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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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RODNEY G. FREEMAN,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed June 26, 1984

4-106
83-970

Appeal from the Iowa District Court for Fremont County—J.C. Irvin, Judge.

The petitioner appeals from the trial court's denial of his application for postconviction relief. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR RESENTENCING.

Gary T. Gee, Shenandoah, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, and Hayden.

OXBERGER, C.J.

The petitioner appeals from the trial court's denial of his application for postconviction relief. He challenges his 1981 conviction, pursuant to a guilty plea, for first-degree robbery. We affirm in part; reverse in part; and remand for resentencing.

Our scope of review for postconviction proceedings is on assigned error, except when there are issues raised as to a constitutional violation. Then we must independently evaluate the totality of the relevant circumstances shown by the record under which rulings on those constitutional rights were made. Evidence relevant to the issue is received de novo. Bledsoe v. State, 257 N.W.2d 32, 33 (Iowa 1977).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981); Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973); § 663A.8.

Freeman asserts: (1) that the trial information only stated the elements of second-degree robbery and that his plea to the higher charge of first-degree robbery was invalid; (2) that the sentencing court erred by failing to consider all sentencing options and by failing to realize that probation was available in his case because he was a juvenile at the time of the crime; and (3) that his trial attorney rendered ineffective assistance by failing to raise the two preceding issues in the trial court. Freeman also asserts that his trial attorney rendered ineffective assistance by telling him incorrectly that the State might pursue additional charges unless he pleaded guilty.

All of these issues were raised for the first time in defendant's postconviction proceedings; defendant did not take a direct appeal. Therefore, it is defendant's burden to show sufficient reason for failing to raise those issues or he is barred from asserting the claim in postconviction proceedings. Washington at 235.

In State v. Turner, 345 N.W.2d 552 (Iowa Ct. App. 1983), we stated:

> In a postconviction proceeding, when a defendant raises a factual or legal contention which he knew of and which he deliberately and inexcusably failed to raise in the proceeding leading to conviction, or, having raised the question in trial court, failed to pursue the matter on appeal, we will deny relief. There is an exception, however, and that is inadequacy of counsel might be sufficient reason why an issue was not asserted or was inadequately raised originally. However, the ineffective assistance of counsel claim was also raised for the first time in the postconviction proceeding. Therefore, we must first decide if there was sufficient reason why that claim was not raised in the direct appeal.

Id. at 558. We find such to be the case here.

We deal first with the first degree-robbery charge. If we assume Freeman knew about the alleged discrepancy in the information, our first task is to resolve the question of whether there was sufficient reason why an ineffective assistance of counsel claim was not raised in a direct appeal.

When the same counsel represents defendant in the original proceeding and on direct appeal, a sufficient reason exists for the failure to raise a claim of ineffective assistance on direct appeal. See Turner at 558. We believe the same should hold true when a defendant has one counsel in the original proceeding and a direct appeal is not taken, as the effect is basically the same. See Turner at 558. As such, we find the issue of ineffective assistance properly before the postconviction court.

II. Ineffective Assistance of Counsel and Guilty Plea

We must first determine whether Freeman was denied ineffective assistance of counsel when counsel failed to inform the sentencing court and the court before

whom the guilty plea was entered that defendant had allegedly pleaded guilty to robbery in the second degree. If we find such a denial, we will next determine the merits of defendant's claim.

When defendant relies upon a specific act or omission to prove such a claim, defendant must show that counsel failed to perform an essential duty and that prejudice resulted. State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). The burden on defendant is great because it must be shown that the ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. Id. at 234.

The trial information in the instant case stated that Freeman:

> . . . did unlawfully and willfully with the intent to commit a theft, threaten another with or purposely put another in fear of immediate serious injury, and that said acts were done to assist or further the commission of the intended theft and that while perpetrating said robbery, he did go armed with a dangerous weapon. That said dangerous weapon was used in the commission of said forcible felony, to wit: that he did participate in the theft. . . and that a shotgun and rifle were used in the commission of such theft. . . .

At the end of the guilty plea proceedings, the county attorney stated that he "would seek leave of Court to amend Count I in this information to delete the language that does charge Mr. Freeman with use of a forcible—use of a weapon—dangerous weapon in the commission of a forcible felony."

Second-degree robbery includes robbery without the use of a dangerous weapon. Even though the trial information was amended as has been heretofore explained, we find Freeman did not plead guilty to second-degree robbery.

The defendant struck a bargain with the county attorney which was clearly stated in the transcript of the guilty plea.

> THE COURT: It's my understanding the plea bargain is that you plead guilty to robbery one; that you will receive a twenty-five year sentence; that you will not be—will not receive the mandatory minimum of five years due to firearm. In other words, the County Attorney is dropping the portion of the Information that refers to the use of firearm; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.

The defendant acknowedged his part in the first-degree robbery offense; he admitted having used a firearm; he acknowledged several times within the course of the guilty plea proceedings that he was pleading guilty to robbery in the first degree.

We have reviewed the evidence and find that the offense was never intended to be reduced to second-degree robbery. The plea bargain offered the defendant an alternative which he found advantageous, i.e., the mandatory minimum of a five-year sentence due to the use of a firearm would not be applicable. Nothing would have been gained had defense counsel told the court that his client was actually pleading guilty to second-degree robbery. If anything, a favorable plea bargain might have been destroyed.

All the evidence before us indicates that when the trial information was amended, it was intended to be amended in such a way so as to delete the language referring to a firearm, while retaining the language as to the use of a dangerous weapon, which is an element of first-degree robbery. Defendant's plea and subsequent conviction is not rendered void because of this technical error. See Herman at 545. Defendant should not be able to accept the benefit of his plea bargain, then subsequently attack it as being invalid.

However, even assuming that counsel failed to perform an essential duty by neither objecting to nor informing the court about the alleged discrepancy between the information and the plea, the foregoing demonstrates that there was no resulting prejudice to the defendant. Therefore, there is no viable ineffectiveness claim. See Miles at 233-34.

But had we reached the merits of this issue, we find defendant is still not able to obtain relief. Freeman contends his plea of guilty to first-degree robbery and his subsequent conviction was invalid because the trial information charged only second-degree robbery. However, a plea which is voluntarily and intelligently given waives all defenses except that the information charges no offense. See State v. Kobrock, 213 N.W.2d 481, 483 (Iowa 1973). As such, we find that defendant waived the imperfection he now seeks to rely on. See Herman v. Brewer, 193 N.W.2d 540, 545 (Iowa 1972).

Freeman also asserts his counsel was ineffective because counsel allegedly incorrectly told defendant that the State might pursue additional charges unless he plead guilty. We disagree.

Although such charges were not pending against Freeman due to a prior ruling of the court that such charges must be filed first in juvenile court, the State remained in a position to file and prosecute those charges. Part of defendant's plea arrangement was that in exchange for a guilty plea the State would not seek to prosecute the charges. The fact that such charges were not actively pending at the time of the plea arrangement does not render counsel ineffective for informing defendant of potential additional charges.

Therefore, we find no ineffective assistance of counsel; we affirm defendant's conviction of first-degree robbery based upon his guilty plea.

III. Sentencing

Freeman filed no direct appeal contesting his sentence on the grounds that Iowa Code section 232.8(3) was not considered. It is most likely that Freeman was not aware of this sentencing alternative at that time. If a postconviction applicant did not know about the factual or legal contentions in the original trial which he now seeks to assert in postconviction relief, failure to directly appeal

does not bar him from asserting those contentions in a postconviction proceeding. See Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979). Therefore, we find this issue properly before the postconviction court and we review the issue on its merits.

Freeman was seventeen years old at the time of arrest. The initial proceedings were held in juvenile court. That court subsequently waived jurisdiction and Freeman was charged as an adult. Iowa Code section 232.8(3) states:

> The juvenile court, after a hearing and in accordance with the provisions of section 232.45, may waive jurisdiction of a child alleged to have committed a public offense so that the child may be prosecuted as an adult for such offense in another court. If the child pleads guilty or is found guilty of a public offense in another court of this state that court may, with the consent of the child, defer judgment and without regard to restrictions placed upon deferred judgments for adults, place the child on probation for a period not less than one year upon such conditions as it may require. Upon fulfillment of the conditions of probation the child shall be discharged without entry of judgment.

(emphasis added).

At the plea proceeding, the court stated that it had "no alternative but to give [Freeman] a twenty-five year sentence." The court subsequently indicated on four other occasions that the sentence was to be twenty-five years. Nowhere in those proceedings was section 232.8(3) mentioned.

At the sentencing proceedings, a different judge presided. However, again, no mention was made about the alternative offered in section 232.8(3). The sentencing judge's duty in every case is to consider available options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice for society and for the individual defendant. State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977). Even though the court stated reasons for the sentence imposed, we find no convincing evidence in

the sentencing record indicating that section 232.8(3) was taken into consideration. As such, we remand the case to the trial court for resentencing with directions to consider section 232.8(3) as an available option. Accordingly, we need not reach the issue of whether trial counsel rendered ineffective assistance by failing to raise the preceding issue.

IV. Equal Protection

Freeman contends that he was denied equal protection because he, as a black juvenile, was sentenced to imprisonment while a white adult co-defendant, also convicted of first-degree robbery, received probation. We find there is no longer a factual basis for Freeman's argument as the Iowa Supreme Court has recently remanded the co-defendant's case for resentencing. See State v. Ohnmacht, 342 N.W.2d 838 (Iowa 1983).

V. Presence at Hearing

Freeman asserts that the trial court abused its discretion by refusing to allow defendant to be present at the postconviction hearing. The matter is wholly discretionary with the trial court. Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982). It is defendant's burden to show that the court abused its discretion and that he was prejudiced by the abuse. See State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978).

The record indicates that counsel did not demonstrate any reason why defendant's position could not be adequately brought before the court by affidavit. Furthermore, the court indicated that defendant could be brought in if necessary for cross-examination of any witnesses' rebuttal testimony; however, there were no witnesses brought in for either the defendant or the State.

Freeman's evidence included his application, affidavits, exhibits, and brief. The record indicates no reason why Freeman's presence was also necessary; therefore we find no abuse of discretion in the court's refusal to order defendant's presence at the hearing.

VI. Intent to Dismiss

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Freeman asserts that the trial court improperly failed to notify him of its intent to deny his application for postconviction relief. We find Freeman was not entitled to advance notice of the court's ruling. Freeman argues that the court's ruling was under Iowa Code section 663A.6 which allows a notice of intent to dismiss; Freeman is mistaken. Examination of the record indicates that a hearing was held on the merits of the postconviction proceeding as contemplated by 663A.7. Rheuport v. State, 238 N.W.2d 770, 776 (Iowa 1976). Section 663A.6 has no application here.

For the foregoing reasons we affirm the conviction of first-degree robbery, reverse the sentence imposed, and remand for resentencing.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR RESENTENCING.