

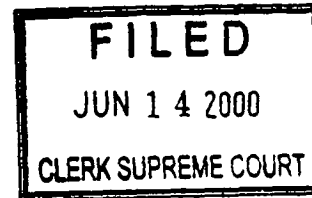
IN THE COURT OF APPEALS OF IOWA

No. 0-173 / 99-912
Filed June 14, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH HILLIARD,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch and Jon Fister, Judges.

Kenneth Hilliard appeals from the judgment and sentence entered upon his guilty plea to possession of cocaine base with intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

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

ZIMMER, J.

Kenneth Hilliard appeals from the judgment and sentence entered upon his guilty plea to possession of cocaine with intent to deliver. We affirm.

Hilliard was charged with possession of crack cocaine with intent to deliver, in violation of Iowa Code section 124.401(1)(c). At the guilty plea proceeding on March 4, 1999, Hilliard informed the court he had struck a plea bargain with the State. He agreed to enter an Alford plea and the State agreed to make a sentencing recommendation of a ten-year suspended sentence, two to five years of probation, and a fine. Hilliard's attorney indicated he would be arguing for a deferred judgment. The court accepted Hilliard's plea and set a date for sentencing.

In the interim, the presentence investigation revealed Hilliard had two 1992 Mississippi felony convictions on charges of grand larceny and sale of cocaine, making him ineligible for a deferred judgment. Neither the prosecution nor the defense attorney appeared to have known of these convictions before entering the plea bargain. Prior to the sentencing date, the prosecutor indicated to defense attorney Charles Fagan she would not follow the agreed-upon sentencing recommendation because of the prior convictions. Fagan immediately filed a motion in arrest of judgment to permit Hilliard to withdraw his guilty plea. At the sentencing hearing on May 27, 1999, Fagan argued Hilliard was entitled to withdraw his plea because the plea agreement was no longer in force. In response, the prosecutor stated she would abide by her previous recommendation. As a result of the prosecutor's retreat, Fagan and the district court both concluded the motion in arrest of judgment was moot. The parties

also agreed the plea did not fall under Iowa Rule of Criminal Procedure 9 governing pleas conditioned on the court's being bound by the plea agreement. Sentencing proceeded. Since a deferred judgment was no longer available, Hilliard argued for a suspended sentence and the State put forth its prior recommendation. However, based on Hilliard's record, his previous incarceration, and the presentence investigation recommendation, the court imposed a ten-year prison sentence with a one-third mandatory minimum and a fine.

Hilliard appeals. He claims trial counsel was ineffective for abandoning the motion in arrest of judgment. He contends Fagan should have argued for withdrawal of the plea on the ground the court failed to advise Hilliard that the plea did not fall under rule 9 and the sentence could be less favorable than that recommended by the State. Hilliard also maintains he should have been allowed to withdraw his guilty plea at the time of sentencing because the prosecutor's sentencing recommendation was "specious" and breached the plea agreement.

I. Scope of Review. We review claims of ineffective assistance of counsel de novo. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

II. Ineffective Assistance of Counsel. To succeed with a claim of ineffective assistance of counsel, a defendant must prove two elements: counsel failed to perform an essential duty and prejudice resulted from counsel's error. *Id.* at 298. Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997), grant of habeas corpus *aff'd sub nom. Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999).

However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). We find the record adequate.

A. *Withdrawal of Plea.* Hilliard contends Fagan should have argued for withdrawal on the ground the court failed to advise Hilliard that the plea did not fall under Iowa Rule of Criminal Procedure 9¹ and the sentence could be less favorable than that recommended by the State. We conclude that because rule 9 does not apply, Fagan was not ineffective for failing to argue for withdrawal on this basis. The essence of an ineffectiveness claim is to fault a trial attorney for failing to make an argument that could have been made. However, the rule 9 argument could not have been made here.

Rule 9 governs pleas conditioned on the court's concurrence. See Iowa R. Crim. P. 9(2). The record reveals neither the State nor the defendant viewed the plea as one falling under rule 9. At the guilty plea proceeding, no one

¹ Iowa Rule of Criminal Procedure 9 provides in pertinent part:

2. Advising Court of Agreement. If a plea agreement has been reached by the parties the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon, if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made by the prosecuting attorney, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.

3. Acceptance of Plea Agreement. When the plea agreement is conditioned upon the court's concurrence, and the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement. . . .

4. Rejection of Plea Agreement. If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw defendant's plea, and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. . . .

mentions rule 9. The parties delineated the plea agreement for the court: Hilliard would enter an Alford plea and the parties would argue for different sentences—Hilliard for a deferred judgment and the State for a suspended sentence. Then the trial court outlined the maximum and minimum penalties that could be imposed. It is difficult to view this as a rule 9 plea when there was no sentence to which the court could bind itself and no indication the plea agreement was conditioned on the court's concurrence. The parties had merely "agreed" to make competing recommendations. At sentencing, the court specifically asked if this was a rule 9 plea and both parties denied that it was. There was no point in Fagan's arguing the court did not comply with the rule 9(4) advisory because this was not a conditional plea. We do not fault trial counsel for failing to urge a meritless issue. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998).

B. Specious Nature of State's Sentencing Recommendation. Hilliard faults his trial counsel for failing to object to the State's allegedly specious sentencing recommendation. He claims the State made the agreed-upon recommendation and then reminded the court that it need not follow that recommendation. Hilliard cites no authority in support of this argument.

The State cites *State v. Homess*, 600 N.W.2d 294, 299 (Iowa 1999), but contends it does not apply here. In *Homess*, the Iowa Supreme Court held that a prosecutor breached the "spirit" of a plea agreement by failing to inform the court that the State supported the sentence which the State had promised to recommend, "by informing the court of an 'alternative recommendation' and making statements implying that the alternative recommendation was more worthy of acceptance," and "by requesting 'an appropriate sentence' rather than

the sentence he had agreed to recommend." *Id.* at 300. The court enunciated the State's obligation with regard to sentencing recommendations it agrees to make as part of a plea agreement:

It is clear the State's promise to recommend specific sentences to the court requires the prosecutor to present the recommended sentences with his or her approval, to commend these sentences to the court, and to otherwise indicate to the court that the recommended sentences are supported by the State and worthy of the court's acceptance.

Id. at 299. The court went on to hold that trial counsel's failure to object to this breach of the plea agreement constituted failure to perform an essential duty. *Id.* at 300.

Homess is distinguishable. In this case, the prosecution did not offer an alternative recommendation or make an argument calculated to support a sentence other than the one she had agreed to recommend. The prosecutor did point out the court was free to impose an appropriate sentence after the parties both made their competing recommendations. We do not consider this statement to rise to the level of the prosecution's actions in *Homess*. In addition, Fagan may well have wanted sentencing to proceed without interruption to ensure Hilliard would not lose the benefit of the State's favorable recommendation, which was being made despite the fact he concealed his prior criminal record during plea negotiations. We conclude trial counsel was not ineffective for failing to object to the State's sentencing recommendation.

AFFIRMED.