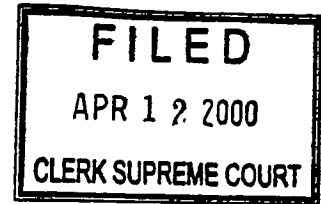


IN THE COURT OF APPEALS OF IOWA

No. 0-124 / 99-1386
Filed April 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

SILAVONE LOVAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy,
Judge.

Silavone Lovan appeals the judgment and sentence entered upon his
guilty plea to burglary in the third degree and stalking in the first degree.

AFFIRMED.

Ta-Yu Yang and Jeanne K. Johnson, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, Philip E. Havens, County Attorney, and David William Patton, Assistant
County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

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PER CURIAM

Duties are simply laws put into practice. Silavone Lovan claims both the trial court and his defense counsel failed to perform their respective duties. These claimed duties, however, cannot be characterized as such because they are not rooted in the laws of this state. Therefore his claims must fail and his convictions are affirmed.

I. Background Facts & Proceedings.

The defendant, Silavone Lovan, is a native of Laos and immigrated with his family to the United States in 1976. Upon coming to the United States, Lovan attended school from fifth to the tenth grade. At the time of trial Lovan was thirty-four years old, and his immigration status was that of a legal permanent resident alien. The State charged Lovan with burglary in the third degree, in violation of Iowa Code section 713.6A (1997), and with stalking, in violation of Iowa Code section 708.11(3)(b)(1997). In May of 1999 Lovan agreed to plead guilty to the offenses, and the State agreed to dismiss several other criminal charges. At the plea hearing, the following colloquy took place:

COURT: What year did you come to the United States?

DEFENDANT: 197— '76 or '77. Can't quite figure. '76, I think.

COURT: Do you have any trouble reading, writing or understanding the English language?

DEFENDANT: Little bit writing, but reading is pretty good.

COURT: Reading is pretty good. You can understand. You can converse with your lawyer all right, right?

DEFENDANT: Yeah.

COURT: You understand what I am saying to you here today?

DEFENDANT: About 90 percent of it, I think I understand.

COURT: Okay. You don't have any trouble understanding what I am saying to you, though, do you?

DEFENDANT: Not really.

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The court then continued with the colloquy and later accepted Lovan's pleas. Lovan did not file a motion in arrest of judgment, and the court sentenced him in accordance with the statutory prescriptions.

Lovan appeals claiming (1) his plea was not voluntary or knowing as he did not sufficiently understand English; (2) the trial court failed to warn him of potential immigration consequences that could possibly arise from his pleas; (3) his trial counsel was ineffective for failing to warn him of potential immigration consequences that could possibly arise from his pleas; and (4) his trial counsel was ineffective for failing to ascertain Lovan's ability to understand English, in failing to ensure Lovan understood the nature of the charges, and in failing to explain what was to occur as a result of his pleas.

II. The Pleas Were Voluntary and Knowing.

Lovan first claims his pleas of guilty were not voluntary and knowing based on his limited understanding of the English language and the trial court's failure to apprise him of the potential immigration consequences implicated by his pleas.

A. Standard of Review. Allegations that a trial court failed to make sufficient inquiry into the knowing and voluntary nature of a guilty plea gives rise to an inquiry of constitutional magnitude. *State v. Everett*, 372 N.W.2d 235, 236 (Iowa 1985). When considering claims of constitutional implication, our review is de novo. *State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997).

B. Lovan's Grasp of English. In order to properly accept a defendant's plea of guilty, the court must first determine if the plea is both voluntary and

knowingly. Iowa R. Crim. P. 8(2)(b). We look to the totality of the circumstances in adjudging whether the trial court's explanation of the proceedings was of sufficient depth to ensure the defendant understood the charges, the proceedings, and the consequences of his plea. *Brainard v. State*, 222 N.W.2d 711, 714 (Iowa 1974). Factors relevant to this inquiry include the accused's education and experience. *State v. Victor*, 310 N.W.2d 201, 204 (Iowa 1981). Because guilty pleas are generally accorded finality, once the plea is entered the defendant bears the burden of showing the plea was not made knowingly or voluntarily. See *United States v. Wildes*, 910 F.2d 1484, 1486 (7th Cir. 1990).

Lovan cannot carry his burden. The trial court made sufficient inquiry into Lovan's ability to understand the nature of the charges, the rights he was waiving, and the penal consequences of his plea. Lovan had been living in the United States for over twenty years, had five years of formal education in the United States, and assured the court on four separate occasions he understood the English language. Lovan's testimonial responses throughout the proceedings, although not spoken with grammatical precision, further indicate an understanding of the English language. Based on the totality of the circumstances, we find Lovan's guilty pleas were both voluntary and knowing.

C. Collateral Immigration Consequences. In addition to an overall understanding of the words employed by the district court, a defendant must also understand "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 97, 908 (Iowa 1998) (citation omitted). The court does not have a duty, however, to alert a defendant of indirect or collateral consequences of his plea.

~~Id.~~ A consequence is neither indirect nor collateral if the consequence "represents a definite, immediate and largely automatic effect on the range of defendant's punishment." *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975). Among those consequences considered purely collateral is the threat of immigration proceedings as a result of the conviction. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987).

The *Mott doctrine* continues to be the law of this state. Despite the recent trend by many other states to remove potential immigration difficulties from the collateral realm, neither the appellate courts nor the legislature has swayed from the pronouncement in *Mott*. *Id.* The threat of potential immigration proceedings resulting from a plea of guilty is a collateral matter. Thus, the court did not fail to perform an essential function, and the pleas were constitutionally valid.

III. Ineffective Assistance of Counsel.

Lovan finally claims his counsel was ineffective for (1) failing to inquire into his understanding of the proceedings given the limited interaction between Lovan and his attorney and their language barriers and (2) failing to alert him of the potential immigration problems that could arise as a result of his pleas.

A. Counsel's Inquiry into His Client's Understanding. Normally, "we preserve ~~claims~~ of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Lovan's first claim of ineffective assistance of counsel rests on accusations not

contained in the record. He asserts counsel left him with the erroneous impression that after pleading guilty to the charges the court was going to find him guilty of a lesser charge, that he had limited interaction with his attorney, and finally his somewhat strained language abilities further muddled the mix. As we cannot justly examine trial counsel's actions, the claim is preserved for postconviction relief.

B. Collateral Consequences.

1. *Standard of Review.* Normally, a trial court's denial of an application for postconviction relief is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). If, however, the applicant asserts violations of constitutional safeguards, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

2. *The Merits.* Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. With regard to the first prong, *Lovan* must prove the performance of trial counsel was not within the normal range of competence. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). In evaluating counsel's performance, we presume counsel acted competently. See *Risdal*, 404 N.W.2d at 131. An ineffective assistance of counsel claim may

be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Similar to our above discussion on collateral consequences, defense counsel may only be held ineffective if she fails to advise a defendant of the direct consequences of a guilty plea. *Mott*, 407 N.W.2d at 582-83. *Mott* specifically holds possible immigration problems arising from a guilty plea are purely collateral in nature. *Id.* at 584. Therefore, defense counsel does not have an affirmative duty to become well versed in federal immigration law and then pass that knowledge along to a client. *Id.* As counsel did not fail to perform an essential duty, Lovan's claim must fail. His convictions are affirmed.

AFFIRMED.

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