FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EDWARD DEAN KIILSHOLM,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed May 28, 1985 244

5-125
84-395

Appeal from the Iowa District Court for Humboldt County - Mark J. Cady, District Associate Judge.

Petitioner appeals from the trial court's denial of his petition for postconviction relief. AFFIRMED.

Charles Harrington, 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 Snell, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Edward Dean Kiilsholm appeals from the trial court's denial of his application for postconviction relief. He claims his guilty plea was induced by alleged misrepresentations of his trial counsel concerning the penal consequences of his guilty plea.

Kiilsholm was charged in Humboldt County with sexual abuse in the second degree under two separate informations. The informations were subsequently amended to allege defendant represented he was in possession of a firearm, displayed a firearm in a threatening manner or was armed with a firearm during the commission of the alleged offense. The causes were consolidated for trial. Defendant entered a plea of guilty to each charge in exchange for the State's agreement to delete the language pertaining to the use of firearms from one of the informations.

Defendant was sentenced to a period not to exceed 25 years on each charge, the sentences to be served consecutively. The court also found defendant was subject to the provisions of Iowa Code section 902.7 (1979), rendering him ineligible for parole until he had served a minimum of 5 years.

Kiilsholm filed a petition for postconviction relief stating numerous reasons why his plea should be set aside. On appeal, Kiilsholm claims only that his trial counsel was ineffective in misinforming him regarding the consequences of his plea and, therefore, his plea should be set aside. Kiilsholm claims his trial counsel told him he was pleading to a 25-year sentence and also told him counsel had talked to the warden at Anamosa and the most time defendant would do on a 25-year sentence was 5 years.

Kiilsholm's trial counsel testified he knew the defendant was concerned about serving two consecutive 25-year sentences. Counsel, also, indicated he had learned from the warden at Anamosa, through the county attorney, that someone in defendant's position would probably serve less than 4 years.

The record at sentencing indicated the defendant knew he could receive 25 years on each charge. The court explained that the plea on the charge with a firearm carried a 5-year minimum and that the sentencing court was not bound by any recommendations or agreements between defendant's attorney and the prosecutor. At sentencing defendant indicated he understood the court would determine whether the sentences were to be served concurrently or consecutively. Again the record reflects a discussion of a mandatory minimum sentence because of the firearm violation.

Defendant argues trial counsel gave him erroneous advice as to the consequences of his plea. "Mere prediction by counsel of the court's likely attitude on sentence, short of some implication of an agreement or understanding, is not ground for attacking a plea." Swanson v. United States, 304 F.2d 865, 866 (8th Cir. 1962), cert. denied, 371 U.S. 894, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962), quoting Dominica v. United States, 292 F.2d 483, 485 (1st Cir. 1961).

There is nothing in the record which shows counsel's prediction of the time to be served was unreasonable. It was based on information received from a warden. Defendant claims his attorney should have checked with the department of corrections. The time actually served is frequently dependent on many variables, including the prisoner's behavior and prison population and is not necessarily predictable by anyone. Time can be shortened by good and honor time. Stovall v. State, 340 N.W.2d 265, 267 (Iowa 1983).

We affirm the district court's denial of postconviction relief and affirm petitioner's guilty plea.

AFFIRMED.