IN THE COURT OF APPEALS OF IOWA

No. 8-284 / 07-1507
Filed April 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW ALLEN GARLICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Thomas A. Renda, Judge.

Defendant appeals from a district court order revoking his deferred judgment. **AFFIRMED.**

Meegan M. Langmaid-Keller, Altoona, and J. Keith Rigg, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Baker, JJ.

BAKER, J.

Matthew Garlick appeals from a district court order revoking his deferred judgment and probation. We reject Garlick's arguments that the district court erred in finding the filing of new charges alone were sufficient to cause revocation and that the court erred in pronouncing sentencing without affording Garlick his right to allocution. We preserve Garlick's claim that his trial counsel rendered ineffective assistance for a possible postconviction proceeding.

I. Background and Facts

On November 8, 2006, Matthew Garlick was charged with third-degree burglary in violation of Iowa Code section 713.6A(1) (2005), one count of theft in the second degree and one count of theft in the third degree, in violation of sections 714.1 and 714.2(3), carrying a concealed weapon in violation of section 724.4(2), and possession of a controlled substance in violation of section 124.401(5). On December 14, 2006, he pleaded guilty to third-degree burglary, third-degree theft, and possession of marijuana. Pursuant to the plea agreement, the other charges were dismissed.

On January 29, 2007, Garlick was granted a deferred judgment and was placed on probation for two years. Conditions of the probation included an agreement to obey all laws and contact his probation officer, James Miedema, within twenty-four hours of any arrest or citation, and to be restricted to and obtain permission prior to leaving his county of residence, Jasper County. On May 5, 2007, Garlick received a speeding ticket in Polk County. After that incident, Miedema verbally instructed Garlick that he was not to be in Polk County during the late night/early evening hours without Miedema's permission.

On June 6, 2007, at 1:25 a.m., Garlick was involved in a motorcycle accident in West Des Moines, Iowa. His passenger, a seventeen-year-old girl, was killed. Garlick was charged with vehicular homicide.

Miedema filed a June 18, 2007 report of probation violations, alleging Garlick had violated rules of his probation due to the May 5, 2007 citation and the June 6, 2007 motorcycle accident, where Garlick was in Polk County during late night/early evening hours without prior permission. On August 1, 2007, a second report was filed, alleging that at the time of the accident Garlick had been operating a motorcycle in a reckless manner with willful disregard for the safety of others, and that Garlick had been charged with vehicular homicide.

On August 2, 2007, a probation revocation hearing was held. At the hearing, Miedema recommended Garlick's deferred judgment be revoked and he be given the maximum penalty for the offenses. The district court revoked Garlick's deferred judgment and probation and sentenced him to prison for a term of five years for the burglary conviction, two years for the theft conviction, and six months for the possession of a controlled substance conviction. The sentences were ordered to run concurrently. Garlick appeals.

II. Merits

Garlick contends (1) the district court erred in finding the filing of new charges alone were sufficient to cause revocation, (2) the court erred in pronouncing sentencing without affording Garlick his right to allocution, and (3) his trial counsel provided ineffective assistance because he failed to prepare for the revocation hearing and failed to request a continuance.

A. Grounds for Revocation

We review a district court's revocation decision for the correction of errors at law. Iowa R. App. P. 6.4. Probation cannot be revoked arbitrarily or capriciously. *State v. Hughes*, 200 N.W.2d 559, 562 (Iowa 1972). Due process requires "[t]he findings of a court revoking probation . . . show the factual basis for the revocation." *Id*.; *accord. State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994).

Garlick contends that the district court "merely found that riding a motorcycle at a high rate of speed is very dangerous" but never found that he was reckless or that recklessness caused the passenger's death. Therefore, he argues, the district court erroneously concluded that the vehicular homicide charge alone was sufficient grounds for revocation.

A court may consider pending charges in revocation hearings, and a conviction is not required before revocation may occur. *State v. Dolan*, 496 N.W.2d 278, 279-80 (Iowa Ct. App. 1992). Proof of the alleged violation must, however, be established by a preponderance of the evidence. *Id.* at 280. "[A] pending charge, absent some showing the defendant actually committed the charged act, is not a sufficient basis" for revocation. *Id.*

We agree with Garlick's contention that the vehicular homicide charge alone is an insufficient basis for revoking his probation. The State must show sufficient evidence in the record from which the district court could find, by a preponderance of evidence, that Garlick committed the new crime. *See id.* Therefore, we do not approve the district court's statement that "the fact that he has been charged with that is sufficient to revoke his probation."

The district court, however, also stated that it made its decision to revoke Garlick's deferred judgment and probation due to the seriousness and nature of Garlick's actions "after hearing all the testimony and the statements of the parties involved." The testimony and statements included the testimony of Officer William Jess, a police officer and accident reconstructionist with the City of West Des Moines. Jess estimated Garlick had been traveling between forty-five and seventy miles per hour in a twenty-five mile per hour zone. Jess testified that witnesses at the scene identified Garlick as the motorcycle driver and told him that Garlick had sped past them and performed a wheelie just prior to the accident. Jess further testified that he had spoken with a woman who had ridden on the motorcycle with Garlick earlier on the evening of the accident, and that Garlick had been speeding and performed a number of wheelies while she was a passenger. We conclude the record contains sufficient evidence from which the district court could find by a preponderance of the evidence that Garlick committed the crime. *See Dolan*, 496 N.W.2d at 280. The court did not err in considering the violation in revoking Garlick's probation and deferred judgment.

B. Right to Allocution

Garlick asserts the district court never gave him an opportunity to speak regarding his sentence. We review sentencing procedures for an abuse of discretion. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999) (citing *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997)). "Such abuse will be found only if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Because probation revocation is a civil proceeding, the rules of criminal procedure do not apply. *Lillibridge*, 519 N.W.2d at 83. The entry of sentence, however, is not part of the civil revocation proceeding but is the final judgment in a criminal case. *Id.* When a sentence is entered after the revocation of probation, therefore, the district court must comply with the rules of criminal procedure. *Id.*; *see also Duckworth*, 597 N.W.2d at 800-01 (noting a defendant's right to make a statement in mitigation of punishment applies when a sentence is entered after a probation revocation).

> A sentencing court is required under Iowa Rule of Criminal Procedure 2.23(3)(*a*) to ask the defendant whether he or she "has any legal cause to show why judgment should not be pronounced against" him or her. The rule continues on in paragraph (*d*) to require that prior to the court's rendition of judgment "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." Together these requirements are referred to as a defendant's right to allocution.

State v. Nosa, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007) (citing *Craig*, 562 N.W.2d at 635-37).

The opportunity to address the court does not have to be couched in the precise words of the statute. *State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968). The point of requiring a defendant be given a right to allocution is to allow the defendant an opportunity to identify any reasons for withholding judgment and to volunteer any information helpful to the defendant's cause. *Craig*, 562 N.W.2d at 635; *Patterson*, 161 N.W.2d 738. Therefore, as long as the district court provides the defendant with an opportunity to speak regarding his punishment, the court is in compliance with the rule. *See generally State v. Christensen*, 201 N.W.2d 457, 460 (Iowa 1972) (holding defendant was not

denied right of allocution where asked, "Is there anything you would like to say to the court before I pronounce sentence?"); *State v. Ludley*, 465 N.W.2d 912, 915 (Iowa Ct. App. 1990) (holding defendant was not denied right to allocution where court asked, "Any comments you want to make at all regarding this offense?"). *But see Duckworth*, 597 N.W.2d at 801 (holding defendant was denied right to allocution where the "record clearly shows the court made no effort to provide [defendant] with an opportunity to volunteer any information in mitigation of his sentence"); *Craig*, 562 N.W.2d at 636 (asking defendant where he was employed and how much he earned did not suggest that he could voice arguments in mitigation of his sentence and therefore did not afford him an opportunity to speak in mitigation of punishment); *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996) (asking defendant, "[A]re you ready to be sentenced at this time?" did not establish defendant was provided with requisite opportunity to speak to court concerning sentence). Trial judges should leave no room for doubt that a defendant has been given the opportunity to speak regarding punishment. *Craig*, 562 N.W.2d at 637.

Garlick contends he was never given an opportunity to speak regarding his ultimate sentence because the district court "received closing statements from counsel, found the violation of probation and immediately pronounced sentence." Prior to pronouncing sentence and after having heard the recommendation by the State, the court asked, "Does the defendant have any statement to make at this point in time?" Garlick's counsel then spoke on Garlick's behalf, citing numerous reasons that the appropriate sentence would be to allow Garlick to continue on probation. The court then proceeded to sentencing.

The record indicates the district court asked Garlick if he wished to say anything before sentence was pronounced. That question afforded Garlick the opportunity to point out reasons for withholding judgment and to volunteer any information helpful to his cause. Accordingly, Garlick was not denied his right to allocution.

C. Ineffective Assistance

Garlick contends his trial counsel was ineffective in failing to prepare for the revocation hearing and in failing to request a continuance. Because a criminal defendant's right to reasonably effective assistance of counsel is derived from the Sixth Amendment of the United States Constitution, we review ineffective assistance claims de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

To prevail on an ineffective assistance claim the defendant must show both failure to perform an essential duty and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 657, 668 (1984). Further, where "the surrounding circumstances ma[k]e it so unlikely that any lawyer could provide effective assistance," ineffectiveness is properly presumed. *Id.* at 661, 104 S. Ct. at 2048, 80 L. Ed. at 669. Under these circumstances, ineffective assistance is established without the showing of prejudice required by *Strickland.*

A second report of probation violations was filed on August 1, 2007, alleging that at the time of the accident Garlick had been operating a motorcycle in a reckless manner with willful disregard for the safety of others, and that Garlick had been charged with vehicular homicide. Garlick's probation revocation hearing was held on August 2, 2007. Garlick asserts that the second report alleged a "complex new criminal charge." He argues that his trial counsel failed to perform the essential duty of subjecting the State's evidence to any meaningful adversarial testing and that, given the complexity of the new allegations, his trial counsel should have requested a continuance rather than proceed to the revocation hearing with only one day's notice of the new allegations.

When an ineffective assistance claim is raised on direct appeal, "the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination" under postconviction relief procedures. Iowa Code § 814.7(3). Because the trial record is often inadequate to allow us to resolve the claim, we frequently preserve ineffective assistance claims for possible postconviction proceedings to enable a complete record to be developed and to give trial counsel an opportunity to explain his actions. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004); *State v. Martin*, 587 N.W.2d 606, 611 (Iowa Ct. App. 1998). Such is the case here. Further, to prevail on an ineffective assistance claim, the appellant must show prejudice. "When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (citing *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983)). The appellant "must state the specific ways in which counsel's

performance was inadequate and identify how competent representation probably would have changed the outcome." *Id.* (citations omitted). On this record we have nothing to review that would indicate that the result would have been different.

We therefore preserve for a possible postconviction proceeding Garlick's claim that his trial counsel rendered ineffective assistance in failing to prepare for the revocation hearing and in failing to request a continuance.

III. Conclusion

Because the record contains sufficient evidence from which the district court could find by a preponderance of the evidence that Garlick committed the crime, the district court did not err in revoking Garlick's probation after he was charged with vehicular homicide. Because the court asked Garlick if he wished to say anything before sentence was pronounced, he was not denied his right to allocution. We preserve Garlick's ineffective assistance claim for a possible postconviction proceeding.

AFFIRMED.