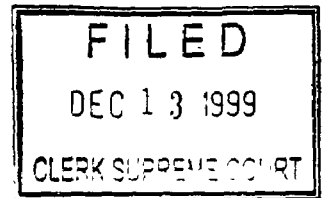


IN THE COURT OF APPEALS OF IOWA

No. 1999-320 (9-573) / 98-1196
Filed December 13, 1999



STEVE YOUNG,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs.
Judge.

Young appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Bruce D. Nestor of Tindal, Erdahl, Goddard & Nester, PLC, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, J. Patrick White, County Attorney, and Rivka Sorensen, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

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HUTTINK, P.J.

I. Background Facts and Proceedings.

Steve Young was arrested and charged with operating while intoxicated--third offense and driving while barred. Young filed a written arraignment and entered a plea of not guilty. Pursuant to a plea agreement, Young withdrew his plea of not guilty and pleaded guilty to both charges against him. The terms of the plea agreement recited at plea taking included the following:

THE COURT: The Court has been advised that some type of plea agreement has been reached. Is that correct?

MR. COHEN: That's correct, Your Honor. My client is prepared to plead guilty to Counts I and II of the Trial Information. We understand that the State will recommend five years prison sentence on Count I with placement in the OWI program, and the minimum of \$750 fine. On Count II the State will recommend a 30 day jail sentence to run concurrently with Count I and a minimum \$500 fine.

THE COURT: Miss Sorensen, is that the plea agreement that's being recommended by the State?

MS. SORENSEN: Yes, Your Honor, that's correct.

The plea taking record also recites:

THE COURT: Mr. Young, you understand the plea agreement involves recommendations of counsel. The decision on your sentence is in the discretion of the court. Do you understand?

YOUNG: Yes.

At sentencing the State made the following sentencing recommendation:

a sentence of five-year indeterminate term in OWI facility, \$750 fine and costs and surcharge on Count I, being the Operating While Intoxicated - Third Offense. On Count II, the Driving While Barred, the State has agreed to recommend the sentence of 30 days to run concurrently with Count I and \$500 plus costs and surcharge.

The State also made arguments concerning and in reference to defendant's lengthy criminal record as disclosed in a presentence report.

In this postconviction proceeding Young alleged the State breached the plea agreement by making references to his prior criminal record at sentencing. Young also claims he was denied effective assistance of counsel. He cites counsel's advice concerning the merits of an appeal, failure to provide him a copy of the presentence report within a reasonable time, failure to disclose the possibility of consecutive sentences, and assurances the sentencing judge would follow the State's recommendations.

The district court rejected all of Young's claims and denied postconviction relief. On appeal Young makes the same claims for postconviction relief asserted below.

II. Standard of Review.

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). **However, where a postconviction petitioner asserts violations of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.***

III. Breach of the Plea Agreement.

Young's allegations that the State breached the plea agreement are based on the following remarks made by the prosecution at sentencing:

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The defendant's criminal history indicates that he has 18 prior substance-related convictions, nine of which are prior OWI - Firsts or Seconds. He had four OWI - Second convictions in 1995 alone. Richard Sills from the Department of Corrections is here. He provided the Court with a Presentence Investigation. If there are any questions about that, he's available to answer those.

These remarks were received without objection. Young did not challenge the State's conduct by posttrial motion or direct appeal. Young also makes no claim counsel was ineffective for failing to object to the State's references to his criminal record.

Young had a duty to either object to the challenged reference or move to withdraw his guilty plea at the time the references were made. *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). By failing to do so, Young waived his right to appeal the State's alleged breach of the plea agreement. *Id.* Because the resulting waiver of the right to directly appeal this issue was not attributed to counsel's ineffectiveness at sentencing or on direct appeal, we hold the State's alleged breach of the plea agreement is not a ground for which postconviction relief can be granted in this case.

IV. Ineffective Assistance of Counsel.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064.

80 L. Ed. 2d at 692-93. “In examining counsel’s conduct we review de novo the totality of relevant circumstances.” *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). “Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.” *Id.* at 131-32.

The district court’s findings of fact provide:

In this instance the Court finds that the Applicant has failed to demonstrate the first element of an ineffective assistance of counsel claim by failing to establish that counsel’s representation was not within the normal range of competence and, therefore, failure to perform an essential duty.

The Court further finds that the testimony of Attorney Dennis Cohen is more credible than that of the Applicant with regard to whether Attorney Cohen told the Applicant that the judge would always go along with the plea agreement. The Court finds that Attorney Cohen told the Defendant that he had a better chance of getting what he was asking for pursuant to a plea bargain than he would without a prosecutorial recommendation. Attorney Cohen testified that his assessment of the case was that the Defendant was highly likely to be convicted following a trial and that he felt it was a very favorable recommendation on the part of the County Attorney to make based upon the Defendant’s record.

Further, the Court finds credible the testimony of Attorney Cohen indicating that the Defendant gave conflicting communications about whether or not he wanted to appeal the Court’s sentence. Attorney Cohen testified that he believed that there were no nonfrivolous issues to appeal and that he did not see any legitimate grounds for an appeal.

The Court believes, based upon the evidence including the circumstances of Defendant’s extensive criminal record and Attorney Cohen’s experience that Cohen had made it clear to the Applicant that the Applicant could receive consecutive sentences and that he was told this several times.

Defendant acknowledged that he saw the presentence investigation report at the sentencing hearing. He took advantage of his right to address the Court. He did not seek to withdraw his plea at that time based upon the statements of the prosecutor, about which he now complains, or based upon the recommendation contained in the presentence report.

Because the foregoing findings of fact implicate the district court's assessment of the witnesses' relative credibility and are abundantly supported by the record, we adopt them as our own. Young has failed to prove either element of his ineffective assistance of counsel claims. The evidence does not establish that counsel breached an essential duty or that his representation was not within the normal range of competence. Furthermore, Young has failed to prove any prejudice resulted from counsel's alleged breach of any essential duty. We affirm.

AFFIRMED.