his sentence for errors at law. *State v. Davis*, 544 N.W.2d 453, 455 (Iowa1996).

III. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance, Berry must prove that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v.*

Simmons, 714 N.W.2d 264, 276 (Iowa 2006). In order to establish the first element of the test, Berry must show that his counsel's actions were not "reasonably competent." *Id.* There is a strong presumption that counsel performed in a competent manner. *Id.* To satisfy the second element of the test, Berry must show that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Ordinarily, we preserve ineffective assistance claims for postconviction relief to allow counsel to more fully develop the facts relating to the disputed conduct and to respond to defendant's claims. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). The trial record is rarely sufficient to resolve ineffective assistance claims. *Id.*

A. Waiver of Constitutional Rights

Berry asserts that his counsel was ineffective for failing to ensure a knowing and voluntary waiver of Berry's constitutional rights to present a defense and to confront witnesses. He contends that his counsel should have insisted upon an in-court colloquy, such as that required by a defendant entering a guilty plea. *See State v. Sisco*, 169 N.W.2d 542, __ 551 (Iowa 1969) (acknowledging the applicability to state guilty plea proceedings of federal due process standards delineated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). However, the Iowa Supreme Court has declined to require such procedures in a stipulated bench trial, recognizing that such a trial is not the same as a guilty plea proceeding. *State v. Sayre*, 566

N.W.2d 193, 195-96 (Iowa 1997). The supreme court established the following requirements for a stipulated bench trial:

> [A] trial court must: (1) verify that the defendant has waived his right to a jury trial in accordance with Iowa Rule of Criminal Procedure [2.17(1)]; (2) confirm the extent of the factual record to which the parties are stipulating; and (3) "find the facts specially and on the record," separately state its conclusion of law, and render an appropriate verdict as required by Iowa Rule of Criminal Procedure [2.17(2)].

Id. Berry acknowledges that the district court complied with this procedure, so he cannot show that his counsel failed to perform an essential duty.

Berry contends that his counsel could have asked the district court to adopt a new rule applying *Boykin* standards to stipulated bench trials. Though such a colloquy may be good practice, current law does not require these procedures; therefore, we cannot find that counsel was ineffective for failing to insist on a colloquy.[2] We do not require defense counsel to be a "'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982). Because the district court followed the procedures described in *Sayre*, we cannot find Berry's counsel ineffective for failing to urge safeguards that have not been required by the supreme court.

B. Adversarial Testing

Berry also argues that his counsel was ineffective for agreeing to go to trial on a stipulated record and for thereby failing to subject the State's evidence

[2] We previously indicated that it is better to separate a colloquy related to a stipulated trial from the required colloquy for waiver of a jury trial. *See, e.g., State v. Taylor*, No. 06-1627 (Iowa Ct. App. Dec. 28, 2007).

to any meaningful adversarial testing. To support this claim, Berry must show that counsel failed to perform an essential duty by stipulating to the State's case. If he is able to demonstrate a "complete failure by counsel," the element of prejudice will be presumed. *State v. Boggs*, 741 N.W.2d 492, 507 (Iowa 2007).

The record contains at least a partial explanation by Berry's counsel of his decision to proceed with a trial on a stipulated record. A review of this conversation with the district court reveals that counsel hoped "to avoid a lot of unnecessary evidentiary complication in trying to sift out from all of this information what a jury should and shouldn't hear." Counsel listed some of the evidentiary problems, which included the difficulty of: (1) cross-examining the officer who talked to Berry; (2) redacting the video tape of Berry's interrogation; (3) cross-examining the alleged victim; and (4) presenting a prior false report by the alleged victim. Finally, counsel expressed his confidence "that the judge knows all the evidentiary rules and will make the appropriate decisions regarding the evidence."

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). Although defense counsel considered many factors relevant to the evidentiary issues, the record is inadequate to allow us to determine whether the waiver of cross-examination and objections at a bench trial was a failure to perform an essential duty. Because the record is not fully developed, we preserve for possible postconviction relief Berry's ineffective assistance claim alleging counsel's failure to test the State's case.

IV. Sentencing

Berry argues that the district court did not have jurisdiction to impose the special sentence and should not have done so without Berry's presence. Generally, a defendant has a right to personally address the court and make a statement in mitigation of punishment. *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001). However, this requirement is not applied to all sentencing proceedings. *State v. Cooley*, 691 N.W.2d 737, 740 (Iowa Ct. App. 2004). One exception states that a defendant need not be present at a sentencing hearing to reduce an illegal sentence. Iowa R. Crim. P. 2.27(3)(*b*). The Iowa Supreme Court expanded this exception, determining that a defendant need not attend a hearing to correct a sentence when the dispositions would not be significantly aided by the defendant's presence. *State v. Austin*, 585 N.W.2d 241, 245 (Iowa 1998). However, the supreme court has required a defendant's presence at proceedings imposing a new and different sentence. *State v. Johnson*, 222 N.W.2d 453, 458 (Iowa 1974).

The Iowa Court of Appeals recently considered a similar issue and held that "a defendant's presence is not required where a district court is correcting an existing sentence, so long as the disposition would not be aided by the defendant's presence and the modification does not make the sentence more onerous." *Cooley*, 691 N.W.2d at 741. The district court's amended judgment imposed an additional sentence of ten years of parole. Because this modification made Berry's sentence more onerous, his presence was required. Accordingly, the district court erred in imposing the mandatory sentence without setting a new sentencing hearing with Berry present.

Because we find error in the imposition of a more onerous sentence without Berry's presence, we need not reach Berry's argument that the district court lacked authority to exercise jurisdiction over sentencing issues.

JUDGMENT AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.