IN THE COURT OF APPEALS OF IOWA

No. 0-502 / 09-1677
Filed August 11, 2010

WILLIAM BRADLY FREEMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Applicant appeals the district court decision denying his request for postconviction relief on his convictions for one class B and one class C felony charge of possession of methamphetamine with intent to deliver. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, and Stephan Bayens, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Applicant William Freeman appeals the district court decision denying his request for postconviction relief on his convictions for one class B and one class C felony charge of possession of methamphetamine with intent to deliver. He contends trial counsel was ineffective in allowing him to plead guilty. We affirm.

I. Background Facts & Proceedings.

Our de novo review of the record shows the following facts: In 2007, William Freeman was the subject of two separate felony drug cases. In April, following the execution of a search warrant for his home in which methamphetamine and marijuana were seized, Freeman was charged with conspiracy to deliver methamphetamine (a class B felony), possession with intent to deliver methamphetamine (a class B felony), failure to possess a drug tax stamp (a class D felony), and possession of marijuana (a serious misdemeanor). Edward Lewis was charged as a codefendant with the same first three counts, delivery of psilocybin mushrooms, and possession with intent to deliver marijuana. Freeman's attorney, Ward Rouse, filed several motions on his behalf, including a motion to suppress. For a variety of reasons, the motion to suppress was eventually set for hearing on October 23, 2007.

On October 3, Lewis's attorney wrote a letter to the county attorney stating that having spoken to Rouse, both Lewis and Freeman would plead guilty to one count of possession of methamphetamine with intent to deliver.

On October 10, 2007, Freeman was charged in separate trial information with possession of methamphetamine with intent to deliver (a class C felony)

based upon drugs found during the execution of another warrant while Freeman was released on bond. When the arrest warrant on this second case was executed, October 5, Freeman suffered a heart episode and was taken to the hospital. Upon discharge from the hospital, he was taken to the Polk County jail, and Freeman posted bond.

On October 23, 2007, the time set for hearing the motion to suppress, the State informed the court that the parties had reached a "package" plea agreement: Freeman would plead guilty to one class B felony in the first case and to the class C felony in the second (on which he had not yet been arraigned), the State would recommend concurrent sentences and grant him a one-third reduction on the class B felony. Lewis would plead guilty to one class C felony. The prosecutor indicated Lewis "does not have other pending charges of which I am aware." Rouse stated the plea agreement recitation was accurate, adding:

> We also discussed the fact that although Mr. Freeman knows that it's not in any way binding on the Department of Corrections, that at the time of the plea and sentencing the State would ask the Court to recommend that he be considered for placement at the Special Needs Unit with the Department of Corrections.

Freeman suffers from numerous physical ailments.[1] His counsel informed the court,

> His circumstances are such, Your Honor, that his health is a major consideration and if he is, in fact, allowed to plead and be sentenced on the same day, it will minimize the amount of time where he'll be held in the Polk County Jail and hopefully get him to the Special Needs Unit sooner.
>
> THE COURT: Is that right Mr. Freeman?
>
> DEFENDANT: Yes, sir, it is.

[1] A letter from his doctor indicates Freeman has "multiple medical problems including type 2 diabetes mellitus, hypertension, obstructive sleep apnea, obesity, degenerative joint disease and generalized debility."

> THE COURT: I just want to make sure I understand the situation, Mr. Freeman. On April 19th of 2007, you were charged with multiple drug felonies, including Class B Felony methamphetamine charges. You posted bond in order to get out of jail. As I understand correctly, it was a pretty significant bond; is that right?
>
> DEFENDANT: Yes, sir it was.
>
> THE COURT: Looks like over almost $140,000.
>
> DEFENDANT: It was, sir.

At this point, Freeman asked for a recess to use the restroom, which was granted.

Rouse returned to inform the court Freeman had not made it to the restroom successfully and had soiled himself. Freeman returned to the courtroom, but the hearing ended shortly thereafter because the motion to suppress was withdrawn.

On November 8, 2007, Freeman pleaded guilty to Count II of the first trial information (a class B felony possession with intent to deliver) and entered an *Alford*[2] plea to the class C felony possession with intent to deliver charged in the second trial information. During the plea hearing, the court inquired:

> THE COURT: [Defense counsel], what are the current medical conditions of Mr. Freeman, and is he capable and competent of entering a knowing and intelligent and voluntary plea today?
>
> [DEFENSE COUNSEL]: I believe that he is, Your Honor. His medical condition is serious and complicated. He suffers from numerous maladies and is under a great deal of daily medication. It's my opinion that he is lucid, coherent, and intelligent and able to proceed today nonetheless.
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> THE COURT: Has he been able to assist you in his defense?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

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[2] In an *Alford* plea, a person voluntarily consents to the imposition of a sentence, even if the person is unwilling or unable to admit to committing the crime. *See North Carolina v. Alford,* 400 U.W. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970).

> THE COURT: Can you just give me the short version of what the current medical conditions are? Are there any mental health conditions?
>
> [DEFENSE COUNSEL]: There are no mental health conditions, Your Honor, other than a history of depression. I'm going to provide to the Court for inclusion in the presentence investigation report a letter from Dr. Michael O'Connor, Mr. Freeman's physician, a letter from Ginny Smith, who is a Register Nurse who takes care of Mr. Freeman, as well as a multipage document which lays out Mr. Freeman's current medical conditions. He has with him, I believe—was it 16—16 prescriptions from his current medications. [3] He has those today because he's going to take those with him so that they can be given to the special needs unit. They have already been provided with lists of his current medications so that they can be prepared to provide either these medications or the generic equivalents thereof.

Freeman was placed under oath and when asked whether it was his decision of his own free will to plead guilty, Freeman responded, "Given the options based on my health and my inability to defend myself in any other way, yes, ma'am, it is." The response initiated further questioning by the court:

> THE COURT: Well, you do have a right to defend yourself by going to trial.
>
> DEFENDANT: Well—but I can't withstand the burden of incarceration while I go to trial without special medical care, and that would be unavailable to me. So, yes, ma'am, it is. My—it's not my decision to accept the plea—
>
> THE COURT: No. That's not right.
>
> DEFENDANT: Well, yeah. I am voluntarily accepting the plea.
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> THE COURT: I mean, we have facilities that can provide you with your needs. You have a complete and total right to a trial. So the decision you are making today is if you want to have a trial or you want to admit your guilt and plead guilty.

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[3] At the plea hearing, counsel submitted a letter from Freeman's nurse, which listed Freeman's medications: Metformin (an oral diabetic "insulin"), Furosemide (for neuropathic swelling), Cozaar (for blood pressure/pulse control), Allopurinol (for control of gout), Lyrica (two different doses for neuropathy pain and depression), Flovent and Albuteral (for asthmatic breathing distress), Allegra D 24 hr (for allergy control), Skelaxin (for muscle spasms), Tramadol (for severe muscle spasms), Solgar VM75 (an extra strength multiple vitamin), Ibuprofen (for general pain control), and Enteric Aspirin (for heart attack and stroke prevention).

> DEFENDANT: I would like to admit my guilt, Your Honor.
>
> THE COURT: All right. Because what your medical condition is has nothing to do with whether or not you have a trial. Do you understand that?
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> [DEFENSE COUNSEL]: Your Honor, perhaps I could clarify for the Court what I think Mr. Freeman is alluding to. Your Honor, if he went to trial in FECR21176 [the first trial information charges] and happened to be convicted of the Class B felony, he wouldn't be eligible for bond pending sentencing. He also would run the risk of being incarcerated pending FECR215439 [the second filed charge]. He does not want to run the risk of having that occur. The point of this plea bargain is that waiving time for sentencing allows him to be transported immediately to Iowa City, and I think that's what he was trying to say.
>
> DEFENDANT: Yes, ma'am, it is. Yes, ma'am, it is.
>
> THE COURT: All right. So you're entering this decision voluntarily? This is—of the options you've got, this the one you want to choose; is that right?
>
> DEFENDANT: Yes, Your Honor, it is.

The colloquy continued. The court noted that Freeman was taking a number of prescriptions related to his medical conditions, which the court identified as type two diabetes, hypertension, sleep apnea, degenerative joint disease, and obesity. Freeman responded, "Yes. I also suffer from colon cancer and severe neuropathy, which is a nerve ending disease where it sits at the ends of your nerves, and glaucoma." Freeman acknowledged that he was able to understand the proceedings despite the medications he was taking.

> THE COURT: And you're able to comprehend this decision you're making and think clearly about whether this is the right decision for you at this time?
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> DEFENDANT: I do, Your Honor.
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> THE COURT: Have you been under the care of a psychiatrist or psychologist or hospitalized for any mental health conditions in the last six months?
>
> DEFENDANT: I have a court-ordered therapist that I've been visiting on a weekly basis—since this case came up, yes, Your Honor.
>
> . . . .
>
> THE COURT: Are you being treated for depression?

> DEFENDANT: Yes, ma'am, I am. By that psychiatrist, and that depression will not preclude me from accepting or understanding this sentence.
>
> THE COURT: Do you know what medication you're taking for the depression?
>
> THE DEFENDANT: Lyrica, which is for terminal pain and the depression thereof. I have—Your Honor, I have—I have been bedridden for the last eight years, so the care I have received has been with a series of nurses. My current LPN is sitting behind me. I—I accept the guilty plea.

When asked what the advantage of the plea bargain was, trial counsel stated the primary advantage "is that he does not, then, run the risk we talked about earlier of being convicted in FECR 211176 and having to be confined in the Polk County Jail prior to sentencing, not being able to bond." Rouse noted that "[p]art of this deal" is the State would agree to Freeman being sentenced the same day and would recommend "that he be considered for placement at the special needs unit in Iowa City where we believe that he will get the best medical care that he can, at least, while he is under the purview of the Department of Corrections." Freeman agreed.

A factual basis was established for Freeman's plea of guilty to the class B felony possession with intent. With respect to the second class C felony charge, Freeman acknowledged that the evidence as outlined by minutes of testimony would establish his guilt and that he had nothing to gain by going to trial. He stated, "There would be significant risk to me if I were to go to trial." Freeman stated he wished to take advantage of the plea bargain and entered an *Alford* plea.

The court found the pleas were voluntary and the defendant "understands his rights and consequences." The court accepted the guilty pleas.

The court asked if it was Freeman's desire to waive the presentence report, the delay for sentencing, and the filing of a motion in arrest of judgment, and proceed to sentencing. He responded, "Yes, ma'am, it is." The court asked further questions to ensure the defendant understood the waiver and then proceeding to sentencing. The court asked to hear why concurrent sentences were appropriate.

The prosecutor noted Freeman had "significant medical problems" and a "lack of criminal history," and consequently, the court could consider both in making a determination that concurrent sentences were appropriate. Rouse noted the imposition of the prison sentence was sufficient. Freeman was provided his right of allocution and made a statement. The court engaged Freeman in additional discussion of his drug use, which Freeman stated stemmed from a "paralyzing debilitating injury in 1988" and colon cancer diagnosed in 1995. The court imposed sentence pursuant to the plea agreement and recommended immediate transport to the special needs unit.

Freeman did not appeal.

On July 30, 2008, Freeman filed an application for postconviction relief, asserting his guilty pleas were a "result of duress caused by his serious and complicated health situation." He asserted trial counsel was ineffective in allowing him to plead guilty.

Following a hearing at which Rouse, Lewis's attorney, and Freeman testified, the district court denied the application.

Freeman now appeals, contending he was denied effective assistance of counsel. He asserts his guilty pleas were not voluntary and intelligent for two reasons: (1) trial "counsel incorrectly advised, or acquiesced, regarding the consequences of his guilty pleas" and (2) "Freeman's preexisting mental and physical disabilities, combined with the large amounts of medication he was taking, negated his ability to enter a voluntary and intelligent plea."

II. Standard of Review.

Postconviction proceedings are law actions ordinarily reviewed for the correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). Claims of ineffective assistance of counsel, however, are reviewed de novo. *State v. Braggs*, ___ N.W.2d ___, ___ (Iowa 2010). A postconviction applicant must demonstrate by a preponderance of the evidence that: "'(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.'" *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (quoting *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006)). The claim fails if either element is lacking. *Id.*

The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). In the case of plea proceedings, to establish prejudice, the applicant must show that but for counsel's errors, the applicant would have insisted on going to trial rather than choosing to plead guilty. *Id*.

III. Merits.

"'Fundamental due process requires a guilty plea to be voluntary and intelligent.'" *State v. Speed*, 573 N.W.2d 594, 597 (Iowa 1998) (quoting *State v.*

Sayre, 566 N.W.2d 193, 195 (Iowa 1997)). To ensure that a plea is knowingly and voluntarily made, trial courts must follow the colloquy set forth in Iowa Rule of Criminal Procedure 2.8(2)(*b*), (*c*). *Id*. Freeman does not assert that the rule was not followed.

Rather, he contends his mental capacity was affected by his medical condition and his trial counsel "did not take the necessary steps to ensure that Freeman was competent to plead guilty." However, nothing in this record indicates that trial counsel or the trial court had reason to doubt that Freeman was mentally competent. He admitted he understood the consequences of the plea. Rouse specifically stated he was "lucid, coherent, and intelligent and able to proceed today." In response to specific inquiry by the trial court as to Freeman's depression, Freeman stated nothing about his depression would preclude him from accepting and understanding the sentence. *See State v. Boge*, 252 N.W.2d 411, 414 (Iowa 1977) (noting there was no evidence in record to suggest a question of defendant's mental competence).

Moreover, Freeman was given the opportunity at the postconviction hearing to prove that he was mentally incompetent at the plea hearing. *See id.* He failed to do so. He offered no evidence that his physical condition alone, or in combination with his medications, deprived him of his ability to knowingly and voluntarily enter a guilty plea. The incontinence incident during the hearing on October 23, 2007, was not associated with any mental disability.

Freeman testified that his psychologist at the time of the plea proceeding "never said that I was incompetent." He testified he did not feel "psychotic or,

you know, suicidal or anything, but there were people who were not—they were worried about my health." This does not establish he was not competent to enter a plea of guilty.

In fact, he testified at the postconviction trial that his physical condition had deteriorated since the guilty plea, and he was still taking similar medications. Yet, there was no evidence presented that his mental capacity was adversely affected by his medical condition or his medications. His responses to the postconviction court were appropriate and without evidence of lack of understanding. Upon our de novo review of the record, we conclude that Freeman has failed to prove his trial counsel's performance was outside the normal range of competence in failing to further investigate his competency to enter a plea.

Freeman acknowledges that trial counsel does not have an affirmative duty to advise an accused of the collateral consequences of a plea. *See Stevens v. State*, 513 N.W.2d 727, 728 (Iowa Ct. App. 1994). However, he contends trial counsel affirmatively misled him as to his right to medical care or the quality of care he would receive.

Reversible error arises if counsel misinforms the defendant concerning collateral consequences of a guilty plea. *Id*. However, the record does not support Freeman's contention. Even if we assume Freeman's trial attorney did not inform him he had a right to adequate medical care in the county jail (which is not established in this record), the district court specifically informed Freeman "we have facilities that can provide you with your needs" at the plea hearing.

Trial counsel negotiated a plea in which the State and the court would recommend Freeman be placed in a special care unit. The State and the court *did* recommend that Freeman be placed in the special care unit. Freeman was informed that recommendations of placement would not ensure that placement.

Furthermore, while Freeman contends now that he would not have pleaded guilty had he known he would not be guaranteed placement in a special medical unit, he does not contend that he would have insisted on going to trial, which is what is required to establish prejudice under the circumstances. *Irving*, 533 N.W.2d at 540 (noting that to establish prejudice, the applicant must show that but for counsel's errors, the applicant would have insisted on going to trial rather than choosing to plead guilty).

IV. Conclusion.

Freeman has failed to establish trial counsel was ineffective and we therefore affirm the denial of his application for postconviction relief.

AFFIRMED.