FILED
SEP 25 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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RICKY D. JAYNE,

Petitioner-Appellant,

vs.

CALVIN AUGER, Warden, Iowa State Men's Reformatory; and STATE OF IOWA,

Respondents-Appellees.

Filed September 25, 1984

4-277
83-854

Appeal from the Iowa District Court for Polk County - Gene L. Needles, Judge.

Petitioner appeals from denial of his application for postconviction relief, asserting: (1) that the evidence was sufficient to establish that he was ineligible for parole due to operation of Iowa Code section 906.5; (2) that he was denied effective assistance of trial counsel due to counsel's failure to advise him of his statutory ineligibility for parole under Iowa Code section 906.5 and as a result of erroneous advice concerning length of the sentence he would serve; (3) that he was denied due process when the court accepted his guilty plea without advising him of his statutory ineligibility for parole and when both trial counsel and the sentencing court misled him concerning the consequences of his plea; (4) that Iowa R. Crim. P. 8(2)(b) should be interpreted in a manner requiring the court to inform a defendant of the applicability of section 906.5 before accepting a guilty plea; and (5) that Iowa Code section 906.5 is unconstitutional. AFFIRMED.

Bruce L. Cook of Bruce L. Cook, P.C., Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for respondents-appellees.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

PER CURIAM

The petitioner, Ricky Jayne, appeals from denial of his application for postconviction relief. At the postconviction hearing, he alleged that he was denied constitutional and statutory rights because the trial court and his counsel failed to inform him of the effect of Iowa Code section 906.5, which states as follows:

> If the person who is under consideration for parole is serving a sentence for conviction of a felony and has a criminal record of one or more prior convictions for a forcible felony or a crime of a similar gravity in this or any other state, parole shall be denied unless the defendant has served at least one-half of the maximum term of his or her sentence.

Iowa Code § 906.5 (1983).

In 1978, Jayne entered a plea of guilty to a charge of first-degree robbery. At that time, he was on parole from a 1972 conviction of first-degree robbery. Judge Glanton sentenced him to an indeterminate twenty-five year prison term subject to the five-year mandatory minimum required by Iowa Code section 902.7 for use of a firearm, with the sentence to run concurrently with the sentence on the 1972 charge. Judge Glanton did not inform him that he would be ineligible for parole for twelve and one-half years due to operation of Iowa Code section 906.5 although the effect of section 902.7 was discussed as follows:

> THE COURT: And do you understand that the minimum — you can't get out even on a parole till the minimum of five years has passed; do you understand that?
>
> THE DEFENDANT: Yes.
>
> * * * * *
>
> THE COURT: And you were advised you would have to serve a minimum of at least five years before you are subject to parole; do you understand that?
>
> THE DEFENDANT: Yes, sir.

As a preliminary matter, the postconviction court found that section 906.5 does not apply to Jayne. The court also held that the trial attorney's failure to

inform Jayne of the effect of section 906.5 does not constitute ineffective assistance and that section 906.5 is constitutional.

On appeal, Jayne raises the following issues: (1) whether the trial court erred in finding that section 906.5 does not apply to Jayne; (2) whether Jayne was denied effective assistance of counsel; (3) whether Jayne was denied due process as a result of the trial court's failure to inform him of the parole ineligibility pursuant to section 906.5, and as a result of the misleading statements of the trial court and the trial counsel as to the consequences of his plea; (4) whether Jayne has a statutory right pursuant to Iowa Rule of Criminal Procedure 8(2)(b) to be informed of the effects of section 906.5; and (5) whether section 906.5 is unconstitutional.

I. Ineffective Assistance of Counsel. In Snethen v. State, 308 N.W.2d 11 (Iowa 1981), the Iowa Supreme Court set forth the standard for determining effective assistance of counsel:

> In a postconviction proceeding the petitioner has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). There is a presumption that counsel is competent, which must be overcome by the petitioner, Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980); but the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency, Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). "Such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation." Hinkle v. State, 290 N.W.2d at 30.

Snethen at 14.

The two conditions that must be shown to establish that a person has been deprived of a fair trial due to inadequate counsel are: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. Id.

Jayne charges that he received ineffective assistance because his attorney failed to inform him of the effect of section 906.5 and because the pre-plea

advice he received from his attorney was misleading and incorrect.

Turning first to the issue of the trial attorney's failure to inform Jayne of the effect of section 906.5, we affirm the trial court's holding that this did not constitute ineffective assistance.

A guilty plea is not rendered involuntarily in a constitutional sense simply because the defendant is not informed of all the possible indirect and collateral consequences. Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979). Section 906.5 is considered a limitation on the power of the parole board to grant parole as distinguished from a mandatory minimum sentence such as section 902.7 (a mandatory minimum five-year sentence for use of a firearm during the commission of a forceable felony). Boge v. State, 309 N.W.2d 428, 431 (Iowa 1981). "Ordinarily, parole eligibility is . . . an indirect and collateral consequence, of which defendant need not be specifically advised by the court or counsel before entering a plea of guilty." Strader, 611 F.2d at 63. This, however, does not mean that the court or counsel is free to misinform a defendant regarding the collateral consequences of his plea. Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983).

In Boge v. State, the Iowa Supreme Court clearly stated that the trial court is not required to inform a defendant of the effects of section 906.5 in order to meet the requirements of Iowa Rule of Criminal Procedure 8(2)(b)(2) that a defendant be informed of any mandatory minimum punishment. 309 N.W.2d at 431. The court reaffirmed Boge in Grout v. State, 320 N.W.2d 619 (Iowa 1982), and also held that "the due process clause of the federal constitution does not require that a defendant with a prior forcible felony conviction be informed of the period of parole ineligibility prescribed by section 906.5 before his or her guilty plea may be accepted." Id. at 621.

In view of the "collateral consequences" rule of Strader, and the Iowa Supreme Court's statements in Boge and Grout, we find that the failure to inform the defendant of the effects of section 906.5 does not establish that the trial

counsel's performance was below the range of normal competency. The trial court properly found that the failure to disclose the effects of section 906.5 did not constitute ineffective assistance.

The defendant also claims that he received ineffective assistance because his attorney actively misled him as to the length of his incarceration. However, the record does not support such a claim. We affirm the trial court's finding that the defendant failed to establish that he received ineffective assistance.

II. Due Process Violation. The defendant argues that the trial court's failure to inform him of the parole ineligibility under section 906.5 and the misleading statements of the court and counsel regarding the length of incarceration constituted a denial of due process. Specifically, he argues that without this information, his plea was not knowing or voluntary and therefore is void. See State v. Sisco, 169 N.W.2d 542, 546 (Iowa 1969).

The Iowa Supreme Court directly dealt with the issue of the trial court's obligation to inform a defendant of the effect of section 906.5 in Grout v. State, 320 N.W.2d 619 (Iowa 1982). The court expressly stated that the due process clause of the federal constitution does not require that a defendant with a prior forcible felony conviction be informed of the period of parole ineligibility prescribed by section 906.5 before his or her guilty plea may be accepted. Id. at 621.

The record does not support the defendant's argument that the trial court and his attorney misled him as to the length of his term. The court advised the defendant at the guilty plea hearing that the maximum sentence for first-degree robbery was twenty-five years and that because of the use of a firearm he was subject to a five-year minimum sentence. Under the standards set forth by the Iowa Supreme Court, he knowingly and intelligently entered a guilty plea. See Brainard v. State, 222 N.W.2d 711, 715 (Iowa 1974) ("defendant must be aware of the possible maximum punishment, any mandatory minimum punishment, and any enhanced punishment for the offense charged"). Section 906.5 is considered a

limitation on the parole board's power to grant parole rather than a mandatory minimum sentence. Boge v. State, 309 N.W.2d 428, 431 (Iowa 1981). We find, therefore, that the defendant was not denied due process by misleading statements of the trial court or his counsel regarding the length of his incarceration.

III. Iowa Rule of Criminal Procedure 8(2)(b). The defendant argues that he was denied his statutory right, pursuant to Iowa Rule of Criminal Procedure 8(2)(b) to be personally informed by the court of the "mandatory minimum punishment" resulting from his guilty plea. We reject this argument in view of the Iowa Supreme Court's holding in Boge v. State. The court expressly stated that section 906.5 does not impose a mandatory minimum sentence within the context of Iowa Rule of Criminal Procedure 8(2)(b).

IV. Constitutionality of Section 906.5. The defendant seeks to challenge the constitutionality of section 906.5. We find, however, that he lacks the standing to do so.

As the trial court stated:

> nothing in this record, except the defendant's claim, indicates that the Board of Parole had failed to consider him for parole by reason of Section 906.5.

The record clearly supports this finding. The defendant made a request for parole in 1982 which was denied. The letter denying this request stated:

> Your case was reviewed by the Board of Parole this date and it was their decision not to call you for parole at this time.
>
> The factor(s) considered in making this decision is (are):
>
> You have a mandatory minimum sentence to serve before you can be considered for parole.
>
> In view of the seriousness of the crime for which you were convicted, the Board believes that a parole at this time would not be in the best interest of society.

> Your file and institutional progress report will be reviewed again on your regular review date unless sooner initiated by the institutional staff or the Parole Board Liaison officer.
>
> If you wish further information regarding this decision, you should consult the Parole Board Liaison Officer.
>
> If you believe you have been improperly denied parole consideration or if you believe you have facts which should be brought to the attention of the Board of Parole, you may request a hearing before the Parole Board Liaison Officer. Such request should be made to the Officer in writing. The findings of the Liaison Officer will be reviewed by the Board of Parole.

There was no indication in this letter that the Board considered section 906.5. Because the parole board has not ruled on the applicability of section 906.5 to the defendant, he has not been adversely affected by the statute and lacks standing to challenge its constitutionality. State v. Wilson, 314 N.W.2d 408, 410 (Iowa 1982).

The findings of the postconviction court are affirmed.

AFFIRMED.

All judges concur, except Snell, J., who specially concurs.

SNELL, J. (specially concurring)

I concur in the result. The defendant does not have standing to challenge the applicability of Iowa Code section 906.5. Nothing in the record substantiates the defendant's claim that section 906.5 was applied to his case or is presently applicable.

The judge's order clearly sentenced the defendant to a maximum of 25 years for first-degree robbery with a mandatory 5-year minimum sentence because of the use of a firearm. Interpreting the sentencing proceedings and the de minimis order, there is no indication that there was consideration of or advice on whether section 906.5 was applicable. However, if the defendant does suffer incarceration *by virtue of section 906.5's provisions, his claim of ineffective assistance of* counsel would be warranted. Moreover, the record presently made convinces me that his claim is good and his guilty plea should be vacated. Although under the holdings of Boge and Grout, the trial judge is not required to inform the defendant of the applicability of section 906.5, I believe the failure of defense counsel to do so constitutes ineffective assistance of counsel. See State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982) (attorney who undertakes to represent a criminal defendant should be familiar with the basic provisions of the criminal code); Weir v. State, 337 N.W.2d 204, 206-07 (Iowa 1983) ("counsel's legal misadvice resulting from his unfamiliarity with and failure to research applicable statutory provisions that in various plea alternatives would determine the length of his client's incarceration"). See also, Grout v. State, 320 N.W.2d 619, 621-23 (Iowa 1982) (McCormick, J. dissenting).