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MAY 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KERBY JON MILLER,)

Petitioner-Appellant,) Filed May 28, 1987 214

vs.)

STATE OF IOWA,) 7-67
86-507

Respondent-Appellee.)

Appeal from the Iowa District Court for Union County (No. CL 9955), James W. Brown, Judge.

The petitioner appeals from the district court's denial of his application for postconviction relief contending that he was denied effective assistance by his trial counsel's alleged misadvice on the availability of sentencing reconsideration, alleged misadvice on the applicability of good and honor time considerations to the mandatory minimum sentence of Iowa Code section 902.7 (1985), failure to advise him of possible prison classification consequences of his attempted escape, and failure to investigate an available diminished responsibility defense to the offense charged. He maintains his guilty plea was involuntarily entered due to his counsel's ineffective assistance. **AFFIRMED.**

James P. Cleary of Drake University, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Arnold O. Kenyon III, Assistant County Attorney, for respondent-appellee.

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

PER CURIAM

On October 28, 1983, the appellant, Kerby Miller, was charged by amended trial information with robbery in the first degree and unauthorized possession of an offensive weapon. See Iowa Code §§ 711.2, 724.3, and 724.1(2) (1983). A separate information was also filed on that date charging Miller with possession of a firearm by a felon. See Iowa Code § 724.25 and 724.26 (1983). On January 20, 1984, Miller pled guilty to robbery in the first degree as part of a plea agreement reached with the Union County Attorney's office. Sentence was imposed on March 2, 1984. On October 8, 1985, Miller filed an application for postconviction relief. The application was denied by the district court on March 19, 1986. This appeal followed. Miller grounds his request for postconviction relief in allegations of ineffective assistance of trial counsel. Specifically, he maintains his trial counsel was ineffective both by failing to investigate an allegedly-available diminished responsibility defense and by failing to competently advise on sentencing. Miller claims that as a result of these deficiencies his guilty plea and sentence are invalid because involuntarily and unintelligently made. Contentions such as Miller's, the merits of which involve the alleged violation of a constitutional right, are reviewed de novo in light of the totality of the circumstances. Hackett v. State, 354 N.W.2d 247, 249 (Iowa App. 1984). Prior to reaching the merits of Miller's claim, however, we must deal with the State's contention that Miller waived his right to postconviction review of these issues.

I.

In the case at bar Miller failed to challenge the adequacy of his guilty plea by a motion in arrest of judgment in the trial court. See Iowa R. Crim. P. 23(3)(a). Failure to do so generally bars a postconviction relief attack on a guilty plea. Wenman v. State, 327 N.W.2d 216, 217-18 (Iowa 1982). In addition,

Miller failed to raise the present issues of ineffective assistance on direct appeal. Generally, this failure bars the postconviction litigation of such issues. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). The Wenman and Schertz cases embody particular applications of the general principle that a postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court and on direct appeal as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); see also McKnight v. State, 356 N.W.2d 532, 537 (Iowa 1984); Iowa Code § 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Polly, 355 N.W.2d at 855.

As applied to his ineffective assistance claims, our law governing postconviction relief requires that Miller establish two particulars by a preponderance of the evidence: (1) that sufficient reason exists for not having raised the issue on direct appeal; and (2) that by an examination of the circumstances the record demonstrates counsel's inadequacy of representation. Schertz, 380 N.W.2d at 408. As concerns his general attack on the adequacy of his plea, Miller must make a preliminary showing that sufficient reason exists for failing to file a motion in arrest of judgment in the district. Wenman, 327 N.W.2d at 217.

Miller's brief does not expressly address these necessary "sufficient reason" demonstrations. He does maintain, however, that he did not discover the nature

of his counsel's alleged errors until after his incarceration. In addition, he testified that no appeal was taken because his counsel had told him that such action would be "frivolous." We assume, for the purposes of this appeal, that these explanations provide sufficient reasons for the procedural shortcomings associated with this case. We therefore proceed to the issue of whether the present record discloses the type of prejudice required by Polly in order for Miller to succeed on the merits of his claim.

II.

A.

In order to succeed on a claim that he was denied effective assistance of counsel, Miller must show that his counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Miller has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Miller must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Miller must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, Miller must show that counsel's failure to perform an essential duty worked to his actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, he

> 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.

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; Taylor, 352 N.W.2d at 685. In the context of a guilty plea, this standard places the burden on the defendant to show that "there is a reasonable possibility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, ____, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). In analyzing claims of ineffective assistance, we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Taylor, 352 N.W.2d at 685 (Iowa 1984).

Miller argues that his counsel was constitutionally ineffective because (1) he failed to investigate a diminished responsibility defense; (2) he misadvised Miller as concerns the minimum amount of time Miller would serve if convicted at trial of using a firearm while committing a robbery; (3) he misinformed Miller as to the availability of the process for reconsideration of sentence; and (4) he misled Miller as to the effect of Miller's attempted escape on the penal classifications.

B.

On November 21, 1983, Miller's counsel requested that Miller be allowed to undergo a psychiatric evaluation. This request was granted by the district court. On January 20, 1984, Miller entered his guilty plea. On January 24, 1984, Miller underwent the psychiatric evaluation. Miller claims here that

his counsel breached an essential duty by failing to competently investigate a diminished responsibility defense based upon a previously-diagnosed intermittent explosive disorder. Our initial problem with this contention is that the record does not support the claim that Miller has or had such a disorder. Although Dr. Kirpal Singh, a psychiatrist who examined Miller both on January 24, 1984, and on several occasions prior thereto, had suggested intermittent explosive disorder as a provisional diagnosis following an April 1983 examination of Miller, he had rejected that diagnosis by the time of the January 1984 evaluation. Our courts have noted both that counsel's duty to investigate and prepare a defense is not limitless, Schrier v. State, 347 N.W.2d 657, 662 (Iowa 1984), and that the extent of the investigation required in each case turns on the peculiar facts and circumstances of that case. Id. Although Miller's counsel did not consult with Dr. Singh following the January 1984 evaluation, counsel did consult Dr. Singh's report and, based upon that report, determined that no cause was presented for the filing of a motion in arrest of judgment. In any event, the record does not support Miller's contention that counsel was obligated to proffer the defense urged by Miller today.

Moreover, the fact that Miller's counsel did not consult with Dr. Singh following the evaluation is readily understandable in light of the fact that the evaluation occurred four days after Miller entered his guilty plea. The record amply supports Miller's concession in brief that prior to the psychiatric evaluation he had grown "tired of sitting in the county jail and requested [his attorney] to assess plea bargain options." As part of the plea agreement, and in exchange for the guilty plea, the State dropped the allegation that Miller was armed with a firearm when he committed the robbery; dropped the possession of a firearm by a felon charge; dropped the unauthorized possession of a firearm charge; agreed not to file an escape charge; and terminated Miller's probation stemming

from a prior burglary conviction. In addition, the record discloses Miller's religious reawakening which occurred, not surprisingly, simultaneously to his growing tired of being in jail. In light of his personal desires to resolve the matter short of trial and the not unfavorable plea agreement, Miller chose to plead guilty. Given this, as well as the lack of support in Dr. Singh's report for a diminished responsibility defense, we do not think Miller's counsel breached an essential duty by failing to pursue a nonexistent defense for a trial that, by Miller's decision, was never to be.

C.

Miller next claims his counsel was ineffective in misadvising Miller as concerns the minimum amount of time Miller would serve if convicted at trial of using a firearm while committing the robbery. Miller contends his counsel told him that the five-year mandatory minimum sentence associated with such a conviction, see Iowa Code § 902.7 (1983), meant that he would necessarily serve five years before becoming eligible for parole and that good and honor time would not apply to reduce the five-year period. Miller claims his decision to enter into the plea agreement was based in large part on this misadvice. Thus, Miller maintains this case is similar in all relevant aspects to Meier v. State, 337 N.W.2d 204 (Iowa 1983), in which our supreme court found ineffective assistance of counsel in a comparable plea-agreement situation. We find, however, a critical distinction separates this case from Meier.

In Meier, defense counsel admitted, and the postconviction court found, that the defendant had received legal misadvice. Id. at 207. In contrast, Miller's counsel denies giving the advice Miller claims to have received. Counsel stated unequivocally at the postconviction hearing that "I never told [Miller] that he would have to do all five years" if convicted. Counsel also testified that he had in fact told Miller that good and honor time would apply to the potential

sentence. Counsel apparently did tell Miller both that the then-current mandatory minimum sentence system was under attack by persons in the legislature and press who believed that good time credits should not be applied to the mandatory sentence and that it might be changed in the future. This is quite different, however, from the blatant misrepresentation which our supreme court found determinative in Meier. Miller has failed to demonstrate by a preponderance of the evidence his claim that his counsel misadvised him in this respect.

D.

Miller maintains his counsel was ineffective by misinforming him as to the availability of sentence reconsideration following has plea. Miller contends that while incarcerated he learned that, had he stood trial and been convicted of using a firearm in connection with the robbery, good and honor time would have applied to his mandatory minimum five-year sentence. Upon learning this, he contacted his counsel who, according to Miller, advised him to apply for reconsideration of his sentence. As Miller's robbery conviction is not one for which sentence reconsideration is available, see State v. Broten, 295 N.W.2d 453, 454-55 (Iowa 1980); Iowa Code §§ 902.4, 907.3, 702.11 (1985), Miller contends the misadvice constitutes ineffective assistance.

We think Miller has again failed to carry his burden. Contrary to Miller's contention that his counsel advised him to apply for sentence reconsideration, counsel testified he told Miller that his sentence was one for which reconsideration was not available. Although he drafted the application, counsel stated that he did so only after informing Miller of its futility. Miller has not demonstrated counsel's breach of duty with respect to this contention. Nor has he demonstrated, moreover, any relationship between this alleged misadvice, which occurred after his plea and sentencing, and the voluntary and intelligent nature

of his plea, the focus of this postconviction attack. Accordingly, we reject this claim.

E.

Miller contends his counsel misled him concerning the effect of Miller's attempted escape on his penal classification. As part of the plea agreement, the State did not file attempted escape charges against Miller. That Miller had attempted escape was communicated, however, to prison officials and did have ramifications for Miller's classification within the prison system. Miller now contends he was misled by counsel to believe that because the attempted escape charges were dropped they would have no such ramifications.

We think the effect of the non-filed attempted escape charge on Miller's penal classification is a collateral consequence of his guilty plea to the robbery charge. See Saadig v. State, 387 N.W.2d 315, 325 (Iowa 1986); State v. Warner, 229 N.W.2d 776, 781-82 (Iowa 1975). The appropriate classification of persons within Iowa's penal system is committed by statute to the director of the department of corrections. Iowa Code § 902.5 (1985). Such classification does not represent "a definite, immediate and largely automatic effect on the range of defendant's punishment" following the plea. Saadig, 387 N.W.2d at 325 (quoting Warner, 229 N.W.2d at 782. Counsel is not ordinarily required to advise specifically of such indirect or collateral consequences of a guilty plea. Saadig, 387 N.W.2d at 326. Therefore, to the extent Miller's alleged misunderstanding stems from counsel's not going far enough in his advice to Miller, we think Miller's contention without merit as counsel was under no duty to do so.

However, defense counsel is not allowed to misinform his client regarding the collateral consequences of a plea. Id. Miller's postconviction testimony was that he was told by his counsel that he "would suffer no consequences from the escape" because the charges had been dropped. Counsel testified the only

discussion he had with Miller concerning the escape charge was that during which he informed Miller that the charge would not be filed. Miller has failed to persuade us that the alleged misrepresentation was, in fact, made by counsel. Accordingly, we reject this argument.

III.

We today reject each of Miller's allegations of ineffective assistance of counsel. His claim that such ineffective assistance rendered his guilty plea involuntary and unintelligent must fail as a consequence of these determinations. See Hill v. Lockhart, 474 U.S. 52, ____, 106 S. Ct. 366, 370-71, 88 L. Ed. 2d 203, 210-11 (1985); Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973); McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763, 774 (1970). The district court's judgment is affirmed.

AFFIRMED.