FILED
OCT 05 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-166 / 88-920

VAN EUGENE MOSIER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County (97348), Cameron B. Arnold, Judge.

Mosier appeals from the denial of his application for postconviction relief challenging the validity of his plea of guilty to a charge of false use of a financial instrument. **REVERSED.**

Raymond E. Rogers, State Appellate Defender, and James F. Whalen, Assistant State Appellate Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Thomas D. McGrane, Assistant Attorney General; and Mark A. Campbell, Assistant County Attorney, for resister-appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

PER CURIAM

Appellant Van Eugene Mosier appeals from the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1987). We reverse.

Van Mosier pled guilty to a charge of false use of a financial instrument pursuant to a written plea agreement that provided, in part, that Mosier's Iowa sentence would run concurrently with a sentence he was then serving in Nebraska. The district court agreed to be bound by the agreement, sentenced[1] Mosier to an indeterminate five-year prison term, and returned him to Nebraska.

Appellant discovered in September 1986 that the time he served in Nebraska after the date of his Iowa sentencing could not, his plea agreement to the contrary, be credited against his Iowa sentence because of Iowa Code section 903A.5 (1987). That section provides, in pertinent part, that, "An inmate shall not receive credit upon the inmate's sentence . . . for time served in an institution or jail of another jurisdiction during any period of time the person is receiving credit upon a sentence of that other

---

1. It is beyond dispute that the written plea agreement provided that the Iowa sentence "shall be allowed to run concurrently with the sentence imposed by the district judge in and for Dakota County, Nebraska . . . ." The sentencing judge accepted and agreed to this agreement. There is some discussion as to the meaning and extent of the plea bargain. However, the sentencing judge had the final say when he ordered in his judgment entry that "the defendant's sentence shall run concurrent with the sentence he is presently serving in Dakota County, Nebraska."

jurisdiction." Appellant then made application with the district court for postconviction relief, but such relief was denied.

On appeal from that denial, Mosier contends that his guilty plea was induced by the plea bargain, and because the district court failed to tell him that a key provision of that plea bargain was expressly prohibited by statute, the plea was not knowingly, intelligently, and voluntarily entered.

In the alternative, Mosier alleges ineffective assistance of counsel grounded in his trial counsel's failure to inform him that a central feature of the plea agreement was prohibited by statute.

The State responds, first, that Mosier's failure to file a motion in arrest of judgment precludes review and, second, that he has not carried his burden of proof to show that he was prejudiced by the alleged ineffective assistance of counsel.

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--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Appellant asserts he was misled by his attorney, and the district court as to the consequences of his guilty plea. The State, however, contends that appellant's failure to file a motion in arrest of judgment precludes him from challenging his guilty plea in this court. Therefore, before we can determine the merits of appellant's contentions, he must first establish by a preponderance of the evidence "sufficient reason" for failing to file a motion in arrest of judgment with the district court. Wenman v. State, 327 N.W.2d 216, 217 (Iowa 1982).

We find appellant has met this burden here. Appellant was unaware that his sentence could not run concurrently with the sentence he was serving in Nebraska until some three months after his sentencing. This mistaken belief was the direct product of misstatements of law by both his attorney and the district court that his Iowa sentence was to run concurrently with his Nebraska sentence.

In addition, appellant waived his right to file a motion in arrest of judgment by agreeing to be sentenced immediately after entering his guilty plea. This waiver, however, coming on the heals of the guilty plea, was tainted by the previously mentioned misstatements of law. Such circumstances constitute a sufficient reason for failing to file a motion in arrest of judgment.

Having already determined that the district court and appellant's counsel misstated the law at the plea hearing, we must next determine if this misstatement of law caused appellant's plea to be invalid. The Iowa Supreme Court pointed out in Stoval v. State, 340 N.W.2d 265, 267 (Iowa 1983) that:

> If the court does make a misstatement, if the misstatement is material in the sense that it is part of the inducement for the defendant's decision to plead guilty, if the defendant's attorney does not correct the misstatement, and if the defendant enters a guilty plea accordingly, the plea is not intelligently and voluntarily made, and the defendant is entitled to have his plea set aside and to plead anew.

Similarly, our supreme court noted in Mott v. State, 407 N.W.2d 581, 583-84 (Iowa 1987): "[i]f a defendant has been affirmatively misled by an attorney concerning the consequences of a plea, the plea may be held to be invalid, even though the consequences are characterized as collateral."

Here, the misstatement was an obvious inducement for appellant's decision to plead guilty in that he was led to believe that the time he served on the Nebraska sentence would also count against his Iowa sentence. As such, we determine that appellant's guilty plea was not intelligently and voluntarily made by him. We, however, decline to follow State v. Miller, 756 P.2d 122, 125 (Wash. 1988), and grant him specific enforcement of the plea agreement.

Because of the result reached, we need not determine the ineffective assistance of counsel claim. However, at the postconviction hearing defendant's trial counsel admitted that confusion existed during the course of the guilty plea proceedings. Again we point out that under Iowa law the promise made to the defendant and approved by the court could not be fulfilled.

We reverse the judgment of the postconviction court and remand for judgment vacating the guilty plea, conviction and judgment in appellant's criminal case, and permitting petitioner to plead anew in that proceeding.

REVERSED.