FILED
JUN 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MICHAEL WAYNE REYSACK,	)	FILED JUNE 25, 1986
Petitioner-Appellant,	)	6-149 85-900
vs.	)	147
STATE OF IOWA,	)	
Respondent-Appellee	)	

Appeal from the Iowa District Court for Franklin County (No. C 1082-0284) - M. L. Mason, Sr. Judge.

Petitioner appeals the denial of his application for postconviction relief alleging he was denied effective assistance of counsel. Specifically, he alleges his guilty plea was not knowing and intelligent because: 1) counsel did not properly advise him concerning the admissibility of his confession, and 2) he was misinformed regarding the plea bargain. **AFFIRMED.**

B. John Burns, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General and Stephen P. Carroll, Franklin County Attorney.

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

HAYDEN, J.

Petitioner appeals the denial of his application for postconviction relief alleging he was denied effective assistance of counsel. Specifically, he alleges his guilty plea was not knowing and intelligent because: 1) counsel did not properly advise him concerning the admissibility of his confession, and 2) he was misinformed regarding the plea bargain. We affirm.

Michael Wayne Reysack was charged by trial information with one count of false use of a financial instrument and one count of second-degree burglary. The minutes of testimony revealed that the alleged victim, a bank teller, and a police officer would testify at trial; the police officer's testimony would concern petitioner's confession.

Initially, Reysack pled not guilty, but later withdrew the plea and entered a plea of guilty to the crime of burglary. In accordance with the charging concession which was part of the plea bargain, the State agreed to dismiss the false use charge. Reysack was later sentenced to a term not to exceed ten years.

Reysack's direct appeal was dismissed and he subsequently filed an application for postconviction relief claiming ineffective assistance of counsel. Following a hearing, petitioner's application was denied.

I

Before reaching the merits of this appeal, we must consider the State's claim that petitioner's challenges to the guilty plea are not properly before this court. It is argued that such challenges must first be raised in a motion in arrest of judgment in order to preserve error for appeal.

Iowa R. Crim. P. 8(2)(d) provides that "The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to do so raise such challenges shall preclude the right to assert them on appeal."

Iowa R. Crim P. 23(3)(a) defines a motion in arrest of judgment as "an application by the defendant that no judgment be rendered on a finding, plea, or verdict of guilty." Rule 23(3)(a) also reiterates that "A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal." Our courts, however, have allowed an exception to the general rule of error preservation when a claim of ineffective assistance of counsel is made. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982) "Because these claims (realistically) are not made by attorneys against their own actions, we have allowed the suspension of rule 23(3)(a)." Id.

In the present case, both of Reysack's claims concern ineffective assistance of counsel. As such, his failure to file a motion in arrest of judgment does not preclude appellate review. We therefore reach the merits of petitioner's specific grounds of error.

II

Reysack first argues his trial counsel improperly advised him concerning the admissibility of his confession. It is claimed that counsel's failure to recognize that the confession was inadmissible and inform petitioner of this fact constitutes ineffective assistance. As a result, Reysack contends his plea of guilty was not knowing or voluntary.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W. 2d 231, 234 (Iowa 1984). In Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Applying these principles, we conclude that trial counsel was not ineffective. Under the facts of this case, counsel's conclusion that the confession would be admissible appears to be a reasonable one.

Prior to giving his statement to Officer Miller, the interrogating officer, Reysack told police he no longer needed to speak to an attorney. He now contends that he felt he had no choice but to confess because he was led to believe his accomplice had implicated him when a police officer entered the room and whispered to Officer Miller. However, Officer Miller testified that after he was told of the accomplice's confession, he stressed to petitioner that he did not have to give a statement and that he had a right to an attorney. Further, petitioner testified that he did not hear the police discussing his accomplice's confession.

Based on this evidence, we cannot say that the confession was clearly inadmissible. Nor can we fault trial counsel for failing to reach this conclusion. It is apparent from the record that petitioner's counsel reviewed the evidence, researched confessions, and sought the advice of a county attorney before concluding that the confession was admissible. Testimony also indicates that he spoke to petitioner concerning the confession and the concept of corroboration. We find that this constitutes effective assistance.

Petitioner also claims counsel was ineffective in misinforming him regarding the plea bargain. At the guilty plea proceeding, the court inquired about the plea bargaining agreement. The prosecution stated it would dismiss the false use of a financial instrument charge in exchange for petitioner's plea to second-degree burglary. Petition stated that he understood the State would drop the false use of a financial instrument charge and not file a habitual offender

charge in exchange for his plea to second-degree burglary. On appeal, Reysack maintains that he was under the mistaken belief that the State would charge him under the habitual offender statute and counsel was ineffective in failing to inform him otherwise. We find that the record does not support this conclusion.

At the postconviction hearing, trial counsel testified that he informed petitioner that no habitual offender violation was charged. He specifically told Reysack not to consider the habitual offender statute in making his decision to plead guilty. Thus, in spite of petitioner's misstatement to the court at the guilty plea proceedings, evidence indicates that counsel apprised him of the nature of the plea agreement.

We find petitioner has failed to sustain his burden of establishing ineffective assistance of counsel. The postconviction court's decision is therefore affirmed.

AFFIRMED.