IN THE COURT OF APPEALS OF IOWA

No. 8-492 / 08-1761
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSEPH VANCE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris (plea) and Thomas N. Bower (sentencing), Judges.

Appeal from judgment and convictions for various drug offenses following a plea. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

The defendant-appellant, Robert Vance, appeals from the judgment and convictions entered following his *Alford*[1] plea to various drug charges, contending his trial counsel provided ineffective assistance by failing to object to the court's misstatement of the standards of an *Alford* plea proceeding. We affirm.

In December of 2007, the State charged Vance with conspiracy to manufacture a controlled substance and possession of ephedrine or pseudoephedrine with the intent to manufacture a controlled substance. In August of 2008 the State amended the trial information to add the charge of habitual felon. Following plea negotiations, the defendant entered an *Alford* plea to the initial two counts and the State dismissed the habitual felon charge. During the plea colloquy, the court explained the rights the defendant was waiving, what the State would have to prove, the minimum and maximum sentences for the charges, and other potential consequences of the plea. The colloquy included the following exchange between the court and the defendant:

> **Court:** Mr. Vance, an *Alford* plea is a plea without admitting that you're guilty of this offense you agree that the court can find you guilty based upon what the evidence would be at trial and the evidence that the state would present. You can do that if it is in your best interests to take advantage of the plea agreement, and *if there is a reasonable likelihood that you would be convicted* if this case did go to trial. Do you understand that? **Defendant:** Yes, sir.

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[1] An *Alford* plea is a variation of a guilty plea in which a defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970) (holding Constitution does not bar sentence where accused is unwilling to admit guilt but is willing to waive trial and accept sentence).

(Emphasis added.) At the sentencing hearing in November of 2008, the State recommended consecutive sentences on the two counts. The court sentenced the defendant to concurrent sentences, reduced by one-third for entering a plea. The defendant appeals, claiming counsel was ineffective in not objecting to the court's misstatement of the standards of an *Alford* plea.

We review claims that counsel rendered ineffective assistance de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address the issue, a claim of ineffective assistance of counsel is generally preserved for possible postconviction proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We conclude the record is adequate to address the defendant's claim of ineffectiveness.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 195. A defendant's failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). With respect to the first element of the test, "counsel's performance is measured against the standard of a reasonably competent practitioner, with the presumption that the attorney performed his duties in a competent manner." *State v. Stallings*, 658 N.W.2d 106, 109 (Iowa 2003), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008)). To demonstrate prejudice, a defendant must show that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Straw*, 709 N.W.2d 128, 136-37 (Iowa 2006).

The defendant contends he had not spoken with his attorney about an *Alford* plea and the court did not properly explain the standard of proof necessary. He asserts the proper standard of proof is not "a reasonable likelihood" as stated by the court, but "the evidence *strongly negates* the defendant's claim of innocence." *State v. Knight*, 701 N.W.2d 83, 85 (Iowa 2005) (emphasis added). He argues there is "grave doubt" that he entered a voluntary and intelligent plea. He further argues, "It is difficult to believe that a Defendant who has not spoken with his attorney about an *Alford* plea and who has a judge misstate what an *Alford* plea is can voluntarily and understandably agree to an *Alford* plea."

The defendant makes no claim he would have insisted on going to trial. *See Straw*, 709 N.W.2d at 136-37. He does not even claim his plea was not voluntary or intelligent, but only "it was *not clear he understood* what an *Alford* plea was." (Emphasis added). We conclude the defendant has not demonstrated prejudice.

AFFIRMED.