

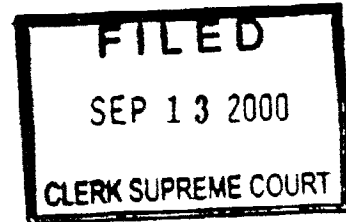
IN THE COURT OF APPEALS OF IOWA

No. 0-500 / 99-1809
Filed September 13, 2000

MICHAEL PAUL MURPHY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Bremer County, Paul W. Riffel,
Judge.

Michael Murphy appeals from partial denial of his application for
postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, and Kasey E. Wadding, County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

In ~~this~~ appeal from a postconviction relief proceeding, Michael Murphy contends: (1) his trial attorney provided ineffective assistance in allowing him to plead guilty to various drug-related charges and (2) the district court failed to consider mitigating factors in sentencing him. We affirm.

I. Background Facts and Proceedings

The State charged Murphy with three counts of delivery of a controlled substance (marijuana), in violation of Iowa Code section 124.401(1)(d), three counts of failure to affix a drug tax stamp in violation of Iowa Code section 453B.12, and one count of possession of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d). Murphy pled guilty to all seven charges and the district court sentenced him to a total term not exceeding ten years. Murphy did not appeal. Instead, he and his attorney filed a total of three applications to reconsider the sentence. The court denied the applications.

Murphy then applied for postconviction relief. The postconviction relief court ordered resentencing on one count but overruled the balance of the application. This appeal followed.

II. Waiver of Error

The State urges us to dismiss the appeal, contending Murphy waived error by failing to file a motion in arrest of judgment and appeal. The State did not alert the district court to this basis for dismissal. However, we may uphold a district court ruling on grounds not urged before the district court, as long as the ground is supported by facts in the record or could be decided as a matter of law.

Bugley v. State, 596 N.W.2d 893, 897 (Iowa 1999). We elect to proceed to the merits of Murphy's ineffective assistance of counsel claim but will resolve Murphy's challenge to the court's sentencing decision on this alternate ground.

We begin by reiterating the pertinent error preservation concepts. First, a defendant who wishes to challenge a plea must file a motion in arrest of judgment within 45 days after a plea is taken. Iowa R. Cr. P. 23(3)(a), (b); *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). Failure to file the motion will preclude a defendant from challenging the plea on appeal, unless the failure is due to ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Second, we have interpreted Iowa Code section 822.8 ". . . to impose a burden upon a postconviction relief applicant to show sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal."¹ *Bugley*, 596 N.W.2d at 896. Additionally, a postconviction relief applicant must demonstrate actual prejudice resulting from the alleged errors. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Ineffective assistance of trial counsel based on failure to file an appeal may constitute sufficient reason for not properly raising the issues earlier. *Id.* at 921.

Murphy did not file a motion in arrest of judgment to challenge his plea. He also did not directly appeal his judgment and sentence. However, Murphy alleges these omissions resulted from ineffective assistance of counsel.² The

¹ Iowa Code § 822.8 requires a postconviction relief applicant to raise all grounds for relief available to the applicant in the applicant's original, supplemental or amended application "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application."

² He alleged, "[p]laintiff told his attorney that he wanted to proceed to trial and was not aware that his attorney would be setting the case for a plea at the time of the pretrial conference." He further

question, therefore, is whether his attorney was ineffective. If we deem he was, we would necessarily have to find Murphy had sufficient reason for failing to file an arrest of judgment motion and direct appeal. This issue, however, converges with the merits of Murphy's ineffective assistance of counsel claim raised in his postconviction relief application. Accordingly, we will proceed to the merits of his first challenge.

III. Ineffective Assistance of Counsel

Murphy frames the first issue on appeal as follows: "the district court erred in dismissing the post-conviction application as the record discloses that trial counsel was ineffective for allowing a plea that was not knowing, voluntary and intelligent because Mr. Murphy wanted to go to trial." He then articulates the following specific inadequacies in counsel's performance: (1) failure to follow his instructions concerning the taking of depositions; (2) failure to proceed to trial as instructed; and (3) failure to file a direct appeal. As an initial matter, the State counters that Murphy waived error by failing to cite authority in support of his contention. We elect to pass on this argument, as our review is not hampered by the omission of authority. See *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999). We will address each of Murphy's arguments in turn, applying the following standard: (1) whether counsel breached an essential duty and (2) whether prejudice resulted. *State v. Ame*, 579 N.W.2d 326, 330 (Iowa 1998).

alleged, " [i]f counsel would have adequately discussed these matters with Plaintiff, they would have proceeded with trial resulting in a verdict of not guilty or a lesser sentence being imposed." Finally, he alleged, "if counsel had adequately consulted with Plaintiff after the sentence was imposed, a more detailed Motion to Reconsider would have been filed and a timely appeal would have been filed."

A. Failure to follow instructions regarding the taking of depositions.

Murphy asserts his attorney should have deposed officers on a drug task force he contends promised him leniency in exchange for his cooperation. At his postconviction hearing, Murphy testified he wanted the depositions taken to "make sure that the deals and the promises that the task force had made would have come out." He testified he discussed this strategy with his attorney, who began plans to take the depositions. According to Murphy, his attorney's failure to complete the depositions amounted to ineffective assistance of counsel.

Murphy's attorney also testified at the postconviction relief hearing. He agreed Murphy wanted depositions taken and further acknowledged he began making arrangements to do so. However, to the best of his recollection, the depositions did not take place because, after initial difficulties in scheduling witnesses, "the strategy changed." According to Murphy's attorney, the prosecutor presented him with a great deal of negative information concerning the nature of Murphy's drug activities and threatened to use the information at sentencing if he called agents from the task force. After he conveyed this information to his client, Murphy decided to go forward with a guilty plea.

An accused is ordinarily bound by strategic decisions made by counsel, except certain basic decisions such as whether to plead guilty, waive a jury trial or testify on his own behalf. *State v. Turner*, 345 N.W.2d 552, 559 (Iowa App. 1983). Whether to take a deposition is such a strategic decision. See *Kellogg v. State*, 288 N.W.2d 561, 564 (Iowa 1980). We have stated, "[w]hen counsel makes a reasonable tactical decision, this court will not engage in second-

guessing." *Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa App. 1989). Here, one of the officers whose deposition was not taken testified that Murphy agreed to arrange other drug buys but never did so. Murphy's attorney reasonably could have believed this testimony would prove harmful to his client. We conclude counsel's decision to forgo the depositions was not a breach of an essential duty and did not amount to ineffective assistance.

B. Failure to proceed to trial. Murphy also contends his attorney did not allow him to proceed to trial as he wished. At the postconviction relief hearing he testified the decision to plead guilty was made without his knowledge or consent at a pretrial conference he did not attend due to his work schedule. Murphy's attorney disputed this rendition of events. He testified he discussed the possibility of a plea agreement with Murphy at least twice before the pretrial conference.

It is well established that a plea must be both knowing and voluntary. *Kyle v. State*, 364 N.W.2d 558, 561 (Iowa 1985). Where a plea is taken with the advice of counsel, we will examine the voluntariness of the plea and the competency of the attorney who rendered such advice. *Id.* On our de novo examination of the record, we conclude Murphy's attorney did not force him to plead guilty. First, counsel's billing records confirm he discussed a plea agreement with Murphy. Second, Murphy signed a written plea agreement expressly acknowledging a discussion of the plea procedures with his attorney as well as the constitutional rights he would be waiving by signing the agreement. Third, Murphy's attorney certified he fully explained the charges, the factual basis

for the charges, the elements of the crimes charged, plea procedures and the constitutional rights affected. Finally, the court engaged in a plea colloquy to ascertain the voluntariness of the plea. While we recognize this colloquy cannot supplant the advice of counsel, the record as described reflects such advice was given. Accordingly, we find counsel did not breach an essential duty and we reject this ineffective assistance of counsel claim.

C. Failure to File a Direct Appeal. Murphy asserts his attorney was ineffective in failing to appeal his seven convictions. He testified at the postconviction relief hearing that he gave explicit directions to his father to inform his attorney he wished to appeal and Murphy also directly conveyed this instruction to counsel. Murphy's attorney agreed he discussed an appeal with Murphy, but testified he told Murphy an appeal might be construed by the district court as evidence of a lack of remorse in the event they filed a motion to reconsider his sentence. He testified, "[m]y general sense is that he asked me to file the motion to reconsider and forgo the appeal. I don't remember his exact words. I do know he was very angry during –with the judge during all this discussion." Murphy's attorney further stated he believed an appeal would have been almost frivolous.

Murphy's attorney made a strategic decision to forgo an appeal. The record reflects both Murphy and his attorney filed motions to reconsider. One of the motions filed and signed by Murphy acknowledges he did not appeal the court's sentence, lending credence to counsel's testimony that the option to forgo an appeal was discussed. Additionally, the district court ruled on Murphy's first

two motions to reconsider within ample time for Murphy to file a timely appeal if he wished. He did not do so, choosing instead to file another motion to reconsider the sentence. This action again suggests Murphy wished to avoid harming his chances of success before the district court by filing an appeal. As the Iowa Supreme Court has stated, "[t]actical decisions such as this are immune from subsequent attack by an aggrieved defendant claiming ineffective assistance of counsel." *Osborn*, 573 N.W.2d at 924. We conclude Murphy's attorney acted within the normal range of competency and accordingly breached no essential duty by failing to file an appeal.

IV. Sentencing Factors

Murphy contends the district court failed to adequately consider mitigating factors in his sentencing. Having concluded Murphy's attorney was not ineffective in failing to file a direct appeal, we also conclude Murphy has failed to provide sufficient reason for bypassing a direct appeal of this issue. See Iowa Code § 822.8; *Bugley*, 596 N.W.2d at 893. Accordingly, we conclude he waived error. See *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993).

We affirm the district court.

AFFIRMED.

Streit, J. concurs; Sackett, C.J., concurs specially without opinion.