

IN THE COURT OF APPEALS OF IOWA

No. 9-161 / 08-1145
Filed April 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN ALAN RICH,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley (plea) and Amanda Potterfield (sentencing), Judges.

Defendant appeals his guilty plea and sentencing for operating while intoxicated, third offense arguing his counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger Assistant Attorney General, Harold Denton, County Attorney, Jerry Vander Sanden and Susan Nehring, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

On February 25, 2008, Justin Rich was charged with two counts: (I) operation of a motor vehicle while intoxicated, third offense; and (II) driving while barred. A subsequent plea agreement was detailed at the March 10 plea hearing. Rich would plead to count I and the State would dismiss both count II and any companion traffic violations. Rich would be released pending sentencing. The State would not make a recommendation regarding sentencing, however, the State “reserve[s] the right to make an adverse recommendation if Mr. Rich picks up new charges before sentencing.” Rich pled guilty.

After the plea but before sentencing, Rich was arrested for interference with official acts. Due to this arrest, the State did not abstain from making a sentencing recommendation at the May 16 sentencing hearing. Rather, the State asked the court to follow the recommendation of the presentence investigation report. This report concluded, “[t]his is the defendant’s 9th lifetime OWI” and recommended indeterminate incarceration up to five years to “protect the community.”

Rich was sentenced to a prison term not to exceed five years and appeals seeking resentencing due to ineffective assistance of counsel. Rich faults his counsel’s failure to object to the State’s alleged breach of the plea agreement when the State made a recommendation at the sentencing hearing. Rich claims the State could only make a recommendation upon Rich’s subsequent *conviction* of a new offense and a subsequent arrest without an accompanying conviction is insufficient.

In order to prevail on his claims of ineffective assistance of counsel, Rich must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Rich's inability to prove either element is fatal. See *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392. We can resolve the issue on direct appeal when the record is adequate to determine Rich will be unable to establish one or both elements. See *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here the record is adequate to resolve Rich's appeal.

At the plea proceeding, the State conditioned its lack of a sentencing recommendation on Rich's not "picking up new charges" while he was free awaiting sentencing. Generally, defendants "bargain for sentencing recommendations from the State because such recommendations may . . . influence the trial court in fixing sentence." *State v. Weig*, 285 N.W.2d 19, 21 (Iowa 1979). The State did not agree to withhold a recommendation only in the absence of new convictions and Rich was free to reject the plea if he did not agree with the "new charges" bargain. See *id.* at 22 (stating State could condition its sentencing recommendation on the condition of intervening criminal charges). Rich's trial counsel was not ineffective because she had no duty to make a meritless motion. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

AFFIRMED.