

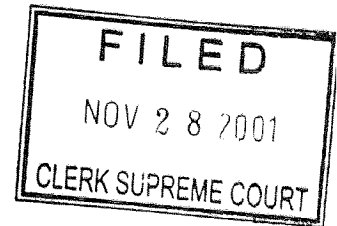
IN THE COURT OF APPEALS OF IOWA

No. 1-614 / 00-782
Filed November 28, 2001

BRIAN JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Black Hawk County, Alan L. Pearson, Judge.

Brian Jones appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Robert J. Hearity of Hearity Law Firm, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jack Lammers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Zimmer, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Brian Jones entered a plea of guilty to two counts of second-degree robbery and one count of possession of marijuana. After the district court accepted his plea, Jones requested immediate sentencing, waiving his right to challenge the plea proceeding through motion in arrest of judgment. Jones was thereafter sentenced to two consecutive ten-year terms plus sixty days. On direct appeal Jones's court-appointed appellate counsel moved to withdraw citing the frivolousness of Jones's appeal. See Iowa R. App. P. 104. In a letter objecting to dismissal of his direct appeal, Jones said:

I am also submitting the grounds for my case. They are as follows: (1) Ineffective counsel due to failure to preserve issues of violation of defendant 5th and [sic] amendment privilege. (2) Failure of Trial Judge to substantially comply with Sisco Requirements.

(Citations omitted.) Counsel's motion to withdraw was granted, and Jones's direct appeal was dismissed.

These proceedings commenced with Jones's petition for postconviction relief. Jones's petition alleged two statutory grounds for relief, including constitutional violations and evidence of material facts not previously presented and heard. Jones made the following factual allegations:

Plea was made as a result of coercion, plea was made under duress. Violation [sic] of the "Miranda Rule."

Failure of Counsel to preserve error, ineffective assistance of counsel. Error in proceedings during plea and sentencing hearing.

* * *

Trial Judge and Attorney failed to fully explain nature of charges and to insure that I understood same. Failure to order a presentence investigation.
Ineffective Assistance of Counsel.

At trial Jones claimed trial counsel was ineffective citing counsel's failure to pursue motions to suppress inculpatory statements Jones made to investigators as well as the results of an impermissibly suggestive photographic lineup implicating him in these offenses. He also challenged the validity of his guilty pleas citing the court's failure to inquire into Jones's understanding of the nature of the crimes charged or applicable penalties.

The trial court, after expressing reservations concerning Jones's preservation of these issues for postconviction relief, nevertheless addressed the merits of Jones's claims. The court ultimately concluded:

The Court declines to indulge in an analysis of the underlying issues brought to the Court's attention by Plaintiff Jones. In the context of the guilty plea proceeding, the plaintiff has failed to carry his burden on either element of proof for postconviction actions. He has not established that Attorney Mason failed in any essential duty regarding the guilty plea proceeding nor has he established that the result would have been different if Attorney Mason had done more research or developed a more in-depth understanding of the issues. The plaintiff's plea was voluntarily and intelligently entered. He understood his rights and the consequences of pleading guilty. The most that can be said is that he has changed his mind about his bargain but that is insufficient reason to set it aside.

On appeal Jones contends the trial court erred in failing to find trial counsel was ineffective. Specifically, he argues counsel breached his duty of zealous representation in failing to pursue the motions to suppress. Jones also argues that he should be entitled to withdraw his guilty plea because the plea colloquy was deficient. He contends the district court failed to determine that he

understood the elements of the crimes charged or the associated mandatory minimum and maximum possible punishments.

II. Standard of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. This is the equivalent of a de novo review. *Id.*

III. Ineffective Assistance of Counsel.

Jones contends he was denied effective assistance of counsel. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the strong presumption his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test, it must be shown that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

Ineffective assistance of counsel claims premised on counsel's failure to investigate or file a motion to suppress do not survive the entry of a valid guilty plea. See *Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000). Any consideration

of Jones's claims concerning counsel's pre-plea representation is therefore contingent on our disposition of Jones's challenge to the validity of his guilty pleas.

The State correctly notes that Jones's failure to file a motion in arrest of judgment precluded any challenge to the validity of Jones's guilty pleas on direct appeal. See Iowa R. Crim. P. 23(3)(a). Failure to do so, however, will not preclude such a challenge in these proceedings if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996) (citing *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982)).

Neither Jones's resistance to appellate counsel's motion to withdraw or petition for postconviction relief cites counsel's failure to file a motion in arrest of judgment as grounds for relief. As a result, Jones is precluded from challenging the validity of his guilty plea in these proceedings. *Id.* Because Jones entered a presumptively valid guilty plea, any claims of ineffective assistance of counsel based on counsel's pre-plea performance are also precluded. *Speed*, 616 N.W.2d at 159.

The judgment of the district court is therefore affirmed.

AFFIRMED.