FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

SEAN VINCENT DUVAL,)

Defendant-Appellant.)

Filed March 9, 1988

7-414
86-1789

395

Appeal from the Iowa District Court for Polk County (No. 33165), Jack D. Levin, Judge.

Defendant appeals his conviction of theft in the first degree as a result of his guilty plea pursuant to a plea bargain. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and James R. Huff, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and James Ramey, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

PER CURIAM 395

This is an appeal by the defendant Sean Duval of the judgment and sentence entered following a plea of guilty to a charge of theft in the first degree, in violation of Iowa Code sections 714.1 and 714.2 (1985). He contends he was denied effective assistance of counsel because his attorney informed him concurrent sentences might be available under Iowa Code section 903A.5. We affirm.

On June 9, 1986, the Polk County Attorney filed a Preliminary Complaint charging the defendant with the crime of robbery in the first degree. On October 28, 1986, the Polk County Attorney and the defendant entered into an agreement by which the State agreed not to prosecute Duval on the charge of robbery in the first degree in exchange for a promise by him to plead guilty to an amended charge of theft in the first degree.

The County Attorney then filed an amended Trial Information charging Duval with the crime of theft in the first degree. The defendant pled guilty to this charge on October 29, 1986.

On December 2, 1986, the District Court sentenced the defendant to serve a term of imprisonment not to exceed ten years, pursuant to Iowa Code sections 902.3 and 902.9(3) (1985). The Court also ordered that the defendants' Iowa sentence was to run consecutively to a previously-imposed federal sentence.

Duval now argues he was denied effective assistance of counsel because his trial attorney informed him there was a possibility his Iowa sentence could run concurrently with his federal sentence. He claims he would not have pled guilty if he knew his sentences would have to run consecutively. The State contends error was not preserved; and, if so, counsel was not ineffective since the Iowa appellate courts have not interpreted Iowa Code section 903A.5.

The requirement of a motion in arrest of judgment is waived when a defendant challenges the validity of his guilty plea based on ineffective assistance of counsel. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). We hold the defendant's failure to make a motion in arrest of judgment does not preclude our consideration of his ineffective assistance claim.

We review the defendant's claim de novo. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). Duval has the burden to prove by a preponderance of the evidence counsel failed to perform an essential duty, and prejudice resulted therefrom. Id.

In proving the first prong of this test, Duval must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. Id. To demonstrate prejudice, Duval must prove 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.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984)).

Duval claims he was told he could receive concurrent sentences under Iowa Code section 903A.5. He argues the court had no authority to do so, and that his counsel was ineffective for misinforming him.

We hold Duval has not shown his counsel to be ineffective. Iowa Code section 903A.5 has never been interpreted by the Iowa appellate courts and counsel was under an ethical duty to advocate in good faith any permissible construction of the law favorable to her client. Iowa Code of Professional Responsibility for Lawyers, Canon 7, EC 7-4; see also State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982) (ineffective assistance of counsel not to raise interpretation of uninterpreted statute).

We also find that Duval has not shown any prejudice from his counsel's actions. At the plea hearing the district court thoroughly explored Duval's understanding of the charge, explained the details of the charge, and explained the possible sentence Duval could receive, including the possibility of a consecutive sentence. Duval indicated he understood the sentencing possibility and then entered his guilty plea. He was apprised of all options prior to the pleas and cannot be heard to complain because he received an unfavorable sentence.

We reject Duval's claim of ineffective assistance of counsel. We affirm the defendant's conviction and sentence.

AFFIRMED.