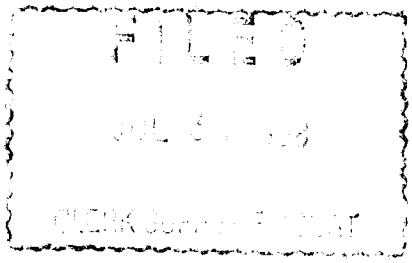
IN THE COURT OF APPEALS OF IOWA

No. 8-210 / 97-1077



JEREMIAH E. COLLINS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Phillip R. Collett, Judge.

Jeremiah Collins appeals the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Victoria Siegel, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

VOGEL, J.

In December 1995, Jeremiah Collins pled guilty to burglary in the third degree in Appanoose County in exchange for dismissal of two other charges in that county. In January 1996, Collins pled guilty in Wapello County to theft in the second degree. In exchange for this plea, the State agreed not to prosecute additional, pending charges against Collins in Wapello County. Collins was represented by the same attorney for the proceedings in Appanoose County and Wapello County.

Collins did not file a motion in arrest of judgment on either plea. There was a joint sentencing hearing on the two guilty pleas. The district court sentenced Collins to a term of imprisonment not to exceed five years on each charge, the sentences to be served consecutively. No appeal was taken.

In August 1997, Collins filed a pro se application for postconviction relief claiming his sentences were inconsistent with his plea agreements, which he alleged provided for concurrent sentences. The application did not raise ineffective assistance of counsel as an issue, but after appointment of postconviction counsel, Collins argued this issue before the court. The district court dismissed the request for postconviction relief, finding the issue of ineffective assistance had not been adequately raised.

On appeal, Collins contends his postconviction counsel was ineffective for failing to amend the application to allege he received ineffective assistance during the

plea proceedings. In addition, he asserts his trial counsel was ineffective because he did not file a motion in arrest of judgment to challenge the fact a term of sentencing was not included in the plea.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, an application must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

The issue of concurrent sentences was not raised during the Appanoose County plea proceedings. The record shows concurrent sentences were mentioned by defense counsel in the recitation of the plea agreement in the Wapello County plea proceedings. The prosecutor stated he had no objection to making the Wapello County sentence concurrent with that of the Appanoose County sentence. The court then immediately asked, "This is not a Rule 9 plea, is it?" The prosecutor and defense counsel both answered in the negative.

Because the plea agreements were not conditioned upon concurrence by the court pursuant to Iowa Rule of Criminal Procedure 9, the court retained discretion in regard to the sentences. The court informed Collins of the maximum sentence for each charge. Additionally, in the Wapello County plea proceedings, the court specifically stated on the record it was not bound by the plea agreement. We conclude

Collins was sufficiently informed the court had discretion in regard to sentencing. *See State v. Townsend,* 238 N.W.2d 351, 357 (Iowa 1976).

We find Collins has failed to show his trial attorney failed to perform an essential duty. We determine Collins' trial counsel was not ineffective for failing to file a motion in arrest of judgment to challenge the guilty pleas. For this reason, we also determine Collins did not receive ineffective assistance from his postconviction attorney.

We affirm the dismissal of Collins' postconviction application. Having considered Collin's other claims on appeal, we affirm. Costs of this appeal are assessed to Collins.

AFFIRMED.