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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOSEPH RANDOLPH KERSEY,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed December 26, 1984

4-426
84-87

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Petitioner appeals from a denial of postconviction relief, asserting that the evidence was sufficient to establish that he was denied effective assistance due to various acts and omissions of trial counsel. AFFIRMED.

Joseph Randolph Kersey, pro se, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., Donielson, and Sackett, JJ.

OXBERGER, C.J.

The petitioner, Joseph Kersey, has appealed from denial of his motion for postconviction relief, alleging a number of errors on the part of his counsel resulting in ineffective assistance. The errors he claims violated his sixth and fourteenth constitutional rights of due process and right to counsel include: (1) failure to properly investigate and prepare a defense of diminished responsibility; (2) failure to adequately discover the State's evidence; (3) failure to file a motion in arrest of judgment following defendant's pleas of guilty; (4) coercing the defendant to plead guilty; (5) promising the defendant he would receive a definite sentence of twenty-five years in exchange for his guilty plea; and (6) failing to adequately preserve the record of the proceedings. We affirm.

Petitioner was charged with one count of first-degree kidnapping, three counts of second-degree kidnapping, one count of first-degree robbery, and one count of possession of a controlled substance. Pursuant to a plea bargain agreement in which the State agreed to make no sentencing recommendation, he entered a plea of guilty to four counts of second-degree kidnapping and was sentenced to four indeterminate twenty-five year prison terms, only two of which were to be served concurrently. His conviction was affirmed by unpublished opinion of the court of appeals.

Notice of a diminished responsibility defense was filed by privately retained trial counsel Barry Kaplan. After a two-hour psychiatric interview, petitioner had been diagnosed as having an antisocial personality. The doctor expressed the opinion in a letter that Kersey was legally sane but that the combination of stress and the influence of alcohol "may constitute some diminished responsibility." Petitioner's mother and sister-in-law testified at the hearing on his application for postconviction relief that his behavior and personality changed after his arrest and incarceration. No further psychiatric examinations were performed and, at the guilty plea proceeding, Kaplan made a professional statement that he believed

that a diminished responsibility defense would be unsuccessful and would expose petitioner to more serious punishment if the case went to trial on the original charges.

The record of the guilty plea proceedings shows that petitioner was informed of, and acknowledged understanding, the elements of the crime, the motion in arrest of judgment requirement, and sentencing options. In the postconviction proceeding he and members of his family testified that he did not understand either the intent element of the crime or the possibility that consecutive sentences could be imposed notwithstanding Kaplan's expression of an opinion that a concurrent sentence was 99 percent certain. He further testified that Kaplan coerced him into pleading guilty and instructed him what to say during the plea colloquy.

No motion in arrest of judgment was filed. Petitioner and members of his family testified that shortly after trial he expressed a desire to file such a motion to a member of Kaplan's law firm. Kaplan wrote him a letter advising against filing a motion in arrest, requesting a reply stating any reasons why the motion should be filed. Petitioner testified that he did not reply to the letter due to his confused mental state.

The petitioner has raised questions concerning violation of his constitutional rights. As a result, we review the record and make our own determination based upon the totality of the circumstances. Lawson v. State, 280 N.W.2d 400, 401 (Iowa 1979).

In order to prevail in his claims of ineffective assistance of counsel, petitioner must prove by a preponderance of the evidence that the counsel's performance was deficient, and prejudice resulted from the inadequate performance of counsel's duties. Strickland v. Washington, ____ U.S. ____, ____

104 S. Ct. ____, ____, 80 L. Ed. 2d 674, 693 (1984); State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The standard against which an attorney's performance is compared is that of reasonableness under the prevailing professional norms. Strickland, ____ U.S. at ____, 104 S. Ct. at ____, 80 L. Ed. 2d at 694. The courts have been admonished to refrain from the "distorting effects of hindsight" in evaluating counsel's conduct. Id.

The second element the petitioner must prove involves a strong showing of prejudice. It must be proven that the ineffectiveness worked to the petitioner's actual and substantial disadvantage. Miles at 234. It must be demonstrated there is a reasonable probability that the results of the proceeding would be different if the errors had not occurred. Strickland, ____ U. S. at ____, 104 S. Ct. at ____, 80 L. Ed. 2d at 674. A reasonable probability has been defined as a probability sufficient to undermine confidence in the outcome. Id.

I.

In petitioner's first claim, he complains that the testing performed at the request of his counsel was too brief, lasting two hours, and that his counsel should have followed up on this report. Petitioner also says there was adequate evidence to alert his counsel that a diminished responsibility defense should be investigated, based on the testimony of his sister-in-law and mother. His sister-in-law said she visited Kersey at jail after his arrest and said he cried, seemed angry, and confused. His mother testified that she thought Kersey was acting strangely at the guilty plea proceedings because he was very quiet and normally is talkative.

The report made by the first doctor who interviewed Kersey shows his opinion that Kersey was not insane, but it was possible there might be a diminished responsibility defense. Kaplan discussed the report with Kersey and revealed his feelings that a diminished responsibility defense would fail and could expose Kersey to a more severe sentence than if he pleaded guilty. Kaplan explained his conclusions as follows in his professional statement:

> And we have on file a Notice of Diminished Responsibility, and that was put on file because I like to get my motions on file as soon as possible, and that was put on right after we were retained basically; but I have discussed the defense of diminished responsibility and the defense of insanity with Joe Kersey and it is—it was Joe's opinion and my opinion and based upon the facts and based upon the tendered plea arrangement made by Mr. Krejci that the defense would not be successful and that he could be exposing himself to a much more serious punishment.
>
> Further, it has always been my thought that, and it will be our presentation at the sentencing, that due to Mr. Kersey's age and past record, concurrent sentences would be appropriate in this case as opposed to consecutive sentences, and it has been my experience with trying a lot of cases and speaking with a lot of people in the know that the chance of consecutive sentences sometimes is more probable or happens more often after there is a jury trial and after all the evidence is in by way of a trial. So this went into my feeling. And so we would, of course, at this time waive our defense of diminished responsibility. Is that right, Joe?
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> MR. KERSEY: Yes.

Kersey's behavior in jail does not appear unusual for someone facing numerous charges and potential life imprisonment. Further, it would be more unusual for Kersey to be talkative at a judicial proceeding where he is expected to speak only at certain times, rather than to be quiet.

II.

In his second claim of error, Kersey says Kaplan should have taken depositions of the State's witnesses.

Kaplan explained he conducted some investigation, but did not depose all the State's witnesses because the county attorney indicated if Kaplan did, he might withdraw the plea bargain:

> After Mr. Krejci made the plea offer, I told Joe that I would like to take some depositions in the case in any event. I know Mr. Schoell had some depositions planned and I consider depositions to be an important part in many criminal cases. When I presented this to Mr. Krejci, and this is not a complaint against Mr. Krejci or his office,-I think this is a part of the purpose of plea bargaining is for the efficiency of justice perhaps in the judicial system—Mr. Krejci said, well, if the case is going to involve depositions and all sorts of motions and hearings, that we might as well just try all the issues.

> Well, I presented this dilemma to Joe Kersey and Joe indicated that he didn't want to take any depositions, he wanted to go with the plea bargain and plea offer made by Mr. Krejci. Well, that still didn't satisfy me, and perhaps against the advice of Joe, we hired a private investigator, a licensed private investigator, to check into the background of these facts and to speak with a witness who would corroborate or not corroborate his testimony and the entire events. And this was done. And I think in my mind, although I would have preferred taking the depositions, this made in my mind—made my mind clear that what happened truly did—what Mr. Krejci and what the County Attorneys and the County Attorney's Information allege happen truly did happen.

Kaplan's decision was reasonably based on his concern of preventing his client from facing a life sentence and because the evidence against Kersey was so overwhelming. There is adequate basis for Kaplan's concerns, considering the county attorney's statements, and the fact that the crime involved the taking of four hostages, where Fort Dodge police surrounded the house where they were held, and finally forced Kersey out with tear gas. There were dozens of witnesses to the incident and to Kersey's statements during the crime.

III.

When Kersey indicated to a person in Kaplan's office that he wanted to file a motion in arrest of judgment after his plea, Kaplan responded by letter telling Kersey why it would not be advisable. He also told Kersey that if he still wanted to go to trial on the original charges, he should inform Kaplan and permission would be sought to withdraw the plea. Kersey never responded, claiming his mental state prevented him from making a wise choice. This evidence shows it was Kersey, not Kaplan, who decided not to follow through with the filing of the motion, and Kaplan had every right to rely on his client's decision. Our courts have indicated when the client delays in taking action, the counsel has not given ineffective assistance. See State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977).

IV.

The evidence does not support petitioner's assertion he was coerced into making a guilty plea by Kaplan. He claims this resulted because Kaplan told him he could get life in prison if he did not plead guilty. The State points out that Kaplan also told Kersey that it was up to him to decide if he wanted to go to trial or plead guilty. Again, counsel cannot be found ineffective because the petitioner later regrets following advice of counsel when that advice is based on adequate grounds.

A case cited by petitioner for his argument is distinguishable. In Dixon v. State, 287 So. 2d 698, 699 (Fla. Ct. App. 1974) the defendant claimed he was innocent, but his counsel told him to plead guilty or he would face a more severe penalty. The Florida court found there was ineffective assistance of counsel. Id. at 700. In Dixon, unlike in this case, the defendant was not allowed to talk with his attorney until the day of his guilty plea and was not given time to discuss the facts of his case or a defense. Id. at 699.

V.

Kersey says he was told by Kaplan that he had a 99 percent chance of receiving concurrent 25-year sentences rather than a consecutive sentence if he pleaded guilty. He says his situation is similar to that in Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977). There, the court found the defendant's counsel to be ineffective because his counsel assured him he would get a lesser sentence than that imposed. Id. at 131.

Kersey was told by Kaplan that he could receive consecutive sentences if the court chose to do so. Kaplan discussed the difference between concurrent and consecutive sentences and warned Kersey there were no guarantees what sentence he would receive. The court, at the guilty plea proceedings, also told Kersey several times he could receive consecutive sentences and asked him if he knew the

difference between concurrent and consecutive. The court asked Kersey if he had been coerced in any way into making the plea of guilty. The State further points out that the Rinehart case cited by petitioner is distinguishable because the 15-year-old boy charged with murder in that case was never told he could face more severe penalties than the sentence his counsel suggested he could get. Id. He was told he would face a 25 to 35-year sentence, and instead received life in prison. Id.

VI.

In petitioner's last claim he says the record was inadequate to show he had the intent required to be guilty of the offenses. This failure to preserve the record properly constitutes ineffective assistance, he says. Kersey puts considerable emphasis on the fact that during the acceptance of the guilty plea, while being questioned by the court on his intent, he paused. There ensued an off-the-record conversation between Kersey and his counsel. He then admitted he had the intent necessary to be guilty of the crime.

The record reflects that the guilty plea proceeding was recorded and transcribed. During the off-record discussion between Kersey and Kaplan, Kaplan told him if he continued to tell the judge he did not have the necessary intent, then he would face trial on the original charges. Kaplan was merely repeating to Kersey what he already knew; that he had to chose between the guilty plea or face the original charges. Nothing improper was said. There was no reason to record a private conversation between counsel and his client.

A review of the record shows that petitioner's claims of ineffective assistance of counsel are without merit. We affirm the trial court.

AFFIRMED.