

IN THE COURT OF APPEALS OF IOWA

No. 4-112 / 93-0642

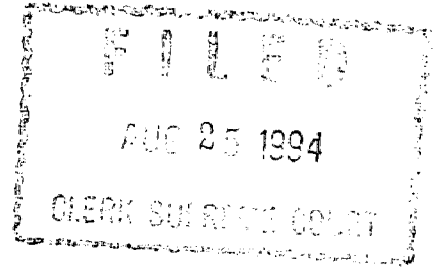
JOSEPH P. CONNOR,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Chief Judge.

The applicant challenges the district court's denial of his application for postconviction relief. **AFFIRMED.**

David A. Poore, Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, Richard Crowl, County Attorney, and Timothy O'Grady, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

The applicant, Joseph P. Connor, appeals from the district court's denial of his application for postconviction relief. We affirm.

After the juvenile court waived jurisdiction, the State charged Joseph Connor by trial information with second-degree theft. Between the waiver order and formal charges, the State filed a second trial information charging Connor with a separate charge of second-degree theft. Pursuant to a plea bargain, the State agreed to amend the second charge to third-degree theft in return for Connor's guilty plea to the second-degree theft charge and the amended third-degree theft charge. The State also agreed to recommend probation if Connor's criminal record was as minimal as Connor represented. The district court accepted Connor's guilty pleas. Connor did not file a motion in arrest of judgment.

Before the scheduled sentencing date, Connor was rearrested. The State charged Connor with first-degree theft, second-degree theft and second-degree arson. The State also charged Connor with fourth-degree criminal mischief and a city weapons violation. The State agreed to accept Connor's guilty plea to first-degree theft in return for the dismissal of the remaining four charges. The agreement also stated that if Connor was sentenced for this charge it would run consecutively to any sentences imposed on the earlier pleas.

Prior to the second plea proceeding, the State indicated it would no longer recommend probation for Connor's earlier pleas to second-degree and third-degree theft. In light of Connor's criminal activities while awaiting sentencing, the State determined probation was not an appropriate alternative. During the second plea proceeding, the court accepted Connor's guilty plea to first-degree theft. Connor did not file a motion in arrest of judgment.

The court sentenced Connor to concurrent terms of up to five years on the second-degree theft conviction and up to two years on the third-degree theft conviction. It sentenced Connor to a consecutive term of up to ten years on the first-degree theft conviction. Connor did not take a direct appeal.

By an amended application for postconviction relief, Connor alleged his trial counsel rendered ineffective assistance. He also claimed that the resulting sentences were illegal because he had not been orally advised that the court ordered the sentences to run consecutively. The district court denied the application. Connor appeals.

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 State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

I. Enforcement of Plea Agreement.

Connor claims his trial counsel and postconviction counsel were ineffective in failing to protect his due process right to enforcement of the August 19, 1991, plea agreement. Specifically, Connor claims the State breached the plea agreement by not recommending probation. Connor contends his trial counsel was ineffective in failing to advise him of his right to specific performance or to withdrawal his guilty plea. Connor argues his postconviction counsel was ineffective in not raising this issue in the postconviction proceedings even though it was raised in the postconviction application.¹

1. A claim of ineffective assistance of postconviction counsel is not constitutionally based. Dunbar v. State, 515 N.W.2d 12, 14 (Iowa 1994). However, the ineffectiveness of postconviction relief counsel constitutes "sufficient cause" under Iowa Code section 663A.8 to excuse an applicant's failure to adequately raise an issue in prior proceedings. Id. The same standards of

The State argues it did not breach the plea agreement. The State contends that since the plea agreement was conditioned on Connor's criminal record being minimal, and since at the time of sentencing it was not, the State was not required to recommend probation.

The performance of a plea bargain agreement must be mutual. State v. Hovind, 431 N.W.2d 366, 368 (Iowa 1988) (citation omitted). When a defendant fails to uphold his end of a plea bargain, the State has no obligation to provide defendant the anticipated benefits of that bargain. Id. Neither the State nor the defendant can breach a material part of a plea bargain and hold the other party to the remainder. State v. Barker, 476 N.W.2d 624, 629 (Iowa App. 1991). However, when the prosecution withdraws from a plea agreement, it has the burden of showing the defendant did not live up to his end of the bargain. Id. at 628. Also the prosecutor's conduct must comply with "our time-honored fair play norm." Id. (citation omitted).

In Barker, the prosecution withdrew from the plea bargain agreement at Barker's sentencing, claiming Barker had violated the conditions of the plea agreement. Id. at 628. Barker thereupon moved for permission to withdraw his guilty plea. Id. at 625. The trial court denied his

competency apply to postconviction counsel as for trial counsel.

motion. Id. We found the prosecutor abused her discretion by: (1) failing to provide notice of the State's withdrawal from the plea agreement, (2) by failing to provide any evidence of Barker's alleged failure to perform his part of the plea agreement, and (3) by withdrawing from the plea agreement without good cause and with no evidentiary basis after the plea had been accepted by the trial court. Id. Therefore, we remanded to allow Barker to withdraw his guilty pleas.

We find Barker distinguishable from our present case. Here, the State's agreement to recommend probation was conditioned on Connor having a minimal criminal record. However, at the time of sentencing Connor had pled guilty to a new felony conviction for Theft in the First Degree. The State informed Connor well in advance of the sentencing that they did not intend to recommend probation because of Connor's criminal record. At sentencing hearing, the State informed the court of the basis for its changed sentencing recommendation:

Your Honor, under the terms of 21660 and '676, the State had originally agreed to recommend probation. However, since that time and while the charges in those two cases were pending, Mr. Connor went out and committed more acts, including the felony to which he's pled guilty, and two others, which were dismissed under the plea bargain. For that reason, this spree that has happened through the summer and fall, we don't think probation is appropriate for Mr. Connor.

Neither Connor nor his attorney made any objection to the State's withdrawal from the plea agreement. Nor did they

request the guilty plea like the defendant in Barker had. Connor was informed of his right to appeal from all the decisions in this case. He did not file a direct appeal.

We agree with the State that this new felony conviction substantially changed Connor's criminal record, thereby relieving the State of its duty to recommend probation as originally agreed.

We find Connor's trial counsel did not breach an essential duty with respect to Connor's due process rights to the original plea agreement. Therefore, we find Connor's postconviction counsel was not ineffective in failing to pursue this issue during the postconviction hearing.

II. Validity of Guilty Plea for Theft First Degree.

Connor next challenges the validity of his guilty plea to the charge of Theft First Degree. He claims his plea was not voluntarily and intelligently made because the district court made misstatements and omissions when accepting the guilty plea. This issue is raised for the first time in this appeal from the postconviction hearing. Connor claims his trial counsel and postconviction counsel were ineffective for failing to raise this issue earlier.

In Stovall v. State, 340 N.W.2d 265, 267 (Iowa 1983), our supreme court stated:

If the court does make a misstatement, if the misstatement is material in the sense that it is part of the inducement for the defendant's

decision to plead guilty, if the defendant's attorney does not correct the misstatement, and if the defendant enters a guilty plea accordingly, the plea is not intelligently and voluntarily made, and the defendant is entitled to have his plea set aside and to plead anew.

The State concedes there was a misstatement of the plea bargaining terms concerning sentencing, but claims the misstatement did not render Connor's guilty plea involuntary because it was one brief reference in an extended plea proceeding in which the correct terms were stated initially by Connor's attorney and three additional times by the court.

At the beginning of the plea proceedings, Connor's attorney correctly stated the terms of the plea agreement.

MR. THOMAS: Your Honor, as far as the matters that have not been pleaded out, Cause No. 21736 is a 3-Count Trial Information. The plea offer is that he pleads to Count I, Theft in the First Degree; that the other two Counts, Theft Second and Arson Second be dismissed.

It has also been agreed that the Third Floor File No. B09-1620, charging Mr. Connor with Criminal Mischief in the Fourth Degree and a City Weapons Violation, will be dismissed.

* * *

It is also, while there is no agreement to what the sentence will be, it is understood that if Mr. Connor is sentenced to time, rather at sentencing in No. 21736, it will be ordered to run consecutively with the cases he has already pleaded guilty to. (emphasis added).

The trial court correctly repeated the plea bargain terms. After a break in the proceedings to enable Connor to consult with his attorney, the trial court stated:

Now, that you have had an opportunity to discuss this with your attorney, I am going to confront you again on the plea bargain that your attorney has made in this pending case, charging you in one Count of Theft in the First Degree, which is a

Class C Felony; Theft in the Second Degree, which is a Class D Felony; and Arson in the Second Degree, which is also a Class D Felony -- I believe. Is that right?

MR. THOMAS: Second.

Mr. O'GRADY: 10-year, Class C.

The court then incorrectly stated:

THE COURT: The plea bargain had provided, in exchange for a guilty plea to First Degree Theft, these other charges would be dropped, and you would not go to jail. (emphasis added).

After the misstatement the court informed Connor of the following:

THE COURT: The elements that have to be proven in a Theft First Case are that, in this particular instance, you are charged with the offense of stealing a motor vehicle which had a value of over \$5,000, with the intent to permanently deprive the owner of its possession, and a review of the witnesses' testimony and notes that are attached to the Trial Information that I have reviewed earlier, would indicate there is a factual basis for accepting your guilty plea, and it is also a Class C Felony that I told you about also. Do you remember that?

THE DEFENDANT: Yes.

THE COURT: And that means that you could go to the pen for 10 years.

The court also advised Connor of the total sentence he faced on all three charges.

The impact of all of that is that you could go to the penitentiary for -- on a 10-year felony, as well as a 5-year felony, and a 2-year aggravated misdemeanor. Those are the penalties of the cases that you have pleaded guilty to the different criminal charges. And the sentencing Court has options all the way from probation up to sending you to the penitentiary. That's up to the sentencing Court or Judge that hears your sentencing. (emphasis added).

THE DEFENDANT: (affirmative shake of head).

THE COURT: Any questions?

THE DEFENDANT: No, sir.

We find the trial court's incorrect statement of the sentencing agreement did not induce Connor to plea guilty. Any possible misunderstanding was corrected by the court in its two subsequent correct explanations of the plea bargain agreement and possible sentencing consequences Connor faced. We find Connor's postconviction counsel and trial counsel were not ineffective in failing to raise this issue earlier.

We affirm the district court's denial of Connor's application for postconviction relief.

AFFIRMED.