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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CARL HOUSTON ROBERTS,	)	
Petitioner-Appellant,	)	Filed January 29, 1985
vs.	)	
STATE OF IOWA,	)	4-472 84-103
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Marshall County - Roger F. Peterson, Judge.

Petitioner appeals the overruling of his application for postconviction relief asserting that the trial court erred in not vacating his guilty plea conviction and sentence since he was misadvised by his attorney. AFFIRMED.

Kermit L. Dunahoo, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Rebecca Claypool, Assistant Attorney General, for respondent-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Petitioner appeals the overruling of his application for postconviction relief. He asserts that the trial court erred in not vacating his guilty plea conviction and sentence since he was misadvised by his attorney. He also argues that his sentence of up to ten years in prison constitutes cruel and unusual punishment in violation of the eighth amendment to the United States Constitution as applied to the states by the fourteenth amendment.

In reviewing postconviction proceedings we make an independent evaluation of the totality of the circumstances on issues involving constitutional rights. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). All other issues are reviewed on error. Id.

I. Misadvice of Counsel. Petitoner was charged on October 2, 1981, by trial information in Marshall County with illegally attempting to obtain a prescription drug in violation of Iowa Code section 155.29(1). Similar charges were being considered, but had not been filed, in Tama and Grundy Counties. Petitioner's court-appointed attorney was informed by the Marshall County Attorney that if defendant pled guilty to the charge he would not invoke the habitual offender provision of Iowa Code section 902.8 based on two Missouri felony convictions. The attorney also made arrangements with the county attorneys of Tama and Grundy Counties not to press charges against petitioner if he pled guilty in Marshall County.

The district court accepted petitioner's guilty plea. Petitioner filed a motion in arrest of judgment and a motion to withdraw the plea, both of which were overruled. Petitioner's attorney was permitted to withdraw and new counsel was appointed for sentencing. Petitioner was sentenced to a term of incarceration not to exceed ten years. Although the case was appealed, the supreme court allowed petitioner to withdraw the appeal and reserve the right to resubmit to the district court grounds in the appeal for development of a more complete record.

On January 31, 1983, petitioner filed an application for postconviction relief alleging that he was misinformed by his original attorney regarding the maximum penal consequences that could result from failure to plead guilty. Petitioner alleges that instead of telling him that the habitual offender provision, if successfully invoked, would enhance the penalty for his offense from ten to fifteen years, see Iowa Code section 902.9(2), his attorney told him the fifteen-year penalty for being an habitual offender was in addition to the ten-year penalty under section 155.30 and that the court could order the two to be served consecutively. Petitioner testified that it was primarily the fear of being sentenced to twenty-five years in prison that persuaded him to plead guilty. At the postconviction hearing Earl Miller, a fellow inmate with petitioner at the county jail, testified that although he could not hear any of the conversation between petitioner and his attorney, he did hear petitioner yell "twenty-five years."

Several letters between petitioner and his attorney were admitted into evidence. In the first one petitioner wrote in part:

> . . . During some of our conversations you informed me that the county attorney had indicated to you that if I proceeded to a jury trial on my charge, he would file the habitual offender section against me. You also explained that with a conviction of section 155.29, I could receive up to a ten year sentence and a conviction for being an habitual offender was fifteen years more, and if I was convicted on both these charges I could be sentenced to a total of twenty-five years in prison. What I would like to know, because I don't recall, did the county attorney threaten to get me twenty-five years if I demanded a jury trial or was you just explaining what was the maximum amount of years that I could be sentenced to, if I proceeded to trial and was convicted on both charges.

The attorney responded:

> In response to your letter of October 26, 1982, my recollection of those conferences was that I had been advised by the County Attorney that he intended to file the habitual offender charge against you if you did not enter a guilty plea on the pending charge. At your request, I explained the habitual offender section to you and explained to you the maximum possible penalty. I do not

> recall any threat by the County Attorney that he would "get you 25 years if you demanded a jury trial."

Petitioner wrote again and, among other things, inquired, "If the County Attorney did not threaten to get me 25 years if I did not enter a guilty plea, then where did the 25 years maximum term come into the conversation from?" The attorney replied:

> I do not have any recollection of a discussion which involved a term of 25 years. I have no recollection of the County Attorney threatening to get you 25 years. The judge did not relay that to me.
>
> If there was a mention of a 25-year maximum term, I would assume that the 25 years was the outside potential of a 10-year term and a 15-year term ordered to be served consecutively. If a 25-year term was discussed, it would have been purely hypothetical.

At the hearing the attorney testified that he did not remember discussing a possible twenty-five year sentence with petitioner. He maintained that he knew the consequences of the habitual offender statute. The attorney stated if twenty-five years was discussed he was probably thinking about the possibility of charges being brought in Tama or Grundy County as well as Marshall County.

Petitioner argues that this case is governed by the supreme court decision in Meier v. State, 337 N.W.2d 204 (Iowa 1983). In Meier the defendant pled guilty to first-degree robbery in order to avoid being sentenced with the five-year mandatory minimum for use of a firearm. Id. at 205. It was undisputed that defendant's attorney misinformed him that if the firearm provision was invoked he would be required to serve five years before eligible for release. Id. at 206. The supreme court held that counsel rendered ineffective assistance. It rejected the rationale that defendant was not prejudiced because he received the sentence for which he bargained. Id. at 208. The court maintained, "the prejudice results not from what petitioner received, but from what he relinquished. He had an unqualified constitutional right to a trial on the issue of his guilt, which he abandoned on the strength of his lawyer's erroneous legal advice." Id. (emphasis in original).

We agree that if petitioner was misinformed by his attorney as to the possible penal consequences of standing trial, his guilty plea conviction cannot stand. Unlike Meier, however, it is a disputed issue in this case whether any erroneous information was given. The evidence in the record is inconclusive. Petitioner admits that part of the plea negotiations was the understanding that no charges would be filed in Tama or Grundy County. It is possible, as the attorney testified, that petitioner could have received twenty-five or more years if he had been convicted in more than one county. Therefore, the attorney's explanation that discussion of incarceration in excess of the fifteen-year maximum that could result from charges in Marshall County might have arisen due to petitioner's alleged commission of the same crime in other counties is a plausible one.

We note that a determination of this disputed fact relies heavily on an evaluation of the credibility of witnesses. The district court is, of course, in a superior position to make that evaluation. See State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976). We cannot say that the district court erred in determining that petitioner had failed to show by a preponderance of the evidence that his attorney provided him with incorrect information.

II. Cruel and Unusual Punishment. Only those matters which were properly raised and preserved below will be reviewed by an appellate court. Wenman v. State, 327 N.W.2d 216, 217 (Iowa 1982). "Even issues of a constitutional magnitude will not be addressed in a postconviction action if they were not raised first in the trial court." Id. at 218. In order to attack a guilty plea a defendant must give a sufficient reason for failing to raise the grounds of attack in a motion in arrest of judgment before the trial court. Id. at 217.

Petitioner filed a motion in arrest of judgment in which he contended, inter alia, that the disparity in punishment for violation of Iowa Code sections 155.29 and 204.403(1)(c) constituted an unconstitutional delegation of prosecutorial discretion which denied him equal protection under the law. Petitioner did not

raise in the motion, however, the argument that the penalty for violation of section 155.29[1] was disproportionate to the offense and, therefore, constituted cruel and unusual punishment.

Petitioner seeks to excuse his failure to raise the cruel and unusual punishment argument in the motion of arrest of judgment by contending that his attorney rendered ineffective assistance.

The test of whether a defendant has been denied his constitutional right to the effective 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). When a claim of ineffective assistance is based upon a specific act or omission of counsel, it must be shown that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." Id. "Prejudice cannot be found unless the error constitutes a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

Petitioner relies upon the case of Solem v. Helm, ___ U.S. ___, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), in arguing that his punishment violates the eighth amendment. In Solem the defendant had been convicted of six nonviolent felonies from 1964 to 1975. In 1979 he was charged with uttering a "no account" check for $100. Although the maximum punishment for this offense under South Dakota law would ordinarily have been five years imprisonment and a $5,000 fine, defendant

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[1] Under Iowa Code section 155.30 violation of section 155.29, when the prescription drug is a schedule II narcotic, is classified as a class "C" felony. See Iowa Code § 204.401(1)(a). Effective July 1, 1984, the legislature amended section 155.30 by Senate File 2304, 70th General Assembly, to make violation of section 155.29(1), when the drug is a controlled substance, a serious misdemeanor. 1984 Iowa Legis. Serv. no. 3 p. 78. See also Iowa Code § 204.403. Petitioner's case is unaffected by the subsequent amendment. However, petitioner points to the amendment as evidence that the prior punishment was disproportionate to the offense.

fell within the provisions of a recidivist statute and was sentenced to life imprisonment without the possibility of parole. Id. at ___, 103 S. Ct. at 3004-05, 77 L. Ed. 2d at 642-44. The Supreme Court held that defendant's sentence was prohibited by the eighth amendment because it was "significantly disproportionate to his crime." Id. at ___, 103 S. Ct. at 3016, 77 L. Ed. 2d at 658.

Prior to Solem, the leading case in this area of the law was Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In Rummel, the defendant was charged with fraudulent use of a credit card to obtain $80 worth of goods or services in 1964, passing a forged check in the amount of $28.36 in 1969, and in 1973 of obtaining $120.75 by false pretenses. All were felonies under Texas law. Based on the prior convictions the prosecution invoked the recidivist statute in the third proceeding. Defendant was sentenced to life imprisonment. Id. at 265-66, 100 S. Ct. at 1134-35, 63 L. Ed. 2d at 384-86. The Court rejected defendant's argument that his punishment was cruel and unusual because it was disproportionate to his offense. Id. at 285, 100 S. Ct. at 1145, 63 L. Ed. 2d at 397-98. After discussing eighth amendment cases involving capital punishment the court observed:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id. at 272, 100 S. Ct. at 1138, 63 L. Ed. 2d at 390. The only successful eighth amendment challenge in a noncapital case noted by the Court was Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910), which involved an unusual form of punishment in the Philippines. Rummel, 445 U.S. at 272-74, 100 S. Ct. at 1138-39, 63 L. Ed. 2d at 390-91.

Petitioner pled guilty on November 9, 1981, and was sentenced April 15, 1982, after the Rummel decision but prior to Solem. An attorney is charged only with knowledge of the existing law; he does not need to predict future changes in the law in order to provide effective assistance. Snethen v. State, 309 N.W.2d at 16. Considering the Supreme Court's disposition of Rummel, we conclude that the failure of petitioner's attorney to raise an eighth amendment challenge did not fall below the range of normal competency of a diligent and conscientious advocate.

Therefore, since petitioner has not shown that he had ineffective assistance of counsel in the original proceedings, his failure to raise the eighth amendment argument at that time is not excused. There is nothing for us to review.

AFFIRMED.