IN THE COURT OF APPEALS OF IOWA

FILED
AUG 27 1986
CLERK SUPREME COURT

HAROLD LEE TRAYWICK,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed August 27, 1986

471

6-202
85-1378

Appeal from the Iowa District Court for Scott County (No. 70099) - Margaret S. Briles and James E. Kelley, Judges.

Petitioner appeals his denial of postconviction relief of sentence for burglary convictions. **AFFIRMED.**

Kent A. Simmons, of Liebbe & Simmons, Davenport, Iowa, for the petitioner-appellant.

Thomas Miller, Attorney General; Christie Scase, Assistant Attorney General; William E. David, Scott County Attorney; and Steve Kraft, Assistant County Attorney for respondent-appellee.

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

SCHLEGEL, J.

Petitioner sought, by postconviction proceedings, to have the judgments and sentences entered against him corrected to reflect the judgments and sentences "actually rendered" against him. The issue arises as a result of the variance which exists between the sentencing judge's oral pronouncement of sentence and the written judgment entries completed by the sentencing judge on the same day as the oral pronouncement of the sentences. In the judge's oral pronouncement, he stated that the sentence pronounced on the second charge to which defendant pleaded guilty would run consecutively to the sentence pronounced on the first charge. In sentencing the defendant on the third of the three charges to which defendant pleaded guilty at that time, the sentencing judge did not state whether that last sentence would be served consecutively to or concurrently with the sentence imposed on the second charge. Following the oral pronouncement of sentences, the judge completed three judgment entry forms - one for each of the three charges - providing the needed details by handwritten language. Each judgment entry provided for incarceration for a term of no more than ten years. The first judgment entry stated the sentence imposed on count XX. The second judgment entry stated the sentence imposed on count II, and stated, "This sentence shall run consecutively to the sentence imposed under count XX of the Information." The third and last judgment entry stated the sentence imposed on count IV, and stated, "This sentence shall run consecutively to the sentence imposed under count II of the Information."

Petitioner claims that the oral pronouncement of sentence prevails in this case, and that the judgment entry relating to count IV should be corrected to show that the sentence there imposed should run concurrently to the sentence

imposed under count II. 476

Defendant further claims that the charges should have been dismissed, because of his denial of a speedy trial. He claims his counsel was ineffective for failing to advise him that his guilty plea would constitute a waiver of that right to appeal.

The postconviction case was submitted by stipulation. Postconviction relief was denied, and petitioner has appealed. We affirm the trial court.

I. We first treat the speedy trial issue, as did the trial court. Unlike the trial court, we believe the raising of this issue was reasonable. We do not believe petitioner's position on this issue is meritorious, but we do not consider it frivolous. Counsel appointed to represent parties in such proceedings has an obligation to raise all reasonable issues. The failure to raise issues which may seem frivolous at the time may well furnish the basis for a claim of ineffective assistance of counsel at a later time, involving time and expense for the attorney who felt he acted in good conscience in omitting such an issue. It seems unfair to infer insincerity in the raising of such issues.

We believe State v. Clark, 351 N.W.2d 532, 534-35, (Iowa 1984), resolves the issue in this case. Traywick, in this case, was charged by trial information during December, 1983. Trial was set for March 5, 1984, well within the ninety days required by the rules. On March 2, 1984, Traywick entered pleas of guilty to two counts, in reliance upon a plea agreement between himself and the State. Sentencing was set for March 19, 1984. The ninety days would have expired on March 20, 1984. Traywick failed to appear for sentencing, and the State moved to withdraw the plea agreement, and the guilty pleas. Traywick was arrested upon a warrant, and as result of his motion, was appointed new counsel. A pre-trial conference was held on March 30, 1984, and in a record signed by Traywick and his counsel, a new trial date was set for April 30, 1984. On April

24, a motion to dismiss on grounds of denial of speedy trial was filed. April 30, the court overruled the motion to dismiss. On that date, Traywick entered pleas of guilty to three counts of burglary in the second degree.

Under the holding in State v. Belieu, 314 N.W.2d 382, 384 (Iowa 1982), Traywick waived his right to speedy trial on March 2, 1984, when he entered his plea of guilty to two counts of the information. In accord with State v. Clark, supra., when the plea agreement was withdrawn, and when the court ordered the withdrawal of Traywick's guilty pleas to the two counts, the speedy trial requirement that Traywick be tried within ninety days began again. Surely it would be incredible if by his failure to appear at sentencing and by the withdrawal of his former guilty pleas (either by his action or the action of the court) and because this activity took the matter past the ninety days, he could claim that rule was violated. Since he pleaded guilty on March 2, 1984, and thereby waived his right to speedy trial, and since, under his reasoning, that waiver could not have been withdrawn until April 30, 1984, when the guilty pleas were ordered withdrawn, there was no speedy trial issue to be preserved for appeal. That being the case, Traywick suffered no prejudice by the failure of his trial counsel to advise him that the plea of guilty would waive his right to speedy trial. Under the record and considering the totality of the circumstances, Taylor v. State, 352 N.W. 2d 683,684 (Iowa 1984), Traywick failed to show that his attorney was ineffective.

II. Since the sentencing judge omitted reference to whether the third sentence would be served concurrently with or consecutive to the other sentences, during his oral statement of those sentences, must the written judgment entry be corrected by the elimination of the written direction that it be served consecutive to the sentence imposed on the second count? We believe not.

It is tempting to resolve this issue on the basis of the procedural aspects

of the "rendition" of the sentence. The court's opinion in State v. Suchanek, 326 N.W.2d 263 (Iowa 1982), described the general provisions for the imposition of a sentence, and stated that "Iowa Code section 901.6 and Iowa R.Crim.P. 23(3)(d) generally provide that a sentencing court shall follow a two-step procedure in sentencing: (1) the rendition or oral pronouncement of sentence on the record in the presence of the defendant and (2) the preparation for recordation in the judgment docket by the filing of a written judgement entry..." The decision goes on to state, "The oral sentence pronounced by the court is not the judgment of the court; the record in the judgment docket is proof that a judgment is entered and is the enforceable judgment. State v. Shilinsky, 248 Iowa 596, 602, 81 N.W. 2d 444, 448 (1957)."

Specifically, Iowa Code section 901.6 provides:

> If judgment is not deferred, and no sufficient cause is shown why judgment should not be pronounced and none appears to the court upon the record, judgment shall be pronounced and entered. (Emphasis added.)

Rule 22 (3) (d) provides as follows:

> 3. Imposition of sentence.
> d. Judgment entered. If no sufficient cause is shown why judgment should not be pronounced, and none appears to the court upon the record, judgment shall be rendered. Prior to such rendition, counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment..."
> (Emphasis added.)

Petitioner, in the case at bar, seeks to distinguish the oral pronouncement of the sentence from the preparation of the judgment entry, and to designate the oral pronouncement as the "judicial" act and the preparation of the written judgment entry as an act merely "ministerial" in nature. It is clear that both of those acts are a part of the sentencing process and are judicial in nature. The entry, or spreading upon the judgment record, of the judgment entry is

the ministerial act which is performed by the clerk of the court. Just as "the record in the judgment docket is proof that a judgment is entered and is the enforceable judgment," Shilinsky, supra. at 602, the sentencing process is not completed until the written judgment entry is prepared for entry upon the record.

The meaning of the sentencing judge in this case, without reference to his testimony set out in the affidavit filed in the case, is clearly that expressed in the completion of the sentencing process, to-wit: the written judgment entry, wherein it is stated that the sentence imposed on count IV shall run consecutively to the sentence in count II. The Iowa court has not ruled that the oral pronouncement (or rendition) of sentence controls in the case of inconsistency between it and the written judgment entry. To the contrary, the cases clearly demonstrate that the only judgment is that contained in the written judgment entry, when that is entered upon the judgment docket.

We find there was no error in denying postconviction relief on this issue.

AFFIRMED.