IN THE COURT OF APPEALS OF IOWA

No. 0-238 / 99-0901
Filed November 20, 2000

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CLERK SUPREME COURT

DELBERT ALAN HASKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

On appeal from the denial of his postconviction relief application, appellant contends he was denied effective assistance of counsel. **AFFIRMED.**

Lori Holm and Christopher Kragnes, Sr., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

STREIT, P.J.

After Delbert Haskins was charged with first-degree robbery, he rejected the State's plea offer of second-degree robbery—now that he has been convicted of the greater offense he wishes he had not. Haskins claims his trial lawyer failed to advise him of the desirability of the offer and thus he was not provided with the effective assistance of counsel. We affirm the district court's denial of his application for postconviction relief.

I. Background Facts and Proceedings.

In April of 1996 Haskins entered a Hy-Vee grocery store, put a package of steaks and a package of shrimp down the front of his pants, and ran out of the store. Two Hy-Vee employees caught Haskins, but when they took him back into the store he tried to escape through a plate glass window. The window did not break. Haskins pulled out a large pocketknifewhen the employees attempted to apprehend him again. He was eventually subdued, arrested, and charged with first-degree robbery.

Melissa Anderson was appointed to represent Haskins. When she was unable to procure a plea bargain that would keep him out of jail, he fired her. At or about the time of the discharge, Haskins was given the opportunity to plead guilty to second-degree robbery—a charge that would have resulted in a prison sentence of ten years. The offer was communicated to Anderson and Haskins's new attorney, Ray Perry.

Haskins fired Perry after only a few weeks of representation. District Judge Ray Fenton immediately reappointed Anderson to represent Haskins. On the same day, he asked Haskins if he wished to plead guilty to second-degree

robbery. Haskins replied he "didn't rob anyone." Anderson testified she then told Judge Fenton she and Haskins would be going to trial.

The plea offer was again briefly discussed during jury selection. At that time, the prosecutor asked, "Are you sure you don't want robbery two?" Haskins did not accept the offer, and the case proceeded to trial. The defense asserted Haskins had committed theft but not robbery because he had not committed an assault in furtherance of the theft. Haskins was convicted of first-degree robbery and sentenced to twenty-five years in prison. His conviction was affirmed by this court on direct appeal.

Haskins filed this action for postconviction relief claiming he received ineffective assistance of counsel because Anderson did not advise him of the desirability of the proposed plea bargain. The district court denied Haskins's application for postconviction relief. Haskins appeals.

II. Discussion.

Haskins's first appellate counsel, Tricia Johnston, failed to raise a claim of ineffective assistance of trial counsel on direct appeal. Any claim not properly raised on direct appeal may not be litigated in a postconviction action unless there is a showing of "sufficient reason" or "cause" for not properly raising it previously and of actual prejudice resulting from the alleged error. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984). Haskins has not met this burden.

A. Sufficient Reason.

Haskins may have had "sufficient reason" for not raising an ineffective assistance of trial counsel claim on direct appeal. Johnston testified she did not

assert Anderson rendered ineffective assistance by failing to adequately advise Haskins of the desirability of the State's plea offer because the evidence in the record did not support such a claim. An inadequate trial record generally does not excuse a failure to raise a claim on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 245-46 (Iowa 1999); *see also Collins v. State*, 477 N.W.2d 374, 377 (Iowa 1991); *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983).[1] Thus, Johnston's decision not to raise an ineffective assistance of trial counsel claim may have constituted ineffective assistance of appellate counsel. Ineffective assistance of appellate counsel, in turn, "may provide 'sufficient reason' or 'cause' to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief." *Osborn*, 573 N.W.2d at 921.

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[1] In *Bugley v. State*, 596 N.W.2d 893, 898, (Iowa 1999), Bugley petitioned for postconviction relief alleging ineffective assistance of counsel. In that case, the Iowa Supreme Court found Bugley had sufficient reason for not raising the ineffective assistance claim on direct appeal because his "appellate counsel specifically examined the record and determined it was inadequate to support the claim." *Bugley*, 596 N.W.2d at 898. *Bugley* does not contradict *Berryhill*.

Prior to his petition for postconviction relief, Bugley had filed an appeal. *Id.* at 893. His appellate counsel, however, filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104. *Id.* In his motion, counsel indicated a claim of ineffective assistance of counsel should be considered in postconviction relief proceedings because the record was inadequate to address the claim on appeal. *Id.* The supreme court thus had an opportunity to review the record and consider the proper method for addressing the ineffective assistance claim before it dismissed Bugley's appeal. *Berryhill*, 603 N.W.2d at 246.

In contrast, the *Berryhill* court did not have this opportunity because Berryhill had voluntarily dismissed his appeal alleging ineffective assistance of counsel. *Id.* Berryhill, therefore, could not establish sufficient reason for failing to raise his ineffective assistance of counsel claim by asserting the trial record was inadequate to address the claim on direct appeal. *Id.* As stated by the supreme court, "appellate courts, not counsel, determine whether the record is inadequate to decide a claim presented on appeal." *Id.*

However, even if Haskins could show such sufficient reason for not raising his ineffective assistance of trial counsel claim on direct appeal, he cannot show actual prejudice resulted from Johnston's conduct. We reach this conclusion because, as discussed below, Anderson did provide Haskins effective assistance as his defense counsel.

B. Actual Prejudice.

We review Haskins's claim of ineffective assistance of trial counsel de novo. *See State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998); *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Haskins bears the burden of demonstrating ineffective assistance of counsel. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone,* 557 N.W.2d 97, 102 (Iowa App. 1996). Trial counsel is entitled to a heavy presumption of competence. *State v. Howell,* 557 N.W.2d 908, 913 (Iowa App. 1996); *State v. Pearson*, 547 N.W.2d 236 (Iowa App. 1996). To prevail, Haskins must prove by a preponderance of the evidence Anderson failed in an essential duty and prejudice resulted. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Westeen*, 591 N.W.2d at 211. In resolving an ineffective assistance of counsel claim, the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Meier v. State,* 337 N.W.2d 204, 206 (Iowa 1983). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to

ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

When making a determination of whether defense counsel exercised the skills and diligence a reasonably competent attorney would provide under similar circumstances, we refer to "prevailing norms of practice." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 699 (1984). We may consult the code of professional responsibility to identify such norms of practice. *See Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996). The Iowa Code of Professional Responsibility for Lawyers states the following:

> A defense lawyer in a criminal case has the duty to advise a client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Iowa Code of Professional Responsibility for Lawyers EC 7-7 (1993).

Anderson thus had two obligations: On the one hand, she had to give Haskins the benefit of her professional advice on the "crucial decision" of whether to plead guilty. *See Purdy v. U.S.*, 208 F.3d 41, 44 (2d Cir. 2000) (quoting *Boria*, 99 F.3d at 497). On the other hand, she had to avoid coercing Haskins into accepting the plea bargain the State had offered him. *See id.* Anderson's decision on how to fulfill these divergent obligations is entitled to some deference given "[t]here are countless ways to provide effective assistance in any given case." *See id.* (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 695). At a minimum, however, Anderson should have assessed the strengths and weaknesses of Haskins's case based on the pertinent facts and legal issues. *See generally* 2 David Rossman, *Criminal Law Advocacy: Guilty*

Pleas ¶ 8.02[4]-[5] (1991). She then should have confirmed Haskins knew the likelihood of a first-degree robbery conviction, the sentence he was facing, and the positive and negative consequences of accepting the proposed second-degree robbery plea bargain. *See generally id.*

Haskins has not proven Anderson failed to give him adequate advice. At Haskins's postconviction relief hearing, Anderson testified she explained to Haskins the risks of going to trial, discussed the evidence with him, and discussed what their theory of defense would be at trial. Anderson testified she remembered having a conversation with him regarding the differences between first-degree and second-degree robbery sentences and whether "he wanted to cut his losses."[2] She also testified she remembered telling Haskins he had a "good chance" of being acquitted if the jury believed the theft had been completed by the time he assaulted the Hy-Vee employees. Upon further questioning by the district court, Anderson was unable to recall additional, specific information regarding when she and Haskins discussed the State's proposed plea bargain and what they discussed. Anderson did testify, however, her general practice when one of her clients is offered a plea bargain is as follows:

> My practice is to sit down with the jury instructions with the client, explain what the burden of proof is, who has the burden of proof and what has to be proved, reconcile that with the facts the State does have in a particular case, and then explain to him the risks . . . .

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[2] Haskins's own testimony establishes he knew second-degree robbery carried a ten-year sentence.

This practice—explaining risks—is tantamount to any advice contemplated as necessary pursuant to the code of professional responsibility and the constitutional right to effective assistance of counsel.

Anderson's inability to provide all the details of her discussions with Haskins regarding the State's plea offer does not provide him with enough evidence to prove she failed to give him adequate advice. As we stated above, trial counsel is entitled to a heavy presumption of competence. *Howell*, 557 N.W.2d at 910; *but cf. Boria*, 99 F.3d at 498 (stating this presumption applies to strategic decisions made by trial counsel). Moreover, Haskins has not offered any objective evidence, other than Anderson's testimony regarding what she told him and what she typically tells her clients, supporting his claim she did not advise him on the desirability of the plea bargain. *See Slevin v. U.S.*, 71 F. Supp.2d. 348, 357 (S.D.N.Y. 1999) (denying petitioner's claim that he had received ineffective assistance of counsel during pretrial plea negotiations). A person in Haskins's position "faces tremendous incentives to fabricate allegations of misconduct in an attempt to avoid incarceration." *See id.* at 358. Therefore, without additional objective evidence to lend credence to Haskins's claim, we will not accept his subjective impressions of what Anderson did or did not tell him regarding the plea offer over her testimony about the issue.

Nor do we accept Haskins's argument that Anderson was required to give him an explicit opinion as to whether he should have taken the State's plea offer. In *Boria*, the Second Circuit held defense counsel was constitutionally required to discuss with his client the advisability of accepting a plea offer and his failure to do so violated his client's right to effective assistance of counsel. 99 F.3d at 497-

98. In a subsequent case, however, the court soundly rejected the contention that defense counsel must always advise his or her client to "either plead guilty or not." *Purdy*, 208 F.3d at 46. The court stated its result in *Boria* was due to the specific circumstances of that case: defense counsel never gave any advice whatsoever regarding the government's plea offer; the defendant's best interests demanded a guilty plea because he had no reasonable chance of acquittal; and the defendant refused to consider the possibility of a plea. *Id.* at 46-47. The court then found these circumstances were not applicable to the case before them. *Id.* at 47.

We also find the circumstances of Haskins's case did not require Anderson to explicitly state whether Haskins should have taken the State's second-degree robbery offer. As we discussed above, Anderson and Haskins did discuss various matters relating directly to the offer. Haskins also had a chance of beating the first-degree robbery charge at trial, and thus his rejection of the offer was not "suicidal."[3] *Cf. Boria*, 99 F.3d at 495 (stating it was defense counsel's own view that his client's decision to reject the government's plea offer

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[3] At Haskins's postconviction relief hearing, Anderson noted her opinion regarding Haskins's probability of success at trial was based in part on her involvement in cases similar to Haskins's in which juries had convicted defendants of fifth-degree theft and assault rather than robbery. Haskins took some meat from Hy-Vee, ran out of the store, and then was apprehended by Hy-Vee employees. After Haskins was brought back into the store, he ran away from the employees, unsuccessfully attempted to jump through a window, and then brandished his pocketknife. Based on these facts, at trial Haskins and Anderson pursued the theory Haskins's theft and assault were separate events.

A person commits a robbery when, having the intent to commit a theft, he or she commits an assault "to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property." Iowa Code § 711.1(1) (1997). Whether Haskins's assault assisted his escape from thescene of his theft or occurred after this escape was a question of fact for the jury. *See State v. Terry*, 544 N.W.2d 449, 452 (1996); *State v. Jordan*, 409 N.W.2d 184, 186 (Iowa 1987).

was suicidal). Finally, Haskins did not wholly refuse to consider the possibility of a plea. In fact, Haskins initially discharged Anderson because she was unable to procure a satisfactory plea offer for him. When he refused the State's subsequent second-degree robbery plea offer, the record shows he did so because he believed he had not committed robbery—not because he was uninformed about the alternatives available to him and the implications of his decision.

Even if the circumstances of this case are more like those in *Boria* than those in *Purdy*, we find Anderson provided Haskins effective assistance of counsel. A defense attorney has a duty to advise his or her client about a plea offer and thus is obligated to do such things as review the evidence amassed by the government, discuss the anticipated sentencing range, and explain the risks the client faces. We are not prepared to hold that in fulfilling this duty an attorney's advice must take a particular form: We cannot say the attorney must employ such magic words as "In my opinion, I think you should . . ." In this case, the record shows Anderson adequately advised Haskins.

In summary, Anderson, in order to provide effective assistance of trial counsel, was not required to give Haskins an explicit opinion as to whether he should have taken the State's plea offer. Because Haskins has not proven Anderson failed to perform an essential duty, we do not address whether prejudice resulted from her performance as his trial counsel. *See State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa App. 1987).

C. Conclusion.

Because Anderson provided effective assistance of trial counsel to Haskins, Haskins did not suffer actual prejudice from attorney Johnston's decision not to raise an ineffective assistance of trial counsel claim on direct appeal. As stated previously, any claim not properly raised on direct appeal may not be litigated in a postconviction action unless there is a showing of sufficient reason for not properly raising it previously *and* of actual prejudice resulting from the alleged error. *Osborn*, 573 N.W.2d at 921; *Polly*, 355 N.W.2d at 856. Accordingly, Haskins's ineffective assistance of trial counsel claim was not preserved and should not have been litigated in his postconviction relief action. We affirm the district court's denial of Haskins's application for postconviction relief.

AFFIRMED.

Zimmer, J., concurs; Hecht, J., dissents.

HECHT, J. (dissenting)

I respectfully dissent. Ineffective assistance of appellate counsel may provide "sufficient reason" or "cause" to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Haskins's counsel on direct appeal failed to raise the issue even though Haskins had brought it to her attention in writing prior to the direct appeal. I would hold that direct appeal counsel's failure to raise the issue because "there's no record of the plea bargain so therefore there was no basis for that issue" was ineffective and sufficient reason for Haskins's failure to raise the issue on direct appeal.

I cannot join in the majority's conclusion Haskins's claim must fail because he failed to supplement his own testimony with objective evidence supporting the claim trial counsel did not advise him on the desirability of the plea bargain. I find objective evidence in Anderson's testimony. Although she testified she discussed with Haskins the elements of the State's claim and the risks of going to trial, she did not claim to have given her client her advice on the desirability of the proposed plea bargain. The following colloquy appears in the postconviction trial record:

> THE COURT: All right. And do you ever recommend to clients whether they should go to trial or not go to trial based on your evaluation of the strength of their case or weakness of their case?
>
> MS. ANDERSON: That would depend. If there's cases where there's room to argue issues, I will. I typically don't recommend. I listen to the client because it's their decision. I explain the risks and the consequences and then leave it to the client to make the decision.

This description by counsel of her typical approach is, in my view, sufficient objective evidence to support Haskins's claim Anderson failed to advise him on the advisability of the plea bargain. Thus, this is not a case in which the court is asked to rely solely upon Haskins's "subjective impressions of what Anderson did or did not tell him."

I part with the majority because I believe their reliance on *Purdy v. U.S.*, 208 F.3d 41 (2d Cir. 2000) is misplaced. Purdy was a military parts supplier charged with the crime of paying kickbacks to federal contractors. The charge exposed the defendant to a prison sentence of twenty-seven to thirty-three months. After several meetings with the prosecutor, defense counsel outlined in writing to Purdy a proposed plea bargain that would have called for a prison term of fifteen to twenty-one months. *Id.* at 43. In correspondence with his white-collar client, defense counsel reviewed the "troublesome" aspects of the case. In another written communication addressed to Purdy, defense counsel urged his client to "give very careful consideration" to the case and advised "it will be difficult to convince the jury that [certain payments] were not made for the purposes of kickbacks." *Id.* at 43-44. It should also be noted defense counsel "informed Purdy at length and on several occasions of the strength of the government's case, going so far as to stage a mock cross examination, and of the benefits of pleading guilty and cooperating." *Id.* at 47. Purdy rejected the plea bargain offer, was convicted and sentenced to prison for a term of thirty-seven months. *Id.* at 44. In furtherance of his subsequent habeas corpus action, he unsuccessfully claimed his trial counsel was ineffective because he gave no advice on the desirability of the rejected plea bargain.

The facts in the case before this court are easily distinguishable from those in *Purdy*. Haskins was not a sophisticated businessman accustomed to dealing with government contractors. Furthermore, the sentence disparity facing Purdy was minimal compared to the one facing Haskins. The first-degree robbery charge for using a knife to further his escape from the scene of a theft exposed Haskins to a maximum prison sentence of twenty-five years. *See* Iowa Code §§ 711.2, 902.9 (1995). The proposed plea bargain would have exposed Haskins to a maximum prison sentence of up to ten years. *See* Iowa Code §§ 711.3, 902.9. The evidence against Purdy, "although strong, was . . . complex." *Purdy*, 208 F.3d at 47. In contrast, the evidence Haskins had used a knife in furtherance of an attempt to escape was overwhelming. Although defense counsel advised Haskins he would have a pretty good chance of success if the jury could be persuaded the theft had been completed before the knife was drawn, I find no factual basis in the record to support a finding Haskins had a reasonable chance of acquittal. He brandished the knife immediately after unsuccessfully attempting to escape by throwing himself through a plate glass window and as the store's employees were approaching to apprehend him. A reasonable fact finder could only find the weapon was used in furtherance of Haskins's attempt to escape. Although the *Purdy* court found Purdy's decision to go to trial was reasonable, I would find as a matter of law Haskins's was not. Thus, I find *Purdy* unpersuasive here.

The facts of the case before this court are much closer to those before the court in *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996). Boria was charged with selling four bags of cocaine to an informer. The charge carried a penalty of

twenty years to life. Defendant made "two ruinous statements" after his arrest. Defense counsel was informed the State was willing to accept a guilty plea calling for a sentence of one to three years. Counsel disclosed the proposed plea agreement to his client and informed him if he rejected it, the possibility of receiving a minimal sentence would be lost. Instead of advising Boria of the obvious desirability of the plea, defense counsel "kept discussing . . . strategies he planned to follow in defending against the . . . indictment." *Id.* at 495.

In reaching its conclusion defense counsel's representation was ineffective, the *Boria* court observed:

> [Defense counsel] was confronted with no strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision of whether or not to accept the plea bargain. In no event could [defense counsel] have been relieved of his constitutional duty to give his professional advice on this crucial decision.

Id. at 498.

As in *Boria*, Haskins's trial counsel was not confronted with a strategic decision of whether to accept the plea bargain. Furthermore, counsel not only failed to give Haskins an ultimate opinion as to the wisdom of the plea, but "never gave [her] client any advice or suggestion as to how to deal with the [State's] offered plea bargain." *Id.* Although Anderson testified she discussed with Haskins "the difference in the amount of time" between first and second degree robbery charges and asked him "if he wanted to cut his losses," I would, on de novo review, find this to be insufficient advice in view of the overwhelming strength of the State's case and the obvious benefits of a guilty plea by Haskins to the lesser charge.

Even if *Purdy* were not distinguishable, I would decline to adopt the rule that defense counsel is not always required to give the client an explicit opinion as to whether a proposed plea bargain is in the client's interest. In *Purdy*, the court observed the principles underlying the right to effective assistance of counsel "do not establish mechanical rules." *Id.* at 48 (*quoting Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984)). Moreover, the court held counsel's duty to give advice on the desirability of a plea bargain should not be viewed as a *per se* rule requiring counsel to "in so many words and regardless of the particular circumstances, . . . advise the defendant to either plead guilty or not." *Id.* at 46. I would not follow *Purdy* because I believe a lawyer has a clear professional responsibility to expressly advise a client whether a plea bargain is in the client's interest.

Several practical considerations influence my preference for a *per se* rule. Most lay people are ill-equipped to properly evaluate whether a plea bargain is in their interest. They have no legal training or experience to inform their crucial decision to either accept a plea offer or go to trial. A lawyer's explanation of the elements of the offense charged, a review of the evidence amassed by the State to prove the charge, and the anticipated sentencing range in the event of a conviction may be useful to the client faced with the task of evaluating a proposed plea bargain. However, such information is clearly inadequate standing alone to inform the client on the decision. The defendant in a criminal case must have the additional benefit of the lawyer's opinion on the ultimate question: Should the plea offer be accepted? In the absence of the trained advocate's recommendation on this question, the defendant is denied an

essential component of the value of legal counsel. By way of analogy, a patient with a serious illness requires more than a diagnosis and a list of treatment alternatives from his physician. If he is to make an informed decision among those often complex alternatives, he needs advice on their relative desirability. Similarly, if a client is to make an appropriate choice among alternative courses of action surrounding a proposed plea bargain, he requires the independent judgment of counsel on whether the proposal advances the client's best interest under the circumstances.

The central importance of counsel's recommendation on whether to accept the plea is enshrined in the code of professional responsibility which sets the parameters of ethical conduct for all lawyers in this state. This prevailing norm of law practice establishes an unambiguous duty. In my view, it is significant our supreme court chose not to articulate the ethical duty in discretionary terms and elected not to confine it to any particular circumstances. I would hold an attorney's representation is ineffective unless the defendant is given counsel's advice on the specific question of whether the proposed plea bargain should be accepted or rejected. To the extent *Purdy* does not require counsel to provide express advice on this specific question, I would decline to follow it.