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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT KYLE STONEMAN,)
Petitioner-Appellant,) Filed September 25, 1986
vs.)
STATE OF IOWA,) 6-245
Respondent-Appellee.) 85-1374

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Appeal from the Iowa District Court for Black Hawk County (No. 66084) - James L. Beeghly, Judge.

Petitioner appeals from the trial court's denial of his application for post-conviction relief. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and Scott Lemke, Assistant County Attorney, for respondent-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Petitioner appeals from the trial court's denial of his application for post-conviction relief. Petitioner, who challenges his conviction after entering a guilty plea to two counts of indecent contact with a child, contends the trial court erred in ruling that petitioner had failed to show "cause and prejudice" in not attacking his plea on a direct appeal. Petitioner contends his postconviction counsel was ineffective in failing to preserve petitioner's right to challenge the validity of his guilty plea. We affirm.

The petitioner, Robert Kyle Stoneman, was convicted of two counts of indecent contact with a child in violation of Iowa Code section 709.12 (1983) after entering a guilty plea on March 9, 1984. He was immediately sentenced by Judge Van Metre to two consecutive two-year terms of imprisonment. The judge suspended Stoneman's sentence, however, and placed him on probation for four years.

On March 15, 1984, Stoneman wrote to Judge Van Metre, complaining that he had not understood the full impact of his guilty plea at the time he made it. On March 26, 1984, Judge Van Metre appointed attorney James Whalen to further represent Stoneman regarding the plea. Whalen failed to take timely action to preserve Stoneman's initial right to appeal his guilty plea in March 1984. Instead, Whalen filed a postconviction action on January 21, 1985, in which he challenged the validity of Stoneman's guilty plea for failure to comply with Iowa Rule of Criminal Procedure 8(2)(b) which sets out requirements the court must observe when accepting a guilty plea. Initially, the postconviction court ruled that Stoneman's plea proceeding did not comply with rule 8(2)(b) and that the trial court had failed to adequately advise Stoneman of the consequences of failing to file a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 8(2)(d). After the State filed a motion to enlarge

or amend the findings and conclusions, the postconviction court amended its findings and conclusions and ruled that Stoneman had failed to show "cause and prejudice" in not attacking his plea on a direct appeal. The postconviction court then vacated its earlier judgment and reinstated the original judgment and sentence of Judge Van Metre.

Generally, postconviction proceedings under Iowa Code Chapter 663A are law actions, triable to the court, and ordinarily are reviewed on error only. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). However, when, as here, there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo-type review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

Stoneman contends that his postconviction counsel was ineffective in failing to preserve his right to challenge the validity of his guilty plea. Stoneman contends that because his postconviction counsel failed to file a notice of direct appeal but instead filed an action for postconviction relief, Stoneman was deprived of effective representation. Stoneman also argues that he did not understand the nature of the charges against him and that his rights were therefore prejudiced. We disagree.

A person claiming that his counsel was ineffective must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). One claiming ineffective assistance has the burden of proving both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1981). There is a presumption that counsel is competent which must be overcome by the person claiming ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The ultimate test is whether under the entire record and all the

circumstances counsel's performance was within the normal range of competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In deciding the second prong of a claim of ineffectiveness of counsel, prejudice, the person claiming ineffectiveness must show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984), articulated the following standard for determining whether specified errors could have resulted in the required prejudice:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Under this standard, we need not determine whether counsel's performance was deficient before examining the prejudice component:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. at 698, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700. Such standard is applicable to postconviction counsel as well. Gering v. State, 382 N.W.2d 151, 156 (Iowa 1986). Accordingly, we first consider the issue of prejudice, if any, arising from postconviction counsel's failure to file a notice of appeal.

At the pretrial conference, the trial court noted that the trial information had been amended, charging Stoneman with two counts of indecent contacts with a child rather than the original charge of lascivious acts with a child. Stoneman's trial counsel then informed the court that Stoneman had agreed to enter an Alford plea to the two reduced counts. The following colloquy subsequently took place between the court and Stoneman:

> THE COURT: Mr. Stoneman, our Supreme Court rules, before I can accept a guilty plea, I am required to advise you of a number of things you probably are already aware of. What you are charged with now is two counts of an aggravated misdemeanor, and the maximum sentence on these two counts would be two consecutive two-year sentences and a five thousand dollar fine on each count or a total of ten thousand dollars and four years; the minimum sentence would be probation under a deferred judgment or suspended sentence. I realize you and Mr. Briner and Mr. Buckner have discussed the probable sentence in this matter.
>
> If you plead not guilty, you're entitled to a jury trial. At a jury trial you are entitled to be represented by an attorney at public expense. You also are presumed to be innocent. The whole burden of proof would be on the State to bring witnesses into open court and satisfy 12 people on a jury unanimously and beyond a reasonable doubt that in fact you did have indecent contact with these two young girls.
>
> You and your attorney could cross-examine those witnesses. You would have no duty to offer evidence and you would have a constitutional right to remain silent. If you chose to remain silent, the State could not even comment on that. However, if you wanted to testify, you could; and if you wanted to call other witnesses in your defense, you could subpoena them, that is, use the power of the Court to compel them to come to the Court. However, if you plead guilty, whether you are admitting that the matter or pleading guilty under what we call an Alford type plea, that has the same effect as if the case were tried and a jury found you guilty. And I think you understand that, don't you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Then I will ask you first as to Count I, the charge with Katrina Negus, how do you plead, guilty or not guilty?
>
> THE DEFENDANT: Yes, guilty.
>
> THE COURT: As to Count II, the charge with Kimberly Standridge, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

Stoneman's trial counsel explained that the State had agreed to reduce the original charge from a felony to an aggravated misdemeanor and had recommended that Stoneman be sentenced to a two-year term on each count, but that such sentences be suspended with two years probation.

The court then asked Stoneman whether he had knowingly and voluntarily entered his plea of guilty, to which Stoneman responded that he had. When asked whether he had anything further to say, Stoneman replied:

> THE DEFENDANT: Well, nothing other than the fact I want to get this out of my hair. I had thought different times going on with trial. I don't want to drag these girls through things. Of course, in this proceedings we took a Polygraph test, which when it came back the questions on there were non-similar what I had been questioned at. Karl and I talked it over here and we come to this agreement here, and I want to get this thing over with and back to a normal life again.

The court then advised Stoneman of his right to appeal, but failed to specifically advise Stoneman of his right to challenge the plea by a motion in arrest of judgment.

The court, upon receiving the aforementioned communication from Stoneman, appointed James Whalen as postconviction counsel. Whalen, however, did not file a notice of appeal, but instead filed an application for postconviction relief on January 21, 1985. The court, in considering the application, determined that Stoneman was not sufficiently advised of his right to challenge his plea by a motion in arrest of judgment. The court, however, in its decree, at length stated that Stoneman had been superiorly represented, that his pleas were made knowingly and intelligently, and that he was fully aware of what would transpire in court before even entering the courtroom.

Upon consideration of the State's motion to enlarge or amend findings and conclusions, the court reversed its earlier ruling and reinstated the original

judgment and sentence. The court specifically noted the extensive negotiations that had occurred prior to Stoneman's pleas of guilty and that Stoneman had been thoroughly advised of his rights concerning appeal. The court, in its unique position as the trier of fact, noted that "[t]o a large extent it appeared that the petitioner's [Stoneman's] motivation for complaining about his convictions after the fact arose from such concerns [of convincing his spouse and friends of his innocence] rather than from any violation of the petitioner's rights." Finally, the court noted Stoneman's wife's testimony, which seemed consistent with the court's view that Stoneman was "trying to put on a show of indignation." The court therefore held that regardless of what other statements the court may have made to Stoneman under either Iowa Rules of Criminal Procedure 8 or 23, Stoneman would have entered the same plea and the same sentence would have been imposed.

Under the totality of the circumstances, and upon viewing the record as a whole, we believe that Stoneman was afforded substantial due process despite postconviction counsel's failure to file a timely notice of appeal. Stoneman admits that the trial court correctly held that he had not shown sufficient cause or reason why he did not appeal. Similarly, Stoneman has failed to show that he suffered any prejudice as a result of the failure to file a notice of appeal.

The record reflects that throughout the proceedings leading up the sentencing hearing, Stoneman was thoroughly advised of each step in the plea bargaining process. At the hearing, Stoneman was advised of the nature of the charges against him and stated that he understood the charges and the consequences of pleading guilty. The trial court found, and we agree, that Stoneman was fully aware of what would transpire in court even before entering the courtroom. He was adequately advised of his right to appeal, including the consequences

of a motion in arrest of judgment. Through the superior efforts of trial counsel, the charges against Stoneman were dropped from a class "D" felony with a possible sentence of up to five years, to an aggravated misdemeanor with a possible sentence of two years. Because Stoneman was 72 years of age and in poor health, the State agreed to have the sentences on the aggravated misdemeanor charges suspended, placing Stoneman on two years probation. Faced with the very great likelihood of conviction on the felony charge, it is small wonder that Stoneman eagerly accepted this plea agreement.

Though we are mindful that an attorney's failure to perfect an appeal can constitute ineffective assistance of counsel, Heath v. State, 372 N.W.2d 265, 266 (Iowa 1985), we hold that such failure in the present case did not work a substantial disadvantage on Stoneman. There is simply no evidence to show that but for postconviction counsel's failure to file a notice of appeal, the result in this case would have been different.

AFFIRMED.