FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-211 / 89-813

ANTHONY CURTIS FLOWERS,

Appellant,

186

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Appellant appeals the denial of his postconviction relief. **AFFIRMED.**

Stephen J. Rapp, Waterloo, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; James M. Metcalf, County Attorney; and Thomas N. Bower, Assistant County Attorney; for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

In 1986 Anthony Flowers entered a plea of guilty to a charge of first-degree robbery. Between his initial arrest and his guilty plea he was represented by a series of five court-appointed attorneys and was incarcerated in the county jail for over six months. He alleges he was physically and psychologically abused by jailers during this incarceration; he asserts his guilty plea was a desperate measure to get out of the county jail, and he would not otherwise have pleaded guilty.

Flowers did not take a direct appeal from his 1986 conviction. However, in 1988 he challenged the conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and Flowers has appealed.

Flowers contends his 1986 guilty plea was involuntary because it was motivated solely by his desire to escape abuse in the county jail. He also contends the involuntariness of the plea entitles him to postconviction relief. He asserts his failure to challenge the plea by a motion in arrest of judgment should be excused because he was sentenced only four days after the plea. He states he did not have time to file such a motion. He also claims he did not explicitly waive the right to file such a motion. In addition, he asserts his failure to file a direct appeal should be excused for two reasons: (1) it resulted from ineffective assistance of counsel, and (2) his present

issue could not have been addressed on direct appeal because there was no record concerning abuse in the county jail.

Defendant Flowers was arrested in 1986 in Nebraska. He was subsequently extradited to Iowa in connection with an armed robbery of a Pizza Hut in Black Hawk County. Flowers was charged with multiple counts in Black Hawk County. Apparently these other charges were dropped when Flowers pleaded guilty to one count of first degree robbery. This conviction carried a minimum of five years sentence due to the use of a firearm. The defendant already had at least two previous felony convictions.

Flowers was also wanted by the federal authorities in connection with up to seven bank robberies in various states. After entering his guilty plea to the first-degree robbery in Black Hawk County, he apparently pleaded to one count of bank robbery in federal court and received a federal sentence. By law, the state and federal sentences cannot run concurrently. Iowa Code § 903A.5 (1989).

Flower was incarcerated in Black Hawk County Jail pending his trial. The record is replete with evidence, and the defendant admits himself, that he was repeatedly violent and belligerent throughout his stay in the jail. He assaulted other inmates and guards, tore phones off the wall, ripped up electrical conduit, threw a fan through a thermo-pane window, and spit on other inmates and guards. He repeatedly threatened the lives of the guards

and relatives and families of the guards, as well as threatening to rape and sodomize the guards' families and relatives.

Flowers also repeatedly banged and kicked the walls and furniture of the jail. The jail is located on the fourth floor of Black Hawk County Courthouse. The courtrooms are located immediately beneath it, on the third floor. Several times various judges had to call up to the jail to request the jailers to quiet the noise, as it was disrupting court proceedings.

The defendant himself admits his behavior was disruptive and purposefully so. He claims he was doing it in retaliation for deprivation of writing utensils, phone calls, and various other privileges. Members of the jail staff testified his behavior was possibly the most disruptive and belligerent they had ever experienced.

Eventually, the jail administrator contacted Dr. Loeffelholz, the direction of the Iowa Medical and Classification Center at Oakdale, Iowa. The jail administrator described the problems they were having with Flowers, especially his violent and disruptive behavior. The doctor was apparently experienced with similar incidents at the Oakdale correctional facility. He prescribed shackling the defendant to a mattress on the floor, and a helmet to prevent Flowers from injuring himself.

The testimony is in conflict as to exactly how the restraint took place. The jail personnel claimed they proceeded to restrain Flowers in the manner prescribed. Flowers claimed he was shackled to the floor without a mattress. Apparently he remained restrained for sixteen to twenty-one hours. He was then released with the assistance of his attorney, after Flowers had promised to control himself.

The next day, Flowers contacted his attorney and requested he be allowed to plead immediately to one count of first degree robbery. Although no formal plea bargain was arranged, a tacit agreement was reached whereby the State would drop its remaining charges against Flowers. Flowers requested he be allowed to plead immediately. A judge was located and his plea was taken.

At the plea hearing, the judge and attorneys present fully informed Flowers of his various rights, including his right to file a motion in arrest of judgment.

At Flowers' explicit request, an expedited sentencing hearing was held four days later. The judge was required by law to sentence the defendant to not more than twenty-five years. Flowers was advised by the judge of his right to appeal the sentence.

Flowers failed to file either a motion in arrest of judgment or an appeal. This post-conviction relief is the first action brought by the defendant on this case since his sentencing.

Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding 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). Ineffective assistance is measured by 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; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). 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. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1987). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

I. Involuntary Plea

The defendant first raises the constitutional issue his plea was involuntary, being induced by coercion. The defendant alleges he entered his plea to get away from the

inhumane treatment he was receiving at Black Hawk County Jail.

However, the record clearly indicates any unusual treatment he endured was brought about by his own doing. He even admitted in a letter to his sentencing judge his attitude and behavior were not appropriate and caused problems. The record further indicates Flowers had engaged in previous plea negotiations. He knew what he was doing. His problem was not mistreatment by the jailers, but rather his own misguided attempts to manipulation. We find the facts of this case do not support Flowers' contention his plea was involuntary due to inhumane treatment. His plea appears to have been voluntary, even calculated. He cannot now be heard to complain he does not like what he bargained for.

Additionally, any possible involuntariness is attenuated by the passage of time between Flowers' strict confinement and when the guilty plea was actually entered. He had plenty of opportunity to consult with his attorney. The trial court properly questioned Flowers as to the voluntariness of his plea, and accepted his plea as voluntary. State v. Lemburg, 257 N.W.2d 39, 41-43 (Iowa 1977).

Our review of the voluntariness issue is focused on the defendant's awareness rather than on the trial court's colloquy. State v. Lemburg, 257 N.W.2d at 45. Here we find Flowers was aware of what he was doing. In fact, he

appears to have calculated the effect of his actions and his plea for his own reasons. The passage of time, the repeated contacts with his attorney, and the opportunity to address the court, nullify any claim of coercion in obtaining the plea.

Additionally, the record shows counsel for Flowers was not ineffective in preventing undue punishment or harsh treatment. Because of counsel's intervention Flowers was unshackled, after he promised to behave more rationally and responsibly.

2. **Motion in Arrest of Judgment**

Flowers contends because his sentencing was only four days after he entered his guilty plea, he was denied his right to file a motion in arrest of judgment. Additionally, he contends his attorney never filed an appeal.

Flowers himself requested the expedited sentencing process. He was informed of his right to file a motion in arrest of judgment. Although he had opportunity to consult with his attorney, he chose not to file such a motion. Flowers is not a newcomer to the criminal justice system. He appears to be fairly sophisticated in his dealings with it. If he chose an expedited sentencing hearing, he had his own reasons for it. Like an attorney's trial tactics, he can not now complain he doesn't like the result of his choices. We determine Flowers was not denied his right to file a motion in arrest of judgment. Rather, he voluntarily waived that right for his own reasons.

III. Failure to Appeal

The failure to appeal was also Flowers' calculated choice. He even makes reference to the favorable benefits he hoped to derive from not going to trial or pursuing an appeal in a letter to the sentencing judge. Aside from the fact there is usually little to appeal from in a properly conducted plea process, Flowers' tactical decision not to appeal nor to request his attorney to do so is his choice.

Based upon the facts before us, we determine Flowers voluntarily allowed the time for appeal to lapse and chose not to appeal. We also determine counsel for Flowers was not ineffective for not pursuing an appeal, especially in light of his client's apparent wishes not to do so.

We affirm the postconviction court on all three grounds for its holding: (1) Flowers' shackling was justified because it was necessary to control him and did not constitute coercion; (2) even if the shackling was improper, its effect was attenuated by the time the plea was entered, so the shackling could not be said to cause the plea; and (3) Flowers' plea was motivated by factors not related to the treatment of which he complains.

AFFIRMED.