IN THE COURT OF APPEALS OF IOWA

No. 9-678 / 08-0848
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEBRA JOY TOBEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Douglas F. Staskal, Judge.

Defendant appeals from her convictions and sentence for theft in the second degree, fraudulent practices in the second degree, and misconduct in office. **CONVICTIONS AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Mary Benton, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Defendant, Debra Joy Toben, appeals from her convictions and sentence for theft in the second degree, fraudulent practices in the second degree, and misconduct in office. She contends (1) she received ineffective assistance of counsel when her trial attorney failed to move for a judgment of acquittal because there was insufficient evidence to support a conviction for theft, (2) there was insufficient evidence to support her conviction for fraudulent practices, (3) the court relied on an improper factor in setting Toben's sentence, and (4) the court imposed an illegal sentence by ordering Toben to serve 365 days in the Guthrie County jail for committing misconduct in office, to be served consecutive to the five-year prison sentence imposed for the theft and fraudulent practice convictions. We affirm Toben's convictions, but due to error in part of the court's sentence, we vacate the sentence and remand for resentencing.

I. BACKGROUND. A mental health advocate "act[s] as [an] advocate representing the interests of patients involuntarily hospitalized by the court" for mental illness under Iowa Code chapter 229. Iowa Code § 229.19 (2005). The advocate is to communicate with and visit each patient and medical personnel treating the patient, review each patient's medical records, and submit quarterly reports to the court detailing the advocate's services to the patient. *Id.* Debra Toben was hired as the mental health advocate for Guthrie County in November 2005. She was paid sixteen dollars per hour and provided a cell phone to make calls to the patients she was assigned. She was to submit monthly claim forms detailing the time she spent attending to each client, the services she performed

during that time, and any mileage reimbursement required. After she submitted the claim forms to the county auditor, a central coordinator, Ted Ely, would review the claim form and if the compensation requested was reasonable, he would forward it on to the county's board of supervisors for approval. If the board approved the claim, the district court would issue an order for payment.

On March 6, 2007, Ely was talking with a client's mother about her son's mental condition and progress. He inquired whether her son, Jason, was receiving visits from a mental health advocate and specifically from Debra Toben. The client's mother stated she had never met or spoken with Toben and neither had her son. Ely grew concerned, knowing that Toben had submitted claims to be compensated for services provided to Jason. He called another client, Karen, who also stated she had never met or spoken with Toben.

Ely contacted Toben with his concerns. Toben assured Ely that she had met with both clients. She stated that Jason preferred to meet without his mother present and provided Ely with an address and phone number that she used to contact Jason. She stated that Karen must have been confused. Ely attempted to confirm Toben's explanation with the clients. Jason stated he had never met or spoke with Toben. In researching the address and phone number Toben provided, Ely discovered the address did not exist and the phone number did not belong to Jason. Ely also knew that Jason was very fearful of meeting anyone without his mother present. Ely then called Karen's husband to ask whether Karen had received services from Toben. Karen's husband confirmed that Karen had never received visits or calls from Toben. Ely then called Toben and stated

she should have no further contact with any clients and she would no longer be compensated for her services.

Ely found additional discrepancies after cross-referencing the cell phone records for the phone assigned to Toben with the claim forms Toben submitted. On March 19, 2007, Ely contacted the county sheriff and gave the chief deputy a list of Toben's clients. The deputy met with each client, showed each a picture of Toben, and had them complete a questionnaire about whether they had met or spoken with Toben and if they had, an estimation of how many times. Through the interviews and further investigation, the deputy discovered eight out of Toben's twenty-one clients claimed to either never have met or spoken with Toben, or had only spoken with her a couple of times. One client Toben claimed she had visited for several months actually died before Toben was hired as the mental health advocate. Toben's claim forms indicated she had repeatedly provided services to each of these clients.

At trial, some clients and caretakers of clients testified that after they were approached by Ely or the investigator, they were later contacted by Toben. They testified that Toben tried to convince them to contact the prosecutor's office and tell the prosecutor that Toben and the clients had actually met. Toben allegedly told one client that people in town were trying to get the client committed to the hospital and if the client would call the prosecutor, Toben could help the client. She also allegedly told that client's boyfriend if he called the county attorney, she would owe him a twelve pack of beer. Toben also testified and denied that she

submitted false claim forms and denied pressuring any clients or caretakers of clients to call the prosecutor.

The State charged Toben with theft in the second degree, fraudulent practices in the second degree, and misconduct in office. Following a jury trial, Toben was convicted on all counts. The district court sentenced Toben to serve five years for the theft conviction, five years for the fraudulent practices conviction, and 365 days for the misconduct in office conviction. The court ordered that the sentences for theft and fraudulent practices run concurrently, and the sentence for misconduct in office be served consecutive to the theft and fraudulent practices sentences. It further specified that the 365-day sentence for misconduct in office be served in the Guthrie County jail. Toben now challenges her convictions and sentences on the four grounds we consider below.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Toben first asserts her attorney rendered ineffective assistance by failing to move for a judgment of acquittal when there was insufficient evidence to support a conviction for theft. We review ineffective assistance of counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We generally preserve these claims for postconviction relief. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). We will address the issue on direct appeal only if the development of an additional factual record is unnecessary and the claim can be decided as a matter of law. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). We find the record is sufficient to address Toben's claim.

To establish ineffective assistance of counsel, Toben must prove both (1) the attorney failed to perform an essential duty, and (2) the defendant was prejudiced thereby. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We may dispose of a claim if it fails either prong. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). In proving the first requirement, the defendant must show that counsel's performance was not within the normal range of competency. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). Trial counsel is not incompetent in failing to pursue a meritless issue. *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998). If a motion for judgment of acquittal is meritless, trial counsel has no duty to make such a motion. *See State v. Milom*, 744 N.W.2d 117, 122 (Iowa Ct. App. 2007) (finding counsel not ineffective for failing to challenge the sufficiency of the evidence when the challenge had no merit). Therefore, if there was sufficient evidence submitted at trial to support a finding on each element of theft, Toben's attorney had no duty to move for a judgment of acquittal.

Toben argues she was charged with the "theft by taking" method of committing theft under Iowa Code section 714.1(1). She contends there was no evidence presented to support a finding of the "theft by taking" alternative. She claims the jury convicted her because it was instructed on "theft by deception." She reasons that the jury should not have been instructed on "theft by deception" when she was actually charged with "theft by taking." Toben asserts, pursuant to

State v. Pexa, 574 N.W.2d 344, 347 (Iowa 1998), that the State must prove the offense was committed in the method charged.

Toben's claim fails because it is based on a mistaken reading of the record. Toben was charged with both "theft by taking" and "theft by deception" alternatives. The trial information accuses Toben "[o]f THEFT IN THE SECOND DEGREE, in violation of Sections 714.1(1) and/or 714.1(3) . . . of the Iowa Criminal Code." Section 714.1(1) describes the "theft by taking" alternative[1] and section 714.1(3) describes the "theft by deception" alternative.[2] Since Toben was charged with the "theft by deception" theory, the State permissibly presented its evidence on that theory and the jury was correctly instructed on the elements of "theft by deception." Toben's trial counsel had no duty to move for a judgment of acquittal based on insufficient evidence of "theft by taking" when such motion would have been meritless.

III. FRAUDULENT PRACTICES. At the close of trial, Toben's counsel moved for a directed verdict, arguing there was insufficient evidence to submit the charge of fraudulent practices to the jury. The district court overruled this motion and Toben contends this was error.

We review challenges to the sufficiency of the evidence to support a guilty verdict for correction of errors at law. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa

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[1] Iowa Code section 714.1(1) provides that "[a] person commits theft when the person . . . [t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof."

[2] Iowa Code section 714.1(3) provides, in relevant part, that a person commits theft when the person, "[o]btains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception."

2004); *State v. Heard*, 636 N.W.2d 227, 229 (Iowa 2001). We will uphold the finding of guilt if it is supported by substantial evidence. *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). "Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Jacobs*, 607 N.W.2d 679, 682 (Iowa 2000). In our review we consider all the evidence in the record, both that supporting and detracting from the verdict. *State v. Hagedorn*, 679 N.W.2d 666, 669 (Iowa 2004). In doing so however, we view the evidence in a light most favorable to the State, including the legitimate inferences and presumptions that may fairly be deduced from the record. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006); *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

The State charged Toben with committing fraudulent practices in violation of Iowa Code section 714.8(3). This section provides that a person is guilty of a fraudulent practice if the person

> [k]nowingly executes or tenders a false certification under penalty of perjury, false affidavit, or false certificate, if the certification, affidavit, or certificate is required by law or given in support of a claim for compensation, indemnification, restitution, or other payment.

Iowa Code § 714.8(3). The State argued that when Toben submitted claim forms requesting compensation for servicing clients that she actually had not provided services to, she knowingly executed and tendered a false certificate in support of a claim for compensation. Toben argues the State provided insufficient evidence to support the conviction for fraudulent practices because the claim forms she submitted for compensation were not "certificates" under the statute. She argues

the claim forms are not certificates because the forms “clearly lack any extra language to indicate that [she] intended th[e] statement to have this heightened sense of accuracy or trustworthiness necessary to qualify as a ‘certificate.’”

The parties agree that “certificate” is not defined in the statute. Toben argues the claim forms were not certificates because they were not notarized and did not contain a formal acknowledgment. We do not find this is required by the statute or by the case law. “In the absence of a legislative definition, words in a statute are given their ordinary meaning.” *State v. Muhlenbruch*, 728 N.W.2d 212, 214 (Iowa 2007). A “certificate” is defined as “a document containing a certified and usu[ally] official statement: a signed, written, or printed testimony to the truth of something.” Webster’s Third New International Dictionary 367 (unabr. ed. 2002). The legal definition is, “[a] document in which a fact is formally attested.” Black’s Law Dictionary 239 (8th ed. 2004). In prior case law, our Supreme Court has defined “certify” as “[t]o authenticate or vouch for a thing in writing, [t]o attest as being true or as represented,” and “to testify to a thing in writing.” *State v. Walker*, 574 N.W.2d 280, 287 (Iowa 1998).

Viewing Toben’s submission of the claim forms in light of these definitions and prior interpretations of the term, we find there is substantial evidence to support a finding that the claim forms were certificates for purposes of the fraudulent practices statute. The claim forms have the characteristics of a formal court document. The heading specifies that the document is directed to the district court of the Fifth Judicial District of Iowa and that it is a claim for reimbursement. It affirmatively states, “AS MENTAL HEALTH ADVOCATE FOR

GUTHRIE COUNTY, I EXPENDED THE FOLLOWING TIMES AND INCURRED THE FOLLOWING EXPENSES, THE ITEMIZED DETAILS [OF] WHICH ARE ATTACHED HERETO." After providing space where Toben listed the time and expenses, the form states, "I REQUEST THAT I BE ALLOWED COMPENSATION, INCLUDING REIMBURSEMENT FOR EXPENSES INCURRED, IN THE AMOUNT OF:." Toben placed her signature below this request. Thereafter the form provided a statement allowing the board of supervisors to waive a hearing on the claim for reimbursement, and then listed the heading ORDER whereby the county was directed to pay Toben if a judge had signed the order in the space provided. The final section of the form is labeled "CERTIFICATE." This section provides space for the date and signature of the clerk of court and states, "The above is a true copy of the claim and Order as appears of record in my office and is hereby certified to the County Auditor for payment."

Toben knew the claim forms were submitted to the court and would be signed as a "certificate" by the clerk of court. In completing the form, Toben represented that she truthfully expended time and expenses servicing clients as a mental health advocate. She submitted the forms, knowing the coordinator, board of supervisors, district court, and clerk of court would rely on the truthfulness of her statements in approving her claim for reimbursement. Toben was aware that the forms and appended reports served as the court's basis for issuing an order to the county to compensate Toben. Her monthly forms were more than time sheets documenting her work, but also served as evidence

supporting each court order giving the county authority to pay Toben. Tendering the false forms was knowingly presenting false evidence to the court. *See Jacobs*, 607 N.W.2d at 688 (stating that when defendant falsely reported financial transactions to the court in probate reports and other court documents to conceal defendant's theft, he committed fraudulent practices). We conclude there was substantial evidence that Toben was vouching for the truth of her statements regarding time and expenses when completing the claim forms and were "certificates" under the fraudulent practices statute.[3]

IV. RELYING ON IMPROPER FACTOR IN SENTENCING. Toben next claims the court relied on improper factors in determining her sentence. We review sentences imposed in criminal matters for correction of errors at law. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). There is a strong presumption in favor of a district court's decision to impose a particular sentence and it will only be overturned when the defendant shows an abuse of discretion

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[3] We also note the claim forms appear to be required by statute. Iowa Code section 229.19(6) explains that the advocate's duties include,

> To file with the court quarterly reports, and additional reports as the advocate feels necessary or as required by the court, in a form prescribed by the court. The reports shall state what actions the advocate has taken with respect to each patient and the amount of time spent.
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> . . . .
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> The court or, if the advocate is appointed by the county board of supervisors, the board shall prescribe reasonable compensation for the services of the advocate. The compensation shall be based upon the reports filed by the advocate with the court. The advocate's compensation shall be paid by the county in which the court is located, either on order of the court or, if the advocate is appointed by the county board of supervisors, on the direction of the board.

Toben's conduct therefore might be viewed as not only executing and tendering a false certificate given in support of a claim for compensation, but also as tendering a false certificate required by law under Iowa Code section 714.8(3).

or a defect in procedure, such as the court's consideration of impermissible factors. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002); *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000); *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). If the court considers an improper sentencing factor, we will remand for the defendant to be resentenced. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999). We do not speculate about how much weight the court gave to the improper factor as there is no way to determine what sentence would have been ordered without consideration of the improper factor. *Id.*

Toben argues the court impermissibly based the sentence on Toben's decision to stand trial and defense counsel's trial strategy to test the credibility of witnesses. Toben believes the court's reliance on these factors is evidenced by the following comments made by the court during sentencing:

> So not only did you cheat the county out of money and deny the people who you were obligated to help the help they needed, you then set out on a course of action of using them to evade your only responsibility as witnessed by your pleading guilty of tampering with witnesses.
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> You approached witnesses, trying to get them to change their testimony, trying to get them to lie and you came into court and insinuated these people were liars or unreliable because of their mental health illness, that you couldn't believe them.
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> That is a level of not only uncaring, but using and manipulating these people that you were supposed to help that I am not willing to overlook.
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> . . . .
>
> I know that you have no prior criminal history. That's a fact in this decision, no question about it, and I considered that as well as everything else as I mentioned at the outset. But I'm unwilling to overlook the seriousness of this behavior, a violation of public trust, denial of help to the people you were obligated to help. And worse of all, your then setting out to make them—manipulate them in a way as to seem that they were the ones responsible for your criminal behavior.

A district court is to consider sentencing options "[a]fter receiving and examining all pertinent information, including the presentence investigation report and victim impact statements . . . ." Iowa Code § 901.5. It is required to determine which sentencing options are authorized for the offense and "which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." *Id.* The court must state on the record its reasons for selecting a particular sentence. Iowa R. Crim. P. 2.23(3)(*d*). A defendant's character, propensity to reoffend, and chances for reform are pertinent factors in determining an appropriate sentence. *State v. Knight*, 701 N.W.2d 83, 86-87 (Iowa 2005). The nature of the offense and the attending circumstances may also be considered in sentencing a defendant. *State v. Millsap*, 704 N.W.2d 426, 435 (Iowa 2005). Specifically, "[a] defendant's lack of remorse is highly pertinent to evaluating his [or her] need for rehabilitation and his [or her] likelihood of reoffending." *Knight*, 701 N.W.2d at 88. Furthermore, it is not error for the court to express concern about how a defendant projects blame upon others if that concern is reasonable and tenable. *See State v. Beets*, 528 N.W.2d 521, 524 (Iowa 1995). A court can also evaluate the defendant's truth and veracity in assessing the defendant's character and potential for rehabilitation during the sentencing process. *State v. Bragg*, 388 N.W.2d 187, 192 (Iowa Ct. App. 1986).

The fact a defendant has exercised her right to require the State to prove her guilt and her right to raise defenses is an impermissible factor and should not

be considered by the court in determining a sentence. *State v. Nichols*, 247 N.W.2d 249, 255 (Iowa 1976). The "'trial court must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant had not pleaded guilty but had put the prosecution to its proof.'" *Knight*, 710 N.W.2d at 87 (quoting *Nichols*, 247 N.W.2d at 256). Therefore, if a court considers a defendant's lack of remorse as a factor, it should do so by relying on facts other than the defendant's choice to not plead guilty. *Id.* at 88. It may consider the defendant's lack of remorse shown by statements made by the defendant pre-trial, at trial, or post-trial, or by other competent evidence admitted at the sentencing hearing. *Id.* at 87-88.

We find the court did not rely on Toben's decision to stand trial and test the credibility of witnesses in issuing the sentence. The court's comments overall show its sentencing decision was based on the nature of Toben's offense, the attending circumstances of the crime, and her character. The court did not reference Toben's decision to plead not guilty or her attorney's strategy of challenging witness credibility. In making its determination, the court was relying on Toben's attempt to conceal the crime afterward by encouraging her clients to lie and fabricate stories. This conduct was presented at trial through the testimony of Toben's clients. Toben admitted at trial to meeting with the clients after being told to have no further contact with them. The court was free to consider this conduct in composing the sentence because it pertains to the nature of the crime, Toben's character, and her likelihood for rehabilitation. *See Bragg*, 388 N.W.2d at 191 (finding that the court's opinion that defendant

concocted a lie to cover his tracks after committing an assault was a proper sentencing consideration since it was relevant to the crime, defendant's character, and defendant's potential for reform). We hold the court did not rely on an improper factor in issuing Toben's sentence.

V. ILLEGAL SENTENCE. Toben's final contention is that the court had no authority to order Toben to serve a 365-day jail sentence consecutive to a five-year prison sentence. Toben contends that although the court had the authority to sentence her for these individual terms of incarceration, the sentencing scheme requires the court to commit her to the department of corrections, and it could not designate that part of her sentence had to be served in the county jail.

A sentence not authorized by law is void. *State v. Stephenson*, 608 N.W.2d 778, 784 (Iowa 2000). We review a court's application of the sentencing statutes for the correction of errors at law. *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001). The court sentenced Toben to five years in prison for her theft conviction, five years in prison for her fraudulent practices conviction, and 365 days in the Guthrie County jail for the conviction of misconduct in office. It ordered that the five-year sentences for theft and fraudulent practices run concurrently and the misconduct in office sentence run consecutive to the theft and fraudulent practices sentences.

Iowa Code section 903.4 governs where persons must be confined to serve out their sentences. Generally, if the confinement is to be one year or less, the county provides the incarceration facility, and if the confinement is over one

year, the person is committed to the custody of the state department of corrections. Iowa Code § 903.4; *see also id.* § 901.7; *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987). When consecutive sentences are ordered, the individual terms are construed as one continuous term of imprisonment. Iowa Code § 901.8; *State v. Kapell*, 510 N.W.2d 878, 880 (Iowa 1994). "[P]ursuant to section 901.8, consecutive sentences are to be viewed as one continuous term of imprisonment for purposes of designating the proper place of confinement under section 903.4." *State v. Patterson*, 586 N.W.2d 83, 84 (Iowa 1998).

Toben's sentence, viewed as one continuous term, exceeds one year. The district court was required to commit Toben to the director of the department of corrections and could not designate that 365 days of the sentence be served in the county jail. We therefore vacate the court's sentence. The State concedes this part of the sentence is void but argues we should sever the invalid portion rather than remand to the district court for resentencing. We acknowledge this alternative but opt to remand to the district court for resentencing.

VI. CONCLUSION. We affirm Toben's convictions for theft in the second degree, fraudulent practices in the second degree, and misconduct in office. Toben did not receive ineffective assistance of counsel because her counsel had no duty to move for a judgment of acquittal on the theft charge as such motion would have been denied. There was sufficient evidence to support the jury's finding that Toben submitted a certificate to satisfy the elements of the fraudulent practices charge. The court did not rely on an improper factor in sentencing

Toben; however, it did lack authority to require Toben to serve 365 days of the sentence in Guthrie County jail.

CONVICTIONS AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.