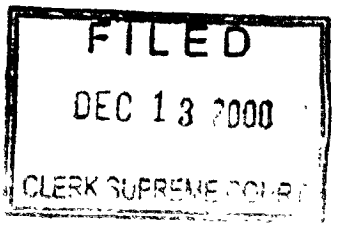
IN THE COURT OF APPEALS OF IOWA

No. 0-614 / 99-1846
Filed December 13, 2000



TODD ALLEN PHILLIPS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, Richard Morr, Judge.

Applicant appeals from the dismissal of his postconviction relief application. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Steve Johnson, County Attorney, and James W. Cleverley, Jr. and Steven C. Johnson, Assistant County Attorneys, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

The applicant, Todd Allen Phillips, appeals the denial of his application for postconviction relief. He contends he was denied effective assistance of both his trial and postconviction counsel. We affirm.

I. Background Fact and Proceedings. In September of 1997, the State charged Phillips with three drug-related offenses and child endangerment following a traffic stop in Jasper County. Phillips was arraigned and entered pleas of not guilty. On October 16, 1997, the State filed a motion to amend the trial information to add a fifth charge of manufacturing methamphetamine with intent to deliver.

On November 10, 1997, Phillips appeared before the district court with his attorney, Gerald Feuerhelm, and entered a plea of guilty to the offense charged in count I of the trial information, possession of methamphetamine (more than five grams) with the intent to deliver in violation of Iowa Code section 124.401(1)(b)(7), a class "B" felony. The plea was the result of a plea agreement which incorporated charges pending in two other counties. Phillips was represented by different counsel in each of the other counties. The district court accepted Phillips's plea.

On December 1, 1997, Phillips filed a motion in arrest of judgment through his counsel requesting permission to withdraw his plea. He also filed a pro se motion to withdraw the plea. Phillips appeared for sentencing on December 22, 1997. The sentencing court addressed the pending motions in arrest of judgment and was informed by defense counsel that the motions were being

withdrawn. Phillips concurred with the statements of his counsel. The court was asked to proceed with sentencing.

During the sentencing hearing, defense counsel requested that the mandatory minimum fine be waived in part because Phillips would be required to pay costs and attorney fees. Neither the parties nor the court commented on the limitation on parole eligibility contained in Iowa Code section 124.413, which applied to the offense for which Phillips was being sentenced. The court sentenced Phillips to a term not to exceed twenty-five years and imposed the minimum fine of $5,000 plus costs and attorney fees. The court ordered Phillips's sentence to be served concurrently with sentences to be imposed in Polk and Marshall counties. The court advised Phillips of his right to appeal his sentence with the assistance of appointed counsel. No appeal was filed.

On February 4, 1998, Phillips's trial attorney filed a timely motion to reconsider the sentence. Among other things, the motion requested the court to "eliminate the mandatory one-third required by statute and to impose a suspended sentence with probation. . . ". The sentencing court did not order Phillips returned to court for a reconsideration hearing. As a result, his original sentence was not modified. Fourteen months later, Phillips filed a pro se application for postconviction relief. Attorney Steve Holwerda was appointed to represent Phillips in the postconviction action.

Phillips's postconviction action was tried to the district court in September of 1999. After Phillips testified at the postconviction relief proceeding, the trial court asked his counsel to specify Phillips's grounds for postconviction relief. This request was hardly surprising given the confused and repetitive nature of

Phillips's claims set forth in his pro se application for postconviction relief. In response, Phillips's counsel claimed: (1) Phillips's guilty plea was not knowingly entered into because he was unaware that he could be assessed attorney fees and courts costs and unaware of the maximum possible sentence; (2) the sentencing court failed to inquire into Phillips's ability to pay court costs and attorney fees; (3) his trial counsel failed to thoroughly investigate his case; and (4) the trial court failed to address the one-third mandatory minimum sentence which applied. The postconviction court found no merit to any of the claims and dismissed Phillips's petition.

Phillips appeals. He contends he was denied the effective assistance of postconviction counsel by that counsel's failure to (1) raise and argue that trial counsel was ineffective in failing to request waiver of the one-third mandatory minimum sentence, (2) allege and establish good cause for failure to file a direct appeal, and (3) request rulings on the issues raised in his application but not ruled on by the court.

II. Preservation of Error. The State argues that Phillips's appeal from the denial of postconviction relief presents error preservation and procedural difficulties. We agree. Any claim not raised on direct appeal may not be litigated in postconviction unless there was sufficient cause for not raising it earlier and actual prejudice resulted from the alleged error. *See* Iowa Code § 822.8 (1997); *Osborn v. State,* 573 N.W.2d 917, 921 (Iowa 1998). Phillips raises issues in his postconviction action that were not litigated on direct appeal. These issues cannot be raised now unless he demonstrates "sufficient cause" for not raising them earlier. Ineffective assistance of postconviction counsel may serve as

sufficient cause to excuse the failure to preserve an issue in prior proceedings. *Collins v. State,* 588 N.W.2d 399, 402-403 (Iowa 1998); *Dunbar v. State,* 515 N.W.2d 12, 14 (Iowa 1994). However, Phillips must do more than assert that counsel failed to raise or fully present a potential issue. He must also specifically state how the outcome of his plea or sentencing procedure would have changed absent counsel's alleged error or omission. *Bugley v. State,* 596 N.W.2d 893, 897 (Iowa 1999). We conclude Phillips has not done so here.

Phillips's pro se application for postconviction relief failed to assert good cause existed for his failure to file a direct appeal of his sentence. Phillips contends his postconviction counsel, Steve Holwerda, was ineffective in presenting his Sixth Amendment claims against trial counsel. He urges that postconviction counsel failed to establish trial counsel was ineffective, which would serve as a cause to excuse his failure to preserve issues. He urges postconviction counsel failed to obtain rulings from the postconviction court on the issues raised in this appeal. Phillips's primary contentions are that trial counsel should have (1) argued for waiver of the mandatory minimum one-third sentence at sentencing; and (2) challenged the order requiring payment of court costs and attorney fees without considering Phillips's ability to pay.

Phillips fails to state or show how the outcome of his plea or sentencing proceeding would have changed absent his trial counsel's alleged errors or omissions. Accordingly, Phillips's claim fails on procedural grounds.

III. Discussion. Even if we had concluded Phillips's claims were properly before us, we would find they were without merit for the following reasons.

A. Guilty Plea Issues. Defendant's allegation that he was not fully informed of the consequences of his plea implicates due process. *See Saadiq v. State,* 387 N.W.2d 315, 324 (Iowa 1986). For a plea to be truly voluntary, the court must ensure a defendant understands "the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment." *State v. Carney,* 584 N.W.2d 907, 908 (Iowa 1998) (citation omitted). To the extent Phillips's claims question the voluntariness of his guilty plea, we find such claims are without merit. At the hearing held on November 10, 1997, Phillips expressed his intention to plead guilty to possession of more than five grams of methamphetamine with the intent to deliver, a class "B" felony. His plea was the result of a plea agreement. In exchange for his plea, the State agreed to dismiss counts II through V of the trial information and recommend that any sentence in this case run concurrently with sentences in the Polk and Marshall County drug cases. In addition, the State agreed not to pursue further sentencing enhancements which were available.

The district court advised Phillips of the constitutional rights he was giving up by pleading guilty. Phillips stated he understood his rights. The court informed Phillips that he was pleading guilty to a class "B" felony carrying a maximum sentence of twenty-five years with a mandatory one-third minimum, a maximum fine of $100,000, and a mandatory minimum fine of $5,000. Phillips confirmed his understanding of the possible penalties. Phillips stated his decision to plead guilty was voluntary and expressed satisfaction with his attorney. Phillips also admitted there was a factual basis for his plea. The court accepted Phillips's plea as voluntary and knowing and advised Phillips of his right

to file a motion in arrest of judgment. The record of the plea proceedings reflects that it was conducted in compliance with Iowa Rule of Criminal Procedure 8(2)(b) and due process principles. The postconviction court properly rejected Phillips's claim that at the time of his plea, he had not been advised of the one-third requirement under Iowa Code section 124.413.

B. Section 124.413. Phillips contends postconviction counsel was ineffective in failing to establish trial counsel's alleged failure to request waiver of the one-third sentence requirement. Under Iowa Code section 901.10, the district court has discretion to waive a portion of the minimum term specified in section 124.413 (one-third of the maximum indeterminate sentence) for a first-time offender who pleads guilty to a methamphetamine offense under section 124.410(1)(b). In such cases, the court has the discretion to reduce the mandatory minimum sentence by up to one-third. *See* Iowa Code § 901.10(2).

Assuming for purposes of argument that Phillips's trial counsel should have requested waiver of a portion of the one-third requirement under section 124.413 at sentencing, Phillips has not demonstrated any prejudice from counsel's omission. The sentencing court gave careful consideration to the contents of the presentence investigation and to the statements made by Phillips's attorney in mitigation of punishment. The district court considered and rejected counsel's request for waiver of the minimum fine. Counsel discussed Phillips's family circumstances, his employment history, his drug problem, and the circumstances of his offense. The court was aware Phillips was to be sentenced on three convictions and agreed to accept the plea agreement concession as to concurrent sentences. Phillips provides no hint as to what

other mitigating circumstances the district court should have considered in exercising its discretion. Phillips fails to state how other actions by his trial counsel would have changed the outcome at his sentencing hearing. Furthermore, the sentencing court had jurisdiction to act on defendant's motion for reconsideration of sentence pursuant to Iowa Code section 902.4. The court took no action on the motion which specifically requested the court to "eliminate the mandatory one-third required by statute. . . ." As a result, the defendant's original sentence remained unmodified.

C. Restitution Issues. Phillips's final complaint is that his postconviction counsel rendered ineffective assistance in failing to properly assert his claim that trial counsel should have challenged the district court's order imposing the payment of court costs and attorney fees without inquiring as to his ability to pay. We conclude his restitution complaint is not properly before this court. Errors relating to victim restitution, court costs, or fees are not subject to collateral attack through the postconviction process under chapter 822. *See* Iowa Code § 822.2(7); *Earnest v. State,* 508 N.W.2d 630, 633 (Iowa 1993). Other procedures exist for Phillips to address the issue of restitution. *See, e.g.,* Iowa Code § 910.7.

We conclude the district court properly dismissed Phillips's application for postconviction relief. We have considered Phillips's other claims and conclude they are without merit.

AFFIRMED.