

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1986

CLERK SUPREME COURT

WILLIE J. WILDER,

Petitioner-Appellant,

vs.

STATE OF IOWA

Respondent-Appellee.

Filed January 29, 1986

5-578
84-1944

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Appeal from the Iowa District Court for Black Hawk County - L. John Degnan, Judge.

The petitioner appeals from the district court's denial of postconviction relief. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and Scott Lemke, Assistant Black Hawk County Attorney, for the petitioner-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for the respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

In 1983 Petitioner Wilder entered simultaneous guilty pleas to a charge of carrying weapons, a charge of unauthorized possession of an offensive weapon, and a charge of assault with intent to inflict serious injury. These pleas were entered pursuant to a plea bargain in which the state agreed to refrain from filing several other charges and to recommend concurrent sentencing.

Wilder was sentenced to a prison term of up to five years on the charge of unauthorized possession of an offensive weapon. He was sentenced to imprisonment of up to two years on each of the other two charges. All three prison terms were to run concurrently.

After arriving at prison, Wilder was informed by prison authorities that because of a 1975 conviction for armed robbery, he would not be eligible for parole under Iowa Code section 906.5 until he had served at least half the maximum term of his sentence. Section 906.5 provides in relevant part as follows:

If a person who is under consideration for parole is serving a sentence for conviction of a felony and has a criminal record of one or more prior convictions for a forcible felony or a crime of a similar gravity in this or any other state, parole shall be denied unless the person has served at least one-half of the maximum term of the defendant's sentence.

Wilder then filed the present application for postconviction relief. The district court denied relief, and Wilder has appealed. Wilder contends his guilty plea was not entered intelligently and voluntarily because the trial court told him he would not be subject to any mandatory minimum sentence. He asserts the trial court's comment was misleading because it led him to believe he would be eligible for parole immediately, whereas in fact he was subject to a mandatory minimum period of incarceration because of the effect of Iowa Code section 906.5. Wilder also contends his trial attorney rendered ineffective assistance by failing to tell him that he would be required to serve a mandatory minimum period of incarceration under section 906.5.

I. Trial Court

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At the guilty plea proceedings, the court told Wilder "[t]here are no mandatory minimum penalties in this case, you understand that," to which Wilder responded "Yes."

A trial court is required to inform a defendant of all maximum and minimum penalties. Iowa R. Crim. P. 8(2)(b). The court is not required to inform a defendant who pleads guilty that he or she is subject to the parole limitation of Iowa Code section 906.5. Grout v. State, 320 N.W.2d 619, 620-21 (Iowa 1982); Boge v. State, 309 N.W.2d 428, 431 (Iowa 1981). However, a guilty plea may be invalid if the trial court misleads the defendant into thinking that he or she will be immediately eligible for parole when in fact section 906.5 prohibits immediate parole eligibility. Stovall v. State, 340 N.W.2d 265, 266-67 (Iowa 1983).

The problem here is not one of minimum sentence, but rather a limitation on the power of the parole board to grant Wilder a parole. The trial court did not make a misstatement to Wilder regarding his parole eligibility as was the case in Stovall v. State. In Stovall the court misspoke when it stated to the defendant "[t]hat means there won't be any five-year period that you have to serve before you're eligible for parole" Stovall v. State, 340 N.W.2d at 266. In Wilder's proceeding, the trial court never mentioned the word parole.

Wilder claims that although the court referred to minimum penalties rather than to a parole limitation, "it would be difficult to point out any difference to the person who must serve the additional time." State v. Wilson, 314 N.W.2d 408, 409 (Iowa 1982). The standard set forth in Stovall v. State is clear and requires that the court make a "material misstatement" in order to invalidate a guilty plea. Stovall at 267. That did not occur during Wilder's guilty plea proceeding.

II. Trial Counsel

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At the postconviction hearing, Wilder testified that his trial attorney assured him he would not be required to serve a minimum amount of time before he could be considered for parole. He further testified that he would not have pled guilty had he been aware that the section 906.5 parole limitation applied.¹ Wilder claims his trial counsel was ineffective.

In order to establish ineffective assistance of counsel, Wilder must show:

- (1) that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
- (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). To satisfy the prejudice requirement, Wilder must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 38 Cr.L.Rep. 3014, 3016 (U.S. Sup. Ct. Nov. 18, 1985).

At the postconviction hearing, Wilder testified:

The plea that I made was an Alford Plea. And I discussed with my attorney, the ramifications of going to trial — jury trial with those charges.

And we discussed what would be in my best interest. And he had said that since the charges — none of the charges I had were forceable felonies, that if run concurrently with the parole violation, that I wouldn't have any mandatories to do, and the maximum sentence I could get would be five years with no mandatories. And he — We discussed some other things, and I felt it would be in my best interest to accept that plea bargain at that time.

¹ At the postconviction hearing, Wilder's postconviction relief counsel incorrectly labeled section 906.5 as a "mandatory minimum penalty" when he was questioning Wilder. We must remind counsel that a limitation on parole is not a penalty, punishment, or sentence.

Wilder's understanding of the conversation between himself and his attorney regarding his guilty plea leads us to the conclusion that Wilder did intelligently and voluntarily enter his guilty plea.

Wilder relies on Meier v. State, 337 N.W.2d 204 (Iowa 1983) in support of this claim. We believe that case is distinguishable. In Meier, the court stated:

In the case before us it is undisputed that trial counsel gave petitioner erroneous advice regarding the law on the time he would be required to serve under the "mandatory five-year term," and that petitioner relied on this advice in waiving trial and pleading guilty.

Meier v. State, 337 N.W.2d at 206. Wilder has not shown that his counsel gave him clearly erroneous advice. In his testimony at the postconviction hearing, Wilder repeatedly stated his trial counsel told him there would be no mandatory or minimum "penalty." However, Wilder never stated his trial counsel misstated his parole eligibility to him. It is his postconviction relief counsel that uses the term parole.

- Q. Would you have pled guilty at the plea bargain, if you were aware of the mandatory minimum penalty before consideration for sentencing could be given? A. No, I would not.
- Q. I'll rephrase that question. Before consideration for parole could be given? A. No, I would not. That was a major concern going into the preliminary hearings was whether or not there was a mandatory in any way connected with those sentences. And I was assured by both my attorney and your Honor, that there was no mandatory minimum penalties.
- Q. And you have been informed; have you not, that the mandatory minimum requirement comes from Section 906.5 of the 1983 Code? A. Yes.

To prevail on a claim of ineffective assistance of counsel, Wilder must show the attorney's performance was deficient and that as a result there was

prejudice to him. Wilder has not made this showing. The district court correctly denied Wilder's postconviction relief.

AFFIRMED.