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IN THE COURT OF APPEALS OF IOWA

Filed June 26, 1984 593

OTIS WALTON,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

PERCY WALTON,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

4-156
83-996

Appeal from the Iowa District Court for Woodbury County - James P. Kelley, Judge.

Petitioners appeal from the denial of their applications for postconviction relief from their guilty plea convictions for robbery in the first degree and false use of a financial instrument. AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for petitioners-appellants.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

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

SCHLEGEL, J.

The petitioners, Otis and Percy Walton, appeal from the denial of their applications for postconviction relief from their guilty plea convictions for robbery in the first degree and false use of a financial instrument. Petitioners assert on appeal that the attorney who represented them both in their joint 1981 guilty plea proceeding, Michael Hobart, rendered ineffective assistance by giving them erroneous advise about the consequence of their guilty pleas. We affirm.

Postconviction relief actions under Iowa Code chapter 663A are law actions triable to the court and ordinarily are reviewed on error. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981); Thomas v. State, 316 N.W.2d 182, 183 (Iowa Ct. App. 1981). However where, as here, there is an alleged violation of a constitutional safeguard, this court will make an independent evaluation of the totality of circumstances under which the postconviction ruling was made. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Thomas v. State, 316 N.W.2d at 183. The burden of proof in a postconviction action is on the petitioner to establish the facts asserted by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977).

The petitioners, who are brothers, entered simultaneous guilty pleas to charges of robbery in the first degree and false use of a financial instrument. They were both sentenced to concurrent terms of up to twenty-five years on the robbery conviction and up to ten years on the false use conviction. See Iowa Code § 711.2 (1979); Iowa Code § 715.6 (1979); Iowa Code § 902.9. Pursuant to a plea bargain, the State had amended the robbery charges to delete allegations that a firearm was involved; thereby avoiding the imposition of a five year mandatory minimum sentence. See Iowa Code § 902.7 (1979).

The petitioners' primary concern prior to accepting a guilty plea was that they be eligible for parole as soon as they started serving their sentences. The county attorney also offered, as a possible plea alternative, to reduce the robbery

charge to robbery in the second degree with a finding that a firearm was used. This charge would have been in addition to the false use charge and the two resulting ten-year sentences were to have run consecutively. However, the mandatory minimum for the use of a firearm under Iowa Code section 902.7 would have been applicable.

Hobart, the petitioner's attorney at the guilty plea proceeding, conducted an investigation and took depositions of all the witnesses listed in the minutes of testimony submitted by the State. Hobart testified that due to the overwhelming evidence against the petitioners he was unable to obtain a better plea bargain from the county attorney's office. Petitioners did not appeal their convictions.

The petitioners have each had two interviews since their incarceration before members of the parole board for the purposes of parole consideration. See Iowa Admin. Code chapter 615 § 3.6(3) (requirement for annual interviews). They both testified that the reason they were denied parole was based upon the parole board's policy that precluded them from parole for at least five years because of the nature of the crime. They did not, however, introduce a written copy of the parole board's decision, see Iowa Admin. Code chapter 615 § 3.9, nor evidence of what the parole guidelines were at the time of their plea bargain.

Petitioner Otis Walton filed a pro se application for postconviction relief on February 3, 1982, alleging, inter alia, that the police illegally secured his confession and that he was denied effective assistance of counsel by Hobart's failure to suppress his confession and by Hobart's actions in allowing the guilty plea to be made. Otis Walton's appointed counsel in the postconviction action, Richard McCoy, subsequently amended the petition to allege, in addition, that petitioner was denied effective assistance of counsel by Hobart's dual representation of both Otis and Percy. Percy Walton filed a pro se application for postconviction relief on July 20, 1982, alleging that his conviction and sentence were in violation of his constitutional rights and that he was also denied effective

assistance of counsel due to Hobart's dual representations of both him and his brother, Otis Walton. The petitions were consolidated for trial upon request by the petitioners, and McCoy was appointed as counsel for both petitioners.

The trial court denied petitioners' postconviction relief after a hearing. The court, ruling specifically on each ground raised, held, inter alia, that the petitioners' confessions and guilty plea were constitutionally obtained and that Hobart's dual representation of them did not amount to a conflict of interest. The court found that Hobart had performed well within the range of competence for criminal defense attorneys. No specific ruling was made on the ground that Hobart misinformed them as to the parole board's guidelines. Nor did petitioners file a motion to enlarge pursuant to Iowa Rule of Civil Procedure 179(b). See Starling v. State, 328 N.W.2d 338, 341-42 (Iowa Ct. App. 1982).

The petitioners did not appeal their guilty plea convictions after entry of judgment. We find, however, that their claims for relief were properly before the postconviction court. See Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979) (failure to take an appeal bars relief in postconviction action only as to factual and legal conclusions which applicant knew of at the time of the original trial court proceeding).

The petitioners state on appeal that the issue of ineffective assistance in misinforming petitioners as to the penal consequences of their pleas is properly before us because the issue was tried by "consent" at trial. See Iowa R. Civ. P. 106 (variance between pleading and proof is not material unless it misled opposite party); Nuzum v. State, 300 N.W.2d 131, 132-33 (Iowa 1981) (rules and statutes governing the conduct of civil proceedings are applicable to postconviction proceedings). Assuming arguendo it was tried by consent, there was no ruling upon that issue by the trial court. A party must move under Iowa Rule of Civil Procedure 179(b) to enlarge the findings and conclusions of the court in its postconviction proceeding in order to preserve error on an issue, claim or legal

theory submitted for adjudication but not ruled on by the court. Starling v. State, 328 N.W.2d at 341-42. We do not consider issues on appeal that were not raised at trial. Snethen v. State, 308 N:W.2d 11, 16-17 (Iowa 1981).

The petitioners contend on appeal that, in the event we determine the issue was not adequately preserved for appeal, we may nevertheless consider that issue because McCoy, petitioners' postconviction counsel, provided ineffective assistance of counsel in failing to preserve an issue for appeal that he pursued at trial level. See Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980). Initially, we are not convinced that the issue was, in fact, pursued at trial level. In any case, we do not believe the record is sufficient for us to "judge the reasonableness of counsel's challenged conduct [alleged failure to preserve issue] on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, ___ U.S. ___, ___, ___ S. Ct. ___, ___, ___ L. Ed. 2d ___, ___, 52 U.S.L.W. 4565, 4571 (1984). This record shows that McCoy pursued those issues raised by the petitioners and the issue of dual representation. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's [petitioners'] own statements." Id. Accordingly, the issue of Hobart's alleged ineffective assistance of counsel in improperly advising petitioners as to the penal consequences of their plea is not before us.

Moreover, assuming arguendo that petitioners established sufficient reason for failing to preserve the issue on appeal, they have not shown on this record that they received ineffective assistance of counsel in entering their guilty pleas. There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. Strickland v. Washington, ___ U.S. at ___, ___ S. Ct. at ___, ___ L. Ed. 2d at ___, 52 U.S.L.W. at 4571. The ultimate test is whether, under the entire record and totality of circumstances, counsel's performance was within the range of normal competency. Snethen v. State, 308 N.W.2d at 14. Two conditions must be satisfied before a party will have been

found to be denied a fair trial due to inadequacy of counsel. It must be shown that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. Id. at 14. Petitioners have not shown that Hobart failed to perform an essential duty.

The Iowa Supreme Court has stated, in reference to counsel's duty to accurately advise a criminal defendant of parole guidelines, as follows:

> Faced with records of erroneous pre-plea advice concerning parole and other release guidelines, the federal circuit courts generally have determined there was ineffective assistance of counsel. See Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979). In Hawkman, 661 F.2d at 1170, the court wrote:
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> "A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options."
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> The State also refers to the Strader case, along with other federal and Iowa decisions standing in part for the proposition that the defendant need not be informed of all indirect and collateral consequences of his plea. While there is no constitutional requirement that a judge provide advice relating to parole or the possibility of sentence deferral, see Hunter v. Fogg, 616 F.2d 55, 61 (2d Cir. 1980); Grout v. State, 320 N.W.2d 619, 620-21 (Iowa 1982); State v. Woolsey, 240 N.W.2d 651, 653-54 (Iowa 1976), that does not leave a court, or an attorney, free to misinform a defendant regarding collateral consequences of his plea.

Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983).

As in Meier, it is apparent in this case that the reason the petitioners' pleaded guilty to first degree robbery instead of second degree robbery was to avoid the "five year mandatory" sentence and the consecutive sentencing. If, as petitioners allege, the parole board had a strictly enforced policy of not granting parole where this type of crime was involved and that information was available to criminal defense attorney's upon request, Hobart's assistance may have been inadequate. See Meier v. State, 337 N.W.2d at 207; State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982). Hobart testified at trial that he routinely called the

parole board's office concerning their guidelines and that he discussed with petitioners the possibility of parole in eighteen months or twenty-four months in advising them as to their alternatives prior to their entry of guilty pleas.

However, there was no evidence introduced at the postconviction hearing showing whether or not the parole board, in fact, had established parole guidelines that were routinely available to defense counsel, see Strader v. Garrison, 611 F.2d 61, 63 (4th cir.), cert. denied, 444 U.S. 858, 100 S. Ct. 120, 62 L. Ed. 2d 77 (1979), or what these regulations were at the time they entered their guilty pleas. Under these circumstances, it is clear that the petitioners have not met their burden to show that Hobart failed to perform an essential duty.[1] It is not alleged that Hobart's advice on the collateral consequences of the petitioners' pleas was erroneous under the provisions of the Iowa Code or the Iowa Administrative Code.

Accordingly, the decision of the trial court must be affirmed.

AFFIRMED.

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[1] This case concerns only the giving of misadvice based on available information as to the collateral consequences of a guilty plea; we do not intend to suggest that counsel must routinely advise criminal defendants of all the possible collateral consequences of their plea.