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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHARLES LLOYD TYLER,	)	
Petitioner-Appellant,	)	Filed November 26, 1986
vs.	)	6-25 85-749
STATE OF IOWA,	)	
Respondent-Appellee.	)	348

Appeal from the Iowa District Court for Madison County (No. CL 22494 and CR 1632) - Michael J. Streit, Judge.

Petitioner-defendant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Robert J. Kromminga, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and Arlen Hughes, County Attorney, for respondent-appellee.

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

OXBERGER, C.J. 343

In this appeal, Petitioner Charles Lloyd Tyler challenges the district court's order denying his application for postconviction relief. He contends that he received ineffective assistance of counsel because his trial attorney coerced him to plead guilty, failed to inform him of the consequences of his plea, instructed him to admit involuntarily certain facts supporting the plea, and failed to file a motion in arrest of judgment. We affirm.

Because the petitioner alleges a denial of his constitutional right to the effective assistance of counsel guaranteed by the sixth amendment, we make an independent evaluation of the totality of the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). This is the equivalent of a de novo review. Id.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must prove by a preponderance of the evidence: (1) that counsel's performance was so deficient as to deprive him of "counsel" within the meaning of the sixth amendment; and (2) that the deficient performance prejudiced the petitioner, thereby denying him a fair trial. White v. State, 380 N.W.2d 1, 3 (Iowa Ct. App. 1985); Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). Moreover, the petitioner must overcome a presumption of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of representation. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In addition, more is required than a mere showing that trial strategy backfired or that another attorney would have handled the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). The ultimate test is whether, under the record as a whole, counsel's performance was within the normal range of competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). With these principles in mind, we now address the merits of this appeal.

The record discloses that the appellant was one of three persons charged with first degree murder and first degree robbery in connection with the death of Alberta Mickeal. The appellant's co-defendants were tried on these charges in July of 1981. They were each found guilty of second degree murder and first degree robbery, and were sentenced to serve two consecutive twenty-five year prison terms. On September 16, 1981, after the trial and sentencing of his co-defendants, the appellant pled guilty to charges of second degree murder and first degree robbery, and was sentenced to serve two consecutive twenty-five year terms.

Tyler first argues that his attorneys, acting with the knowledge that he did not want to plead guilty, coerced him into entering his plea. Although our review is de novo, we give weight to the trial court's findings concerning the credibility of witnesses. Iowa R. App. P. 14(f)(7); Taylor v. State, 352 N.W.2d 683, 687 (Iowa 1984). The postconviction trial court concluded that Tyler's defense counsel insured that his plea represented his informed and voluntary choice. We find credible evidence in the record supporting this determination. The record discloses that, at the outset of the case, Tyler expressed a desire to proceed to trial; this intention was expressed before the conviction of his co-defendants, however. The record further reveals that prior to the entry of Tyler's guilty plea, his attorneys thoroughly discussed the charges and explained to him the likelihood of a first degree murder conviction if he proceeded to trial. In addition, one of his attorneys contacted the presiding judge to discuss possible sentencing terms, and an ex-parole board member to discuss parole possibilities; the information gathered was fully discussed with Tyler. Based upon their findings, Tyler's attorneys advised him to accept the plea agreement offered by the State. In short, we find no evidence contradicting Tyler's attorney's testimony that, "Charlie

had been through the system several times in the past. He wanted to know everything. He made up his own mind."

Similarly, the record contradicts Tyler's assertion that his defense counsel failed to inform him of the potential consequences of a guilty plea. The testimony of Tyler's attorneys indicates that Tyler was explicitly advised of the consequences of concurrent or consecutive prison terms, and that he was informed of the presiding judge's tendency to impose consecutive sentences. In these circumstances, we cannot say that his disappointed expectation of leniency provides grounds for relief. See State v. Dee, 218 N.W.2d 561, 563-64 (Iowa 1974).

Tyler additionally contends that his counsel instructed him to answer questions during the plea proceeding in the affirmative, thus requiring him to admit involuntarily facts supporting the guilty plea. Tyler's attorneys asked him all of the questions concerning the factual basis of the plea. His attorneys testified that this method was employed because of their understanding that the judge taking the plea was reluctant to accept it because of his belief that Tyler should be facing a charge of murder in the first degree. Tyler's attorneys stated that they felt their system would insure that Tyler's excuses and mitigation would enter the record clearly. We cannot say that this matter of strategy amounted to ineffective assistance of counsel. Moreover, there is nothing in the record indicating that Tyler's statements at the hearing were either involuntary or false.

In addition, we find no merit in Tyler's complaint that his counsel failed to make an adequate record. The off the record discussion between Tyler's counsel and the presiding judge which Tyler complains of was held merely to insure that the provisions of Iowa Rule of Criminal Procedure 8 were followed in the taking of the plea. This does not implicate the supreme court's decision in State v. Reaves, 254 N.W.2d 488, 494 (Iowa 1977), where the court stated that defense counsel have a professional responsibility to assist in the making of a record

showing that a guilty plea was intelligently, voluntarily, and accurately entered. That statement refers to the attorney's duty to insure that the plea represents his client's best interest; it does not refer to the making of an off the record comment as in the instant case.

Tyler is correct in noting that his counsel did not file a motion in arrest of judgment challenging the plea proceeding. The fact that the motion was not filed is not, however, indicative of ineffective assistance. See State v. Scholerman, 315 N.W.2d 67, 71 (Iowa 1982). Tyler's counsel testified that because they had explained the elements of the crimes to which Tyler pled guilty and the potential sentences the court might hand down, including the possibility of consecutive twenty-five year terms, they did not feel that a motion in arrest of judgment would be appropriate. In addition, both attorneys testified that they believed the plea taking procedure was sound, and that Tyler had received an advantageous result because the second degree murder plea had been accepted. Moreover, the judge informed Tyler of the necessity of filing a motion in arrest of judgment in order to challenge the entry of the plea; Tyler made no response to this explanation. He offered his pleas and was satisfied with the court's acceptance. Only when the court handed down its sentence did Tyler attempt to renege on his agreement. In these circumstances, we cannot say the attorneys' failure to file a motion in arrest of judgment suffices as a basis for relief.

Finally, Tyler contends that the county attorney prosecuting his case promised him that he would not receive the same sentence as his co-defendants if pled guilty. While it is clear that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," Santobello v. United States, 404 U.S. 257, 262, 92 S.Ct. 495, 501, 30 L.Ed.2d 427, 433 (1971), we find insufficient evidence in the instant case supporting the appellant's conten-

tion. The prosecutor testified that he at no time offered Tyler any promises regarding his sentence; nor could Tyler's counsel support Tyler's allegation that a promise had been made. Furthermore, the record discloses that the presiding judge asked Tyler prior to sentencing if he had received any guarantees; Tyler offered no response.

In conclusion, we do not think that the appellant has shown that he was denied effective assistance of counsel. Accordingly, the denial of his application for postconviction relief is affirmed.[1]

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[1]Tyler also alleged that his guilty plea was not voluntarily and intelligently given due to his lack of understanding the nature and elements of the offenses, and the lack of a factual basis supporting the charges. Because he failed to file a motion in arrest of judgment preserving consideration of the plea taking procedure for appeal, we are precluded from considering this contention. Iowa R. Crim. P. 23(3)(3)(a); State v. Lucas, 323 N.W.2d 228, 230 (Iowa 1982). Moreover, because of our finding that Tyler's counsel did not render ineffective assistance in declining to file a motion in arrest of judgment, this case does not fall within the purview of the exception to the rule 23(3)(a) requirement noted in State v. Scholerman, 315 N.W.2d 67, 71(Iowa 1982).