FILED
DEC 27 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GREGORY LEE BECKETT,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed December 27, 1983

3-371
2-69360

Appeal from Polk District Court - Joel Novak, Judge.

Petitioner appeals from the trial court's denial of postconviction relief. REVERSED AND REMANDED.

John F. Sprole, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for respondent-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Petitioner appeals from the trial court's denial of postconviction relief. We reverse and remand.

Petitioner, Gregory Beckett, was charged with first-degree robbery based on two separate incidents. He entered a plea of guilty to one charge and the second charge was dismissed. He was sentenced to imprisonment for up to twenty-five years with a five-year mandatory minimum due to his use of a firearm.

Petitioner filed this application for postconviction relief alleging that his attorney in the guilty plea proceeding, Nicholas Krpan, misrepresented to him the penal consequences of his guilty plea. Petitioner asserts that due to this misrepresentation the guilty plea was not knowingly and voluntarily entered, and counsel rendered ineffective assistance. In addition petitioner alleges that Krpan failed to properly investigate several possible defenses petitioner had to the robbery charges.

The trial court denied postconviction relief. On appeal petitioner reiterates his complaints about counsel's performance and the voluntariness of his plea. In addition he asserts that the postconviction court infringed his right to avoid self-incrimination by permitting the State's attorney to ask him whether he had told the truth when he admitted guilt in the guilty plea proceeding. Finally, an argument based on the postconviction court's quashing of a subpoena was withdrawn from our consideration by petitioner's counsel at oral argument.

Since petitioner raises issues involving the violation of constitutional rights, we make an independent evaluation of the totality of the circumstances. This is the equivalent of a **de novo** review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

I.

The Guilty Plea. Before a guilty plea can be accepted, the court must personally address the defendant and determine that he understands, among other things, the penal consequences of his plea. Brainard v. State, 222 N.W.2d 711, 713 (Iowa 1974).

In the present case the court made the following remarks to petitioner at the guilty plea proceeding:

> Q. It would be a mistake for you to plead guilty based on an assumption the Court was going to do anything except the maximum penalty I've described to you.
>
> I'm going to order a presentence investigation from the Department of Correctional Services. I won't make up my mind until I get that, review it very carefully and listen to your attorney and the county attorney and then impose the sentence which I think is proper in this case. Do you understand that?
>
> A. Yes, sir.

Since petitioner had pled guilty to a forcible felony involving a firearm, the court had no choice but to sentence petitioner to an indeterminate twenty-five year sentence with a five-year minimum. Iowa Code §§ 902.7, 902.9, 907.3 (1979). Petitioner contends that the court's promise to enter the "proper" sentence after reviewing the presentence investigation report led him to believe that the court had discretion in sentencing. Petitioner claims this misunderstanding was aided by erroneous information given to him by his attorney.

A similar situation arose in the case of State v. West, 326 N.W.2d 316, 317-18 (Iowa 1982). There the same judge as in this case made essentially the same remarks to a defendant pleading guilty to a crime for which there was a mandatory sentence. The supreme court held that the judge's statements made it appear as if he had some discretion in sentencing. The case was remanded to allow the defendant to show that he was misled by the court's remarks.

In the present case there is no need to remand for this reason. At the postconviction hearing petitioner testified to his understanding of the court's statement as follows:

> Q. Do you remember the judge also telling you what the penalty was going to be?
>
> A. Yes, sir.
>
> Q. What I'm saying is when he told you during that guilty plea proceeding what the maximum penalty was you knew

that if he accepted your plea of guilty the judge was going to say you had to do 25 years and the mandatory minimum of five. I'm just sort of paraphrasing what the judge told you. The judge said that to you, didn't he?

A. Yes, sir.

Q. And you understood the judge, didn't you, when he said that to you?

A. I understood it through the point of view of what Nick had told me. I didn't understand it from the legal point of view of what he was saying. I was looking at it through the eyes what Nick had told me.

Q. But the judge told you you are going to get 25 years and you're going to have to serve five years of that sentence; is that what the judge said?

A. He said I would get 25 years and you would get five years for the firearm.

Q. And those were basically the terms that the judge used?

A. Yes.

Q. Okay. What you're saying is that you understood what the judge was saying but in your mind Nick Krpan told you in essence you would do about a year in Anamosa or wherever and then about a year in some local correctional facility and within two years that's when you would be on probation, is that right?

A. That's right.

Petitioner admitted that he understood that the court would impose the mandatory sentence. He cannot now claim that the court misled him into believing otherwise. Any confusion existing in petitioner's mind concerning the sentence was clearly caused by his attorney rather than the court. We address the consequences of the attorney's actions in the next section of this opinion.

Since petitioner was not misled by the court this case is distinguishable from West. Any error made by the sentencing court did not prejudice petitioner.

II.

Ineffective Assistance of Counsel. The test applied to a claim of ineffective assistance of counsel "is whether under the entire record and totality

of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The supreme court has recently held that counsel's misinforming a defendant of the penal consequences of a guilty plea constituted ineffective assistance. Meier v. State, 337 N.W.2d 11, 14 (Iowa 1981).

There was ample evidence in this case that petitioner's attorney, Krpan, was either confused as to the amount of prison time petitioner would be required to serve or deliberately misrepresented the situation to petitioner in order to convince him to plead guilty and quickly dispose of the case. Petitioner testified that Krpan told him that if he were convicted for both robberies he would be sentenced to a fifty-year sentence with a ten-year minimum. While consecutive sentences are permitted, they are not mandatory and petitioner should not have been led to believe that he would automatically receive consecutive sentences. On the other hand, Krpan told him that if he pled guilty he would be back on the streets within two years. In actuality the earliest petitioner could possibly be eligible for release is two years and ten months. Furthermore, Krpan told several members of petitioner's family that he could probably have petitioner released within ninety days under the shock sentencing provision of Iowa Code section 902.4 (1979). Shock sentencing, however, is clearly unavailable in cases where there is a minimum sentence. Petitioner also maintains that Krpan told him to disregard the court's remarks concerning sentencing since Krpan could talk to the parole board and county attorney and secure him an early release. Obviously counsel's actions influenced petitioner's decision to plead guilty.

Petitioner also complains about counsel's lack of preparation and investigation of the case. The difficulty petitioner has in proving these allegations stems from his inability, after due diligence, to locate his trial counsel, whose privilege to practice law was suspended. It is difficult to establish what counsel did or did not do when counsel is unavailable to testify. However,

there was evidence in the record from several possible alibi witnesses that they had never been contacted by trial counsel. In any event, we need not rule on these allegations since counsel's obvious confusion concerning sentencing is sufficient to warrant postconviction relief.

Since petitioner was denied effective assistance of counsel, the judgment of the postconviction court is reversed. We remand for entry of judgment vacating the guilty plea, conviction, and judgment in petitioner's criminal case. Petitioner is permitted to proceed anew in that proceeding.

REVERSED AND REMANDED.