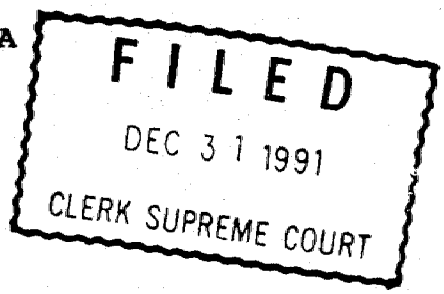
IN THE COURT OF APPEALS OF IOWA

No. 1-484 / 90-1505



DOUGLAS E. KURTZ,

Appellant,

vs.

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STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie Gaul, Judge.

Kurtz appeals a district court judgment denying his application for postconviction relief concerning his guilty plea and conviction for second-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

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

HABHAB, J.

In June 1983, Kurtz was sentenced after pleading guilty to burglary in the second degree and third-degree criminal mischief for breaking into a gas station, both apparently arising out of the same course of conduct. In November 1983, Kurtz pled guilty to the crime of false use of a financial instrument (FUFI), a class D felony. It does not appear that any of these convictions were appealed.

In October 1986, Kurtz was charged with second-degree theft, a class D felony, for misappropriating a color T.V. in his possession. Later, in March 1987, the State amended its trial information to allege Kurtz was an habitual offender by reason of his previous convictions for second-degree burglary and FUFI.

In July 1987, Kurtz pled guilty to second-degree theft and was sentenced to a term of imprisonment not to exceed five years. The habitual offender charge was dismissed. Kurtz did not appeal this conviction.

On October 25, 1990, Kurtz filed this application for postconviction relief concerning his 1987 conviction of second-degree theft. He claimed, inter alia, certain irregularities in his pleas in 1983 to the charges underlying the habitual offender charge. Kurtz claims the threat of the habitual offender charge caused him to agree to plead guilty to the charge of second-degree theft, in exchange for dismissal of the habitual offender charge. Kurtz claims further he would not have pled guilty if his

attorney had advised him that the prior burglary conviction was invalid and would not support an habitual offender adjudication.

The district court denied Kurtz's application and Kurtz appeals. He alleges ineffective assistance of trial and postconviction counsel.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

Kurtz argues judgments entered against him on June 3, 1983, are invalid as a violation of the double jeopardy clause. He raises this issue now, as he contends his counsel at his latest plea hearing was ineffective for failing to inform him of what he claims was the State's inability to substantiate the habitual offender charge.

As it relates to the habitual offender charge, the State amended the trial information charging second-degree theft, the offense Kurtz is currently under sentence for,

to include the habitual offender charge. One of the underlying crimes constituting the habitual offender offense was the June 3, 1983, conviction of second-degree burglary. At the June 3 hearing, Kurtz also pled guilty to criminal mischief. He now contends his dual conviction of these two offenses constituted double jeopardy under the United States Supreme Court's opinion in Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 561 (1990).

We dispose of Kurtz's double jeopardy claim without difficulty. Even if his claim should rise to double jeopardy, the lesser crime of criminal mischief would have merged into the greater felony of second-degree burglary. See e.g., State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982). Thus, the underlying felony would still have been present for the habitual offender charge.

We determine counsel at Kurtz's plea hearing did not breach an essential duty. The 1983 conviction for second-degree burglary stands without regard to the accompanying criminal mischief conviction.[1] We find no need to address the double jeopardy claim, as we resolve the issue on other grounds.

We deny Kurtz's request to preserve his claims of ineffective assistance of postconviction counsel. Kurtz

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1. If we assume the two offenses were in fact the same, the proper remedy would be to vacate only the conviction for the less serious offense--second-degree criminal mischief. See e.g., State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982).

claims his attorney failed to raise various issues at the postconviction hearing. However, we determine Kurtz himself could have brought these issues to the attention of the court.

We affirm the postconviction court's denial of Kurtz's application for postconviction relief. We deny Kurtz's request to preserve his claims of ineffective assistance of postconviction counsel.

AFFIRMED.

Schlegel, J., concurs; Oxberger, C.J., specially concurs.

OXBERGER, C.J. (specially concurring)

I concur in the result only.