FILED
APR 26 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-043 / 93-0034

GEORGE STONE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Defendant appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., Schlegel, Hayden, Sackett, Habhab, and Cady, JJ., but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

HABHAB, J.

The defendant, George Stone, appeals from the district court's denial of his application for postconviction relief. Stone claims his trial counsel was ineffective in failing to: 1) adequately inform him of the terms of the plea agreement; 2) file a Motion in Arrest of Judgment because his plea was not voluntarily and intelligently entered; and 3) request a competency hearing before allowing him to plead guilty. We affirm.

Stone was charged with second-degree robbery, a forcible felony. The minutes of testimony allege that Stone and another man assaulted a man and took sixty dollars. Stone admitted to police that he assaulted the man, but claimed it was in defense of a woman. Stone denied any knowledge or participation in the robbery, but stated that he did hear his friend tell the victim, "Give me your wallet."

Stone slit his wrists while he was detained at the Polk County jail. Within a day or two of this suicide attempt Stone entered an Alford plea to an amended trial information charging him with first-degree theft, a non-forcible felony. No motion in arrest of judgment was filed.

At sentencing, Stone requested he be granted probation. The district court found probation inappropriate and sentenced Stone to a term of incarceration not to exceed ten years. Stone's motion to

reconsider the sentence was denied based on institution reports of disruptive and threatening behavior. Stone did not appeal from his conviction.

Stone filed an application for postconviction relief. He indicated that he did not file a direct appeal because he had been informed by counsel that he would be given shock probation. The district court denied the application for postconviction relief. Stone appeals.

Stone's first claim is that his trial counsel was ineffective in failing to properly inform him of the terms of the plea agreement. Stone claims his attorney, Valorie Wilson, told him he was going to get probation. Stone also argues that even if no promise was made before the guilty plea hearing, trial counsel was ineffective for failing to make the terms of the plea agreement clear to him.

In her deposition that was admitted at the postconviction hearing, Wilson adamantly denied she had promised Stone probation. She testified she has never in her practice told a defendant she could guarantee he was going to get probation. She stated she discussed reducing the second-degree robbery charge with the prosecutor, George Karnas. Karnas offered Stone the opportunity to plead to first-degree theft, a non-forcible felony. Wilson informed Stone of this offer and his possible eligibility for probation with a non-forcible felony. Wilson testified:

> I explained to George that the good thing about the amendment even though it was still a ten year

> offense is that it was not a forcible felony and that he would be eligible for probation. That I could ask for probation and I explained to him that if he were convicted of the felony, the forcible and the robbery (sic), I couldn't even ask for probation pursuant to the law. I couldn't even ask for it but I told him on the theft I could ask for it. Now at no time did I ever, ever promise George Stone that he was definitely, positively going to get probation. No way would I have done that. (Emphasis added).

Ms. Wilson testified that she believed the confusion might have resulted from the Motion for Reconsideration. She stated:

> Now somewhere where some of these people involved on this case may have been confused is when Judge Critelli [the sentencing judge] told me, if this guy gets a good report, I'll give him probation. I'll shock him. . . . He will send him to prison and then request a letter, a report on how he's doing in prison. If the letter comes back good, the report comes back and says we haven't had any problems with George Stone, Judge Critelli says I will bring him back and place him on probation which is shock probation. . . . Unfortunately for George though, he got a bad report from Oakdale because he had so many problems at the Polk County Jail and he had problems at Oakdale.
>
> * * * *
>
> I told George like I tell all my clients after we go through sentencing and after we've been in front of the judge and I go down and sit with my client, I explain to them, say I'm going to file a Motion for Reconsideration. I probably may have said I'm going to ask for shock probation. I don't know how I worded it but I stressed to him the importance of getting a good report as I do all my clients because that's the only thing that saves them from having to serve all the time is they have to have a good report and I stress that to each and every client you have to have a good report, if you don't forget it, you will not be reconsidered. So I do admit telling George if you get a good report, you will get probation because that's what Judge Critelli told me. Yes, I did tell him that but that was after the sentencing keep in mind.

At the postconviction hearing Stone stated he was told he would get probation as part of the plea. He stated Ms. Wilson never explained the decision about probation was strictly up to the sentencing judge. Stone claimed the first he heard about this was when he received the letter from Ms. Wilson regarding her filing of the motion to reconsider the sentence. However, at the sentencing hearing after Ms. Wilson had requested probation, the following exchange occurred between the sentencing judge and Mr. Stone.

> Q. Mr. Stone, do you wish to be heard before I pronounce sentence? A. Yes. I'd like to be placed on probation and given a chance to prove myself. I don't think a long-term imprisonment would benefit me at this time.
>
> Q. Would what? A. I don't feel I need to be incarcerated for a long period of time.
>
> Q. You stated something about a long term. Then I missed. A. Long-term prison term, a long jail term. I just want to, you know, one chance to be out there with my wife and kids, prove myself.

Stone's statement to the sentencing court makes it clear that he knew that he was not, as he claims, guaranteed probation by his attorney and that it was not subject to the court's approval.

Stone, in his original application for postconviction relief, stated "my lawyer told me I was getting probation. That it would take about 30 days because I wanted out of state. I would have to wait at Oakdale until that time." The postconviction court found:

> There is no way that Ms. Wilson would have told the petitioner that statement. There is no way that a person who has received probation is

committed to Oakdale. Oakdale is the original holding facility that a person who has been sentenced to a term of years is committed. Once there, the defendant is under the supervision and control of the Director of the Department of Correctional Services, and except for an Application for Reconsideration, can only be released through parole from the Board of Parole. The petitioner's attorney knew this, and there would be no way that she would have made the prior statement.

We agree with the postconviction court that Ms. Wilson did not promise Stone he was going to receive probation. We also agree Stone understood the terms and conditions of the plea. We find Stone has failed to show his trial counsel was ineffective in this regard.

Stone next claims his trial counsel was ineffective for failing to file a Motion in Arrest of Judgment because the trial court failed to establish the plea was voluntarily and intelligently entered.

A court shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Iowa R. Crim. P. 8(2)(b). The court must explain the nature of the charge; the mandatory minimum punishment, if any, and the maximum possible punishment provided by statute; and the rights the defendant is waiving by pleading guilty, including his right to trial. Id. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the attorney for the state and the defendant or the defendant's attorney. Iowa R. Crim. P. 8(2)(c). The terms of any plea agreement shall be

disclosed of record as provided in Iowa Rule of Criminal Procedure 9(2). Iowa R. Crim. P. 8(2)(c).

When questioning the defendant about whether he was entering his plea voluntarily and intelligently, the district court asked:

> THE COURT: Now, in entering this plea of guilty, have you been threatened, coerced or forced in any way? THE DEFENDANT: No, I haven't.

Stone argues that because the district court, when accepting the guilty plea did not ask the question, "Have you been promised any leniency to encourage your plea of guilty?", his plea was not voluntary and intelligent. Stone claims that if the court would have inquired, he would have told the court, he was to receive probation.

As stated above, we find, as the postconviction court did, that Stone understood the terms and conditions of his plea agreement. There is nothing in the record to support Stone's assertion that he was promised probation as inducement for his plea of guilty. In fact, the evidence shows Stone knew his plea of guilty did not guarantee probation. Stone has failed to show he was prejudiced by the plea proceedings or any alleged attorney error. We find Stone has failed to prove his ineffective assistance of counsel claim on this issue.

Stone's final argument is that his trial counsel was ineffective in failing to request a competency hearing.

A defendant may not be tried unless he is competent, and he may not plead guilty unless he does so "competently and intelligently." Godinez v. Moran, 509 U.S. ---, ----, 113 S. Ct. 2680, 2685, 125 L. Ed. 2d 321, 330 (1993). A competency hearing is required if "the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists." State v. Kempf, 282 N.W.2d 704, 706 (Iowa 1979).

> If at any stage in the criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.

Iowa Code § 812.3 (1989). Relevant factors include 1) presence of irrational behavior, 2) other demeanor during trial which suggests a competency problem, and 3) medical evidence of which the trial court is aware concerning defendant's mental competency. State v. Myers, 460 N.W.2d 458, 460 (Iowa 1990). A history of mental illness standing alone does not mean the defendant is incompetent. Jones v. State, 479 N.W.2d 265, 270 (Iowa 1991).

Stone claims his attempted suicide a day or two before his plea of guilty, his prior history of suicide attempts, and his evaluation at Broadlawns Medical Center establishes there was a question about his competency. He claims his trial counsel had a duty to request a competency hearing.

The district court judge who presided over Stone's plea and sentencing testified, "I have no recollection in this case of there being anything concerning the appearance of Mr. Stone that would cause me to have concerns about his mental competency." Stone's trial counsel testified:

> [Stone] was competent to stand trial or plead guilty because he was always able to tell me what happened. He was able to give a statement to Detective Hickle so there was never any question that George was competent. . . . So someone can be mentally ill but they can still be sane and they can still be competent to stand trial. So I was never concerned about that and quite frankly, I agreed with the statements made by the people in the jail that George was doing this on purpose so he could get out of isolation.

On the date Stone entered his guilty plea, the district court ordered, on the request of Stone's counsel, that Stone be taken to Broadlawns Medical Center for psychological evaluation and treatment. Dr. Singh stated Stone appeared to be highly intelligent and to have no difficulty in expressing himself. He diagnosed Stone as suffering from borderline personality disorder and antisocial personality. He found Stone was not showing any evidence of major depression or any psychotic disorder at this time which needed any further treatment in a hospital.

We agree with the postconviction court that there is no evidence in the record that, at the time of the guilty plea, Stone had any mental problems which prevented him from appreciating the charge, understanding the proceedings, or assisting effectively in his defense. We

find his trial counsel was not ineffective for failing to request a competency hearing before allowing Stone to plead guilty.

AFFIRMED.