

IN THE COURT OF APPEALS OF IOWA

No. 0-80 / 89-384

FILED

OCT 23 1990

CLERK SUPREME COURT

ROBERT A. DAVIS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Polk County,
George W. Bergeson, Judge.

Appellant appeals the district court's dismissal of his
application for postconviction relief under Chapter 663A,
Iowa Code (1989). **AFFIRMED.**

Kermit L. Dunahoo, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Mark Joel
Zbieroski, Assistant Attorney General; James Smith, County
Attorney; and D. William Thomas, Assistant County Attorney,
for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Appellant, Robert A. Davis, appeals the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1989). We affirm.

Appellant pleaded guilty to two counts of first-degree robbery pursuant to a plea bargain. As part of the plea arrangement, the State dismissed a third count of first-degree robbery and also agreed not to refer appellant's case to federal authorities for possible prosecution under the federal Armed Career Criminal Act (ACCA). See 28 U.S.C. § 924(e)(1). Appellant took no direct appeal, but subsequently brought this postconviction action challenging the validity of his guilty pleas.

Appellant alleges his counsel failed to properly inform him about the applicability of the federal statute to his case and, as a result, his plea was not knowingly, intelligently, and voluntarily entered. Appellant also argues his postconviction trial counsel provided ineffective assistance of counsel in not submitting appellant's criminal record to prove the inapplicability of the federal statute.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the

circumstances. This is the equivalent of de novo review.
Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989); State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

Appellant asserts he was misled by his attorney into believing the federal Armed Career Criminal Act (ACCA) was applicable to his case, and as a result, his guilty plea was not knowingly, intelligently, and voluntarily entered. See Saadig v. State, 287 N.W.2d 315, 324-26 (Iowa 1986), appeal dismissed 479 U.S. 878, 107 S.Ct. 265, 93 L.Ed. 242 (1986). Appellant's claim, in essence, is whether ACCA was applicable to his case.

18 U.S.C.S. § 922(g)(1) (Law Co-op. Supp. 1989) states:

(g) It shall be unlawful for any person --

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in and effecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

A defendant convicted under section 922(g)(1) is subject to the penalty enhancement provision found in 18 U.S.C.S. § 924(e)(1) (Law Co-op. Supp. 1989):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

Essentially, appellant's argument is he did not have the requisite number of felony convictions to cause the penalty enhancement provision of section 924(e)(1) to apply to him. He claims his attorney failed to advise him of this. Also he was advised the threat of federal prosecution was a reality; Davis argues he received ineffective assistance of counsel, and his guilty pleas should be set aside.

Davis' offenses apparently were committed with a weapon; therefore, he could also be charged by the federal authorities under § 922(g). The State alleges he had four prior convictions, one in Iowa and three in California. The three in California were all guilty pleas entered in one hearing. The State alleges these are separate convictions, thus qualifying Davis for the enhanced sentencing under § 924(e)(1).

Davis contends the California convictions amount to only one conviction, which, with his Iowa conviction, would

give him only two prior convictions. Thus, the enhancement provisions of § 924(e)(1) would not apply. This, of course, would buttress both Davis' argument of ineffective assistance of counsel and his pleas not having been knowingly and intelligently made.

We turn to the federal courts for guidance in determining whether multiple convictions constitute separate offenses under the federal statute in question.

Other courts of appeal, . . . have examined the ACCA to determine if multiple convictions arising out of a single spasm of criminal activity may be counted for sentencing enhancement. In these cases, courts considered whether to count merely the number of convictions obtained against the defendant, or whether to count the number of convictions obtained from separate criminal episodes. In each case, the "separate episode" test was adopted. Recently, the Second Circuit stated that "it is fairly well established in other circuits that § 924(e)(1)'s reference to 'convictions' pertains to single 'episodes' of felonious criminal activity that are distinct in time, rather than literal convictions." United States v. Towne, 870 F.2d 880, 889 (2d Cir. 1989). [Citing other authorities.]

Therefore, as noted in United States v. Towne, "every federal court of appeals that has considered the issue has adopted the multiple episodes approach . . . these courts have 'simply required that the criminal episodes be distinct in time.'" [Citation omitted.] . . . [O]ur own examination of the statute brings us to the same conclusion, namely that the statute does not require that the three predicate offenses be separated by intervening convictions.

United States v. Schoolcraft, 879 F.2d 64, 73 (3rd Cir. 1989). See also United States v. Balascsak, 873 F.2d 673 (3rd Cir. 1989) (in depth analysis of the legislative history of the ACCA).

The record in the case as it was originally presented was insufficient for us to make a decision. We remanded the case to the district court for a determination as to whether the prior California convictions were for three separate offenses or one offense.

On remand, the trial court determined the California convictions were for three separate offenses. These three convictions, together with the one prior Iowa felony, make the requisite number of convictions under 18 U.S.C. § 924(e)(1). We affirm.

Certified copies of Davis' California record indicate he entered guilty pleas to three separate counts of robbery. All three guilty pleas were entered at one hearing. They were each for a forcible robbery, under California Penal Code 211:

Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

These three California convictions, together with the prior Iowa conviction for robbery, were more than enough to raise the possibility of prosecution under 18 U.S.C. § 922(g), with its consequent penalty enhancement provisions under 18 U.S.C. § 924(e)(1). Therefore, Davis' trial attorney was not ineffective when he advised Davis of this possibility in their discussions of the county attorney's plea bargain offer. Because of the very real possibility of federal prosecution, We determine Davis' plea was knowingly, intelligently and willingly made.

We hold Davis has not carried his burden of proof his trial counsel was ineffective or the federal statutes did not apply in his case. The decision of the trial court is affirmed.

AFFIRMED.