IN THE COURT OF APPEALS OF IOWA

No. 9-102 / 08-0890
Filed March 11, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RACHEL JUNE NELSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee (guilty plea) and Gregory D. Brandt (sentencing), District Associate Judges.

A defendant appeals following her conviction of operating while intoxicated, third offense. **AFFIRMED.**

Rachel Nelson, Estherville, pro se.

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter and Matthew McKinney, Assistant County Attorneys, for appellee.

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

MANSFIELD, J.

Rachel Nelson appeals from the judgment and sentence entered by the district court following her guilty plea to operating while intoxicated, third offense. Nelson asserts that (1) her counsel rendered ineffective assistance by failing to file a motion in arrest of judgment because her guilty plea did not comply with Iowa Rule of Criminal Procedure 2.8(2)(*b*), and (2) the portion of her sentence prohibiting her from owning or registering a vehicle during the period of her driver's license revocation is an illegal sentence. Upon our review, we affirm and preserve Nelson's ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

I. Background Facts and Proceedings

At approximately 2:00 a.m. on October 21, 2007, a Des Moines police officer stopped a vehicle driven by Nelson. Following the stop, Nelson exhibited signs of intoxication, and a subsequent breath analysis demonstrated she had a blood alcohol content of .16. On November 16, 2007, the State charged Nelson with operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2007) and operating under suspension in violation of section 321J.21. On January 10, 2008, a pretrial conference was held, at which a preliminary breath test demonstrated that Nelson's blood alcohol content was .278. As a result, the district court ordered Nelson's bond to be increased to $100,000.

On February 7, 2008, Nelson filed a petition to plead guilty. That same day, the district court conducted the following in-court colloquy:

> THE COURT: Is that what you want to do is enter a plea of guilty to OWI in the third offense?
> DEFENDANT: Yes.

> THE COURT: You do realize I would give you a trial if you wanted one. You have a right to be represented by counsel at that trial. You would have a right to call witnesses, to cross-examine witnesses called by the State. I would issue subpoena power to you and force those witnesses to come into court and testify on your behalf even if they did not want to do so voluntarily, but most importantly you would have a right to be innocent until proven guilty. If the State is not capable of meeting its burden of establishing your guilt beyond a reasonable doubt, you can walk out of that courtroom free if they couldn't reach their burden. Do you understand that? You have to answer out loud.
>
> DEFENDANT: Yes
>
> THE COURT: Of course you give up all those rights when you plead guilty. You will not have a trial or hearing or anything like that. In a few minutes you and I will enter into a conversation about these charges and you will need to tell me what you have done and I must find that you have violated the law before I can find you guilty of these charges. Is that what you want to do here today, plead guilty?
>
> DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: My understanding from your attorney is that he's talked to you about all your constitutional rights. They are contained in a form that we call a Petition to Plead Guilty. Has he talked to you about all these?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Did you understand all of these?
>
> DEFENDANT: Yes.
>
> THE COURT: You want to waive all these rights and enter a plea of guilty to these charges, is that correct?
>
> DEFENDANT: Yes.

The district court accepted Nelson's guilty plea and advised her of the need to file a motion in arrest of judgment to challenge the validity of her guilty plea. Nelson did not file a motion in arrest of judgment.

On May 12, 2008, the district court sentenced Nelson to five years in prison and ordered her to pay a fine of $3125, plus the surcharge and court costs. Nelson's driver's license was revoked for six years. Additionally, the district court entered a separate order providing that Nelson "shall not purchase or register any motor vehicle during the period of [Nelson's] driver's license

revocation." Upon the State's request, the district court dismissed the operating while under suspension charge.

Nelson appeals and asserts that (1) her counsel rendered ineffective assistance by failing to file a motion in arrest of judgment because her guilty plea did not comply with Iowa Rule of Criminal Procedure 2.8(2)(*b*), and (2) the order prohibiting her from owning or registering a vehicle during the period of her driver's license revocation is an illegal sentence.

II. Ineffective Assistance of Counsel

We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008); *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Although a defendant does not need to raise an ineffective-assistance-of-counsel claim on direct appeal to preserve the claim, a defendant may raise the claim if the defendant believes the record is adequate to resolve the claim. *Straw*, 709 N.W.2d at 133. If raised on direct appeal, we may either find the record is adequate and decide the claim or find the record is inadequate and preserve the claim for possible postconviction relief proceedings. *Id*. Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal, but prefer to reserve such claims for postconviction proceedings. *State v. Tate*, 710 N.W.2d 237, 239-40 (Iowa 2006). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *Straw*, 709 N.W.2d at 133.

To establish an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Straw*, 709 N.W.2d at 133.

Due process requires that guilty pleas are knowing and voluntary. Iowa Rule of Criminal Procedure 2.8(2)(*b*) provides district courts with a blueprint for guilty plea proceedings. *Straw*, 709 N.W.2d at 133. Rule 2.8(2)(*b*) states in relevant part:

> Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
> (1) The nature of the charge to which the plea is offered.
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
> (4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(*b*). Substantial compliance with this rule is required. *Straw*, 709 N.W.2d at 134.

The State concedes that the district court did not substantially comply with rule 2.8(2)(*b*) when it failed to advise Nelson of mandatory minimum or maximum punishments in its colloquy with her at the time of her guilty plea.[1] *See id*. at 134 (finding that the district court did not substantially comply with rule 2.8(2)(*b*)

[1] The written petition that Nelson signed did, however, mention both the minimum and maximum punishments.

where the district court omitted any mention of the punishment the defendant could face). Thus, because Nelson's counsel failed to bring this to the district court's attention or file a motion in arrest of judgment, her counsel failed to perform an essential duty. *Id*. The State and Nelson disagree over whether the district court substantially complied with rule 2.8(2)(*b*) in certain other respects.

We next turn to the question of whether, on the present record, we can determine whether Nelson was actually prejudiced by her counsel's failure to file a motion in arrest of judgment. Nelson "must show that there is reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." *Id.* at 138. We find this record to be inadequate to make a determination of whether Nelson was actually prejudiced. *See id.* ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). Thus, we preserve the issue whether Nelson's counsel was ineffective in failing to file a motion in arrest of judgment based on the court's failure to comply with rule 2.8(2)(*b*) for possible postconviction relief proceedings.

III. Illegal Sentence

Our review of challenges to the illegality of a sentence is for corrections of errors at law. *State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999). We may correct an illegal sentence at any time. *Id*.

An illegal sentence is one that is not authorized by statute. *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2008). Nelson asserts that the order prohibiting her from purchasing or registering a motor vehicle during the period of her driver's license revocation is an illegal sentence because it is not authorized

by any code section.[2] However, the district court's order is authorized under Iowa Code section 321J.4B. Section 321J.4B(11)(a)(2) provides that a person "convicted of an offense under subsection 2, shall not purchase or register any motor vehicle during the period of impoundment, immobilization, or license revocation." Iowa Code § 321J4B(11)(a)(2). The question then is whether Nelson was a person "convicted of an offense" under section 321J.4B(2).

Section 321J.4B(2) deals with impoundment, and states that a motor vehicle is subject to impoundment if a person commits either of two offenses. The first type of covered offense is a "second or subsequent offense under section 321J.2." The second is the operation of a vehicle while one's license is suspended for a violation of section 321J.2. In this case, Nelson in fact pled guilty to a "second or subsequent [i.e., third] offense under section 321J.2." Thus, Nelson was convicted of an offense under section 321J.4B(2), her vehicle would have been subject to impoundment (if she still had it), and she was properly prohibiting from purchasing or registering a vehicle during the period of her license revocation.

Accordingly, we affirm the district court.

AFFIRMED.

[2] Nelson asserts that her trial counsel was ineffective for failing to object to the illegal sentence. However, because an illegal sentence is void, it can be corrected at any time. *See Woody*, 613 N.W.2d at 217. Therefore, we need not analyze Nelson's claim as an ineffective-assistance-of-counsel claim, but rather we may proceed directly to the merits. *Id*.