IN THE COURT OF APPEALS OF IOWA

No. 9-494 / 08-1840
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH RAY HENDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker (plea proceedings) and Michael H. Moon (sentencing), Judges.

Defendant appeals from the conviction and sentence for possession of a controlled substance. **CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Bradley Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Jennifer Miller, County Attorney, and James S. Scheetz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J. and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, J.

Defendant Kenneth Henderson appeals from the judgment and sentence entered on his convictions following his guilty plea to the possession of cocaine base with intent to deliver in violation of Iowa Code sections 124.401(1)(b)(3), 124.413, and 901.10(1) (2007) (count I); and interference with official acts in violation of Iowa Code sections 719.1 and 702.7 (count III). The district court imposed a twenty-five year sentence on count I and a two-year sentence on count III; the sentences were ordered to run consecutively to each other.

I. Background Facts and Prior Proceedings

On January 26, 2008, Henderson was a passenger in a vehicle that was stopped by the Marshalltown police for a traffic violation. The police asked for identification of the two passengers and found that Henderson had an outstanding arrest warrant. After observing what appeared to be Henderson's attempt to hide or retrieve something from the rear seat, the officers assisted Henderson in exiting the vehicle. Henderson resisted, and the officers' attempts to subdue him with pepper spray were unsuccessful. After considerable struggle and the efforts of six police officers, Henderson was finally secured. He was initially transported to the hospital to be examined, and later taken to the county jail. At the jail, Henderson was still combative, and a taser was used to control him. After he stopped resisting, he admitted "I got dope," which was then found rolled in the waist of his jeans. There were three plastic bags found, two with one ounce of crack cocaine, and the other with two ounces. Cash in the amount of $3000 was also found in the pocket of Henderson's jacket.

Henderson pleaded guilty to possession with intent to deliver more than ten grams of cocaine base and interference with official acts. He was sentenced to an indeterminate twenty-five year term of imprisonment on his conviction of possession with intent to deliver, and a two-year term of imprisonment on his conviction of interference with official acts; the sentences were to be served consecutively to each other. Henderson appeals.

II. Consecutive Sentences

Henderson asserts that the district court erred in failing to give specific reasons for imposing consecutive sentences. The State contends however that examining the court's statements in the context of the entire sentencing hearing reflects the court's reasons for imposing consecutive sentences. We review sentencing for the correction of errors at law. Iowa R. App. P. 6.4.

The trial court generally has discretion to impose concurrent or consecutive sentences for convictions on separate counts. *State v. Delany*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). Where consecutive sentences are imposed, the sentencing judge must give a reason for doing so; although the reason does not need to be detailed, it must be sufficient to allow appellate review of the discretionary action. *State v. Evans*, 672 N.W.2d 328, 331-32 (Iowa 2003).

At sentencing, the district court stated:

> Well, this is another instance where somebody with a large amount, extraordinary large amount, of illegal drugs in his possession, cash, certainly sounds and has all the appearances of somebody who is an entrepreneur, somebody who does something other that cutting trees in Memphis to get by, but rather is in business where indeed there [is] no W-2 or no 1099 and that would be in sales and

> servicing of people here in Marshall County who may be addicted to cocaine.

The district court went on to explain how this case was analogous to another, and then detailed the sentence imposed on Henderson. However, the court failed to give an explanation behind its decision to impose consecutive, rather than concurrent sentences for the two convictions. *See State v. Uthe*, 542 N.W.2d 810, 816 (Iowa 1996). Nothing in the sentencing colloquy conveys the court's reasoning for choosing consecutive sentences such that we can review the court's exercise of its discretion. More is required to enable a reviewing court to properly perform its duty. *Id.* We therefore vacate the sentences and remand for resentencing.[1]

III. Ineffective Assistance of Counsel- Factual Basis

Henderson next raises a claim of ineffective assistance of counsel. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on his claim, Henderson must prove by a preponderance of 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). To establish prejudice, Henderson must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id*. A claimant must

[1] Because we are vacating the sentences, we need not address Henderson's claim that his counsel was ineffective for failing to advise him of the possibility of consecutive sentences prior to pleading guilty.

also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

Henderson contends that his trial counsel was ineffective for failing to challenge the adequacy of his guilty pleas in a motion in arrest of judgment. *See* Iowa R. Crim. P. 2.24(3)(*a*) ("A motion in arrest of judgment is an application by the defendant that no judgment be rendered on a finding, plea, or verdict of guilty."). He claims there was no factual basis to support the pleas. A district court may not accept a guilty plea without first determining that the plea has a factual basis. *State v. Hallock*, 765 N.W.2d 598, 603 (Iowa Ct. App. 2009). "Generally, the court may determine a factual basis for a guilty plea by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony." *State v. Hightower*, 587 N.W.2d 611, 614 (Iowa Ct. App. 1998). Here, the district court carefully discussed with Henderson each element that the State would have to prove for each of the charges. When asked about each charge, Henderson repeatedly answered that he disagreed with the evidence but conceded that the State would prove the charges. This is akin to an *Alford* plea. *State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005) (stating that a defendant enters an *Alford* plea by pleading guilty while still maintaining his innocence).

Henderson now claims on appeal that an *Alford* plea requires more by way of establishing a factual basis. Although brief, the reference to the minutes of testimony during the plea colloquy, along with Henderson's acknowledgement

that the State could prove the charges the court detailed, were sufficient to establish a factual basis. We find that counsel was not ineffective for failing to challenge the guilty plea.

CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.