

IN THE COURT OF APPEALS OF IOWA

No. 4-494 / 93-1398

FILED

JAN 23 1995

CLERK SUPREME COURT

ROBERT STARBECK,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Linn County,
Thomas M. Horan, Judge.

Robert Starbeck appeals the district court's denial of
his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for
appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen,
Assistant Attorney General, Denver D. Dillard, County
Attorney, and Scott Petersen, Assistant County Attorney,
for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On July 20 and 21, 1989, Robert Starbeck sold cocaine to a confidential informant. In October, he was charged by trial information with two counts of delivery of a controlled substance in violation of Iowa Code section 204.201(1)(1989). Also in October 1989, Starbeck was arrested in Minnesota and charged with two counts of possession of a controlled substance in violation of Minnesota statutes.

In December 1989, Starbeck was convicted of the two counts of possession in Minnesota; however, his Minnesota counsel arranged for sentencing to be postponed until Starbeck was sentenced in Iowa. This was done because Minnesota would give him credit for time served in Iowa, whereas Iowa would not give him credit for time served in Minnesota. Starbeck returned to Iowa to face the charges against him.

On May 4, 1990, Starbeck pled guilty to two counts of delivery of cocaine. He waived his right to file a motion in arrest of judgment and agreed to be sentenced immediately. The district court sentenced Starbeck to two concurrent terms not to exceed ten-years on each count. Pursuant to Iowa Code section 204.413 (1991) (transferred in 1993 to Iowa Code section 124.413), Starbeck was also ordered to receive a mandatory minimum sentence.

In December 1990, Starbeck was sentenced in Minnesota. In accordance with the Minnesota sentencing guidelines,

each of his convictions in Iowa counted as prior felony sentences. In applying the sentencing guidelines, the court ordered Starbeck to serve eighty-eight months to run concurrently with the Iowa sentence.

In August 1991, Starbeck filed an application for postconviction relief. Starbeck alleged he received ineffective assistance of counsel because his Iowa counsel did not advise him his conviction of two counts of delivery of cocaine would enhance his Minnesota sentence. Starbeck explained that, under the Minnesota sentencing scheme, his sentence was enhanced by thirty months because of his Iowa convictions. Starbeck claims if he had known of this consequence he would not have agreed to plead guilty to two counts of delivery and, if necessary, he would have gone to trial.

At a hearing on the application, the court heard testimony of Marie Wolf, Starbeck's Minnesota appellate counsel, Denver Dillard, Linn County Attorney, and Starbeck. The court also considered the deposition testimony of Starbeck's Iowa attorney, John Logan. Starbeck testified Logan had told him not to worry about the Minnesota sentencing. Logan testified he had told Starbeck he did not know what the effect of pleading guilty to two counts of delivery in Iowa would be on his Minnesota sentence. Dillard testified he thought he had a strong case against Starbeck and would not have dropped one count to avoid going to trial. Wolf explained to the court

exactly how Starbeck's guilty plea to two, rather than one, count of delivery in Iowa made a thirty month difference in his Minnesota sentence.

The district court found it was not Logan's responsibility to know the Minnesota sentencing scheme when Starbeck also had Minnesota counsel. The district court further found there was no prejudice to Starbeck because Starbeck did not show that pleading guilty to one count of delivery was an option or that he would have been acquitted of one count if he had gone to trial.

Starbeck appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131. Defendant is not entitled to perfect representation, but only to that which is within the range of normal

competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). We find Starbeck's Iowa counsel, Logan, acted competently and provided effective assistance of counsel.

Logan's representation of Starbeck was limited to the drug charges in Iowa. Starbeck had different counsel for his drug charges in Minnesota. He relied on and followed the advice of his Minnesota counsel when he requested that sentencing take place first in Iowa.

As an Iowa attorney, Logan was unfamiliar with the Minnesota sentencing scheme. The trial court found and we agree that Logan made no representation whatsoever as to the effect the Iowa plea and sentence would have on the Minnesota charges.

We find Logan acted well within the range of normal competency as an attorney. Starbeck was following the advice of his Minnesota counsel when he asked to be sentenced first in Iowa. Under the circumstances here, the effect his guilty plea had on the sentencing scheme under Minnesota law was the responsibility of the Minnesota attorney. Contrary to the argument of appellant counsel, the circumstances of this case do not rise to the level of erroneous advice.

We find Logan provided effective assistance of counsel. We affirm the ruling of the district court.

AFFIRMED.