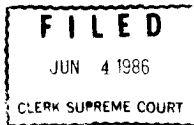


IN THE COURT OF APPEALS OF IOWA



MELVIN OLONZO ADAMS,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

FILED JUNE 4, 1986

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6-78
85-758

Appeal from the Iowa District Court for Polk County (No. PCR 314) Van Wifvat, Judge.

The petitioner appeals the district court's denial of postconviction relief.

AFFIRMED.

Charles L. Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; and Suzanne Engman, Assistant Polk County Attorney, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ..

SCHLEGEL, J.

Petitioner appeals the district court's denial of his application for postconviction relief. Specifically, he contends that he was denied effective assistance by postconviction counsel because of a failure to raise a claim that trial counsel was ineffective in leading petitioner to believe that upon pleading guilty he would receive a concurrent sentence for two theft charges rather than two consecutive sentences. We affirm the district court's decision.

Petitioner pled guilty to two charges of first-degree theft, in violation of Iowa Code sections 714.1 and 714.2 (1983), on March 12, 1984. He failed to appear for his sentencing on April 19, 1984, was subsequently arrested, and was finally sentenced on May 10, 1984. The trial court advised defendant of his right to file a motion in arrest of judgment on the day defendant entered his guilty plea. However, defendant initially filed a pro se motion for reconsideration on June 12, 1984, and did not file his motion in arrest of judgment until June 25, 1984. Both motions were denied. Petitioner did not file an appeal, but on October 22, 1984, he filed a motion for postconviction relief. On May 1, 1984, after a hearing, the trial court denied petitioner's request. The trial court specifically concluded that defendant's motion in arrest of judgment was untimely and that defendant's plea was "with knowledge, freely and fully given."

Petitioner argues on appeal that despite his untimely motion in arrest of judgment, the trial court should have allowed and granted his request for postconviction relief. He alleges that he was misled by his attorney that he would receive concurrent sentences instead of consecutive sentences. He maintains that by the time his sentence was received, it was too late to file a motion in arrest of judgment. Consequently, he concludes, the failure to file a motion in arrest of judgment was due to ineffective assistance of counsel and this should not preclude him from raising his attacks on his guilty plea in a collateral action.

The final claim in petitioner's appellate argument is that his postconviction counsel was, in turn, ineffective for failing to raise and litigate the issue of trial counsel's ineffectiveness in the postconviction hearing.

We are unable to determine the source of petitioner's contention that his postconviction relief counsel was ineffective for failing to raise the issue of the trial counsel's ineffectiveness. It is clear from the district court's conclusions of law and findings of fact that it considered specifically whether or not petitioner's trial counsel competently represented him during the plea bargain and sentencing. After addressing the relevant authority, the trial court concluded, "that the Petitioner has failed to meet its [sic] burden in proving that his plea of guilty was coerced by ineffective assistance of counsel."

The question before this court, therefore, is whether the trial court erred in its conclusion. The supreme court in Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983), said:

The test we apply to a claim of ineffective counsel "is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When the claim is grounded on counsel's failure to take some action, the claimant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983); Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). Claimant must satisfy this burden by a preponderance of the evidence, Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980), and rebut the presumption of counsel's competence. Fryer v. State, 325 N.W.2d 400, 412 (Iowa 1982).

The record shows that at the time of the guilty plea, the trial court was assured by petitioner that his guilty plea was not induced by any promises. At the presentence conference, however, the trial court was made aware of the fact that the county attorney would not oppose concurrent sentences. Petitioner's trial attorney testified that it was his understanding that the trial court

probably was going to give concurrent sentences until petitioner failed to appear for sentencing on April 14, 1984, and an arrest warrant had to be issued.

But a paramount factor to be considered in this review of ineffective assistance of counsel is precisely how much control an attorney has over the sentence his client will receive. The trial court has considerable discretion in imposing a particular sentence on a defendant. See State v. Hansen, 344 N.W.2d 725, 729 (Iowa Ct. App. 1983). Iowa Code section 901.5 (1983) provides in part:

After receiving and examining all pertinent information, including the presentence investigation report, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by the law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

We fail to see how petitioner's trial counsel failed to perform an essential duty. The record shows that up until the time petitioner failed to appear for the April 19, 1984, sentencing date, there was every indication that petitioner would receive concurrent sentences. The trial counsel negotiated the plea with the county attorney on the basis that the county attorney would not oppose concurrent terms. Other than receiving such a commitment from the state, there is not much more an attorney can do. In the final analysis, the determination of the sentence to be imposed is left to the discretion of the trial court. Petitioner was informed of this important fact by his trial counsel. We conclude that petitioner's trial counsel did not fail to perform an essential duty. Meier v. State, at 206. And, although we need not discuss the second prong of the elements of ineffective assistance of counsel, we note that whatever prejudice befell petitioner is due to his failure to appear at his sentencing date.

Because we conclude that the trial counsel's performance was well within the range of normal competency, we *hold that the trial court was correct in denying petitioner's application for postconviction relief and its judgment is affirmed.*

AFFIRMED.