

FILED

MAY 31 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**DALE DEAN SORENSEN,**

)

Petitioner-Appellant,

)

Filed May 31, 1983

vs.

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STATE OF IOWA,

)

3-67
2-67477

Respondent-Appellee.

)

Appeal from Shelby District Court - Glen M. McGee, Judge.

Petitioner appeals from the trial court's decree denying his application for postconviction relief from his 1977 guilty-plea conviction and sentence on a forgery charge. **AFFIRMED.**

Francis C. Hoyt, Jr., Chief Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Petitioner appeals from the trial court's decree denying his application for postconviction relief from his 1977 guilty-plea conviction and sentence on a forgery charge. He claims that: 1) his guilty plea was involuntarily and unknowingly made because he was misled about the possibility of a more lenient sentence; 2) he received ineffective assistance of counsel; and 3) he should have been allowed to appear in person at the postconviction hearing even though he was already incarcerated. We affirm.

Dale Sorensen was charged by information in August, 1977, with forgery in violation of Iowa Code § 718.1(9) (1975) and had been charged with other offenses during that time. A plea bargain agreement was entered into in which Sorensen would plea guilty to the forgery charge and the other charges would be dismissed. The county attorney would in turn recommend that Sorensen be incarcerated in the county jail for one year with credit for time already served. This arrangement was explained in full to the trial court during the guilty plea proceedings who appeared to acquiesce to the agreement but also cautioned Sorensen that the sentencing court would not be bound to accept the recommendation. The court then accepted the guilty plea. The sentencing proceeding was conducted by a different judge who first warned Sorensen that he was not bound by the plea bargain and noted that the presiding judge in the plea proceedings made that statement as well. The court then indicated disfavor with the idea of Sorensen being sentenced to the county jail, noting its lack of occupational therapy courses and opportunity for psychiatric examination. After determining that Sorensen was not a good candidate for probation, the court sentenced him to Anamosa for a period not to exceed ten years. At the same time, the court revoked Sorensen's probation imposed in a separate 1976 charge.

On June 1, 1981, Sorensen made this application for postconviction relief, challenging the adequacy of his guilty plea and claiming that it was not knowingly

and voluntarily made. Among other allegations, he asserted that the county attorney did not fulfill his part of the bargain because he did not recommend the one-year jail sentence proposed in the plea bargain. He also claimed ineffective assistance of counsel. Prior to the hearings on his application, his attorney asked permission to have him brought to the hearings to testify in person. In rejecting this request, the court stated that when an applicant for postconviction relief raises a claim of ineffective assistance of counsel, his personal presence at the hearing is not required.

On October 9, 1981, the postconviction court issued its decree denying relief. It specifically held that the judge presiding at the guilty plea proceeding was not required, under the rules existing at that time, to inform Sorensen of his right to challenge his plea by filing a motion in arrest of judgment. The court also ruled that Sorensen's plea was voluntarily and intelligently made and that the sentencing judge did not abuse its discretion in refusing to allow him to withdraw his guilty plea. Finally, the court held that Sorensen failed to sustain his burden of proving ineffective assistance of counsel. This appeal followed.

I. We first consider Sorensen's claim that he received ineffective assistance of counsel. The standards to be employed in determining this issue were set forth in Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981):

In a postconviction proceeding the petitioner has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. The petitioner must overcome a presumption that counsel is competent. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. When the claim of ineffective assistance of counsel is premised on the failure of counsel to take some action, the petitioner must demonstrate that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. (citations omitted).

"Effective assistance of counsel does not mean successful . . . improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not

necessarily amount to ineffective counsel." Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980) (citations omitted).

We conclude that Sorensen has failed to sustain his burden of proving ineffective assistance of counsel. He first claims that his first attorney, Harold DeKay, should have filed and prosecuted an appeal from the sentence imposed. However, he neither asked DeKay to do so nor did he indicate any desire to proceed along that line within the sixty-day period for filing an appeal. DeKay testified that he did not believe that filing an appeal would serve any useful purpose. We cannot say DeKay's decision was not within the normal range of competence.

Sorensen next claims that Bennett Cullison, his attorney at the sentencing hearing, should have made a timely motion to allow Sorensen to withdraw his guilty plea when it became clear that the sentencing judge would not follow the terms of the plea bargain. There is no question that the motion as made by Cullison was untimely since it was made after the sentence was imposed. See State v. Whitehead, 163 N.W.2d 899, 901 (Iowa 1969). Sorensen was not prejudiced, however, by Cullison's untimely motion since the sentencing judge indicated that the motion to withdraw the guilty plea would be overruled "in any event." Since Sorensen was not prejudiced by Cullison's failure to file a timely motion, ineffective counsel is not established on this claim. In this connection, we reject Sorensen's claim that Cullison should have filed such a motion when the State failed to keep its part of the plea bargain; i.e., to recommend a one-year sentence in the county jail. The county attorney made no recommendation other than that contained in the agreement and did not dispute Sorensen's full recitation of the terms of the plea bargain, including the one-year jail sentence. The State kept its part of the bargain.

Sorensen also asserts Cullison's ineffectiveness because of his failure to file a motion in arrest of judgment to challenge the guilty plea as not having been

knowingly and voluntarily made. Cullison testified at the postconviction hearing that, in his opinion, Sorensen's guilty plea was in fact knowing and voluntary. Sorensen's claim here is based on the fact that the sentencing judge rejected the one-year jail term recommended in the plea bargain agreement and sentenced him to no more than ten years at Anamosa. Sorensen, however, was aware at all times that the sentencing judge is not bound by any plea bargain agreements or sentencing recommendations. "[A] disappointed expectation of leniency is not sufficient cause to vitiate a guilty plea." State v. Dee, 218 N.W.2d 561, 563-64 (Iowa 1974). We believe that Cullison was acting within the range of normal competence in not filing a motion in arrest of judgment to challenge the plea because of his reasonable belief that Sorensen knew what he was doing when he pleaded guilty and knew that the sentencing judge was not bound by the terms of the plea bargain. Cullison was not ineffective in making those determinations and decisions.

Finally, Sorensen claims that Cullison was ineffective in representing him at the probation revocation hearing. Initially, we note that counsel is not always constitutionally required in probation revocation proceedings, Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), and, under the analysis in that case, we do not believe counsel was required in Sorensen's probation revocation. Even if his right to effective legal assistance attached in this case, however, his argument could not prevail. His specific allegations of ineffectiveness are not accompanied by any specific showings of resulting prejudice or that the court would not have revoked his probation absent the alleged ineffectiveness. Without this showing, he cannot sustain his burden of proving ineffective assistance of counsel.

II. Sorensen also claims that the trial court erred in overruling his challenge to the knowing and voluntary nature of his guilty plea. His failure to file below a motion in arrest of judgment to challenge the plea, however, is fatal.

State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977). At that time, the court was not required to inform defendant of the need to file a motion in arrest of judgment in order to challenge the adequacy of a guilty plea. See Iowa R. Crim. P. 8(2)(d). We have determined in Division I of this opinion that his attorney was not ineffective for failing to file such a motion because of his reasonable and competent belief that Sorensen's plea was in fact knowingly and voluntarily made. Under these circumstances, we reject his argument. In addition, we find no abuse of the trial court's discretion in its refusal to allow Sorensen to withdraw his guilty plea. See State v. Tillman, 228 N.W.2d 38, 39 (Iowa 1975).

III. Finally, Sorensen contends that the trial court erred in overruling his request to appear and testify at the postconviction hearing. According to Iowa Code section 663A.7, "[t]he court . . . may order the applicant brought before it for the hearing" (emphasis added). Thus, the matter is wholly discretionary with the trial court. Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982).

In rejecting Sorensen's request to be present, the court stated:

Well, the Court is of the opinion that his presence—the defendant's presence is not required if the basis for the post-conviction hearing is ineffective assistance of counsel by trial counsel; and the Court is of the opinion that the defendant's position on that could be presented to the Court in affidavit form or some other type of form, and you are allowed, Mr. Rosenberg, to do that if you like, but I will deny this morning your motion to allow the defendant to be personally present for that reason.

We believe this reasoned decision to be well within the bounds of the court's discretion. Sorensen does not present the "preliminary showing of need" required by the Sallis court before an incarcerated petitioner will be allowed to personally attend the hearing on his application for relief. Id. at 124.

We have considered all of Sorensen's contentions and find no reason to disturb the judgment of the trial court. Its decree is affirmed.

AFFIRMED.