IN THE COURT OF APPEALS OF IOWA

No. 0-731 / 09-1518
Filed November 24, 2010

LEE ANDREW SMITH,
Applicant-Appellant/Cross-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

The applicant appeals, and the State cross-appeals, from the district court's ruling partially granting an application for postconviction relief. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellant Defender, for appellant/cross-appellee.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee/cross-appellant.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Lee Smith appeals, and the State cross-appeals, from the district court's ruling on Smith's application for postconviction relief. Smith pled guilty in 2006 to burglary, sex abuse, and domestic abuse assault charges. In his application for postconviction relief, Smith alleged his trial counsel was ineffective for failing to file a motion in arrest of judgment because Smith had pled guilty without being informed that he would be subject to mandatory lifetime supervision under Iowa Code section 903B.1 (Supp. 2005) due to the sex abuse conviction. The district court granted Smith's application in part and vacated Smith's sex abuse conviction and sentence, but did not vacate his burglary and domestic abuse convictions and sentences. On appeal, Smith contends the district court should have vacated all the convictions and sentences; the State counters that the entire application should have been denied because Smith failed to establish prejudice. Upon our review, we agree with the State's contention, and therefore reverse and remand for entry of an order dismissing Smith's application for postconviction relief.

I. Background Facts and Proceedings.

In April 2006, Smith entered his ex-girlfriend's home, armed with a knife, and physically and sexually assaulted her. On April 16, 2006, the State charged Smith with first-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (2005) (Count I), third-degree sexual abuse, enhanced as a habitual offender, in violation of sections 709.1, 709.4, 902.8, and 902.9(2) (Count II), and domestic abuse assault causing bodily injury, enhanced as a habitual offender, in violation of sections 708.2A(4), 902.8, and 902.9(2) (Count III).

Before trial, the State offered Smith a plea deal that would have resulted in a twenty-five year prison sentence. The State also indicated that if Smith did not take the deal, it might file a first-degree kidnapping charge against him. Smith's trial attorney, Andrea Dryer, informed Smith of the State's offer and the possibility of a first-degree kidnapping charge, but also told Smith she did not believe the State would have a strong kidnapping case.

Smith declined the plea offer, and the case proceeded to trial on June 27, 2006. During the victim's testimony, Smith leaned over to Dryer and whispered loudly that he "wanted this to stop" and didn't want the victim to "go through this anymore." Smith then repeated himself, speaking loudly enough that Dryer believed some of the jurors had heard. Dryer told the trial judge that she and her client needed a break. A recess was called, after which the State and Smith negotiated a plea bargain. Pursuant to the plea agreement, Smith pled guilty to all three counts, and the State recommended a sentence of twenty-five years on Count I, fifteen years on Count II, and fifteen years on Count III, with the sentences on Counts II and III to run concurrent to each other but consecutive to the sentence on Count I.

During the required Iowa R. Crim. P. 2.8(2)(*b*) colloquy, Smith stated he was forty-nine years of age, had a high school education, and understood the charges against him. He further indicated that he was pleading guilty in order to avoid a first-degree kidnapping charge and the lifetime prison sentence that would result if he were convicted thereon. The judge informed Smith that he would have to take a batterer's education class, register as a sex offender, and pay a civil penalty. Smith was not told he would be subject to mandatory lifetime

supervision under Iowa Code section 903B.1 (Supp. 2005).[1] The district court accepted Smith's plea.

Smith requested immediate sentencing. The judge advised Smith that if he was sentenced immediately, he would waive his right to file a motion in arrest of judgment and could not challenge any defects in the plea proceedings. The colloquy indicates Smith understood he was waiving that right. The court then sentenced Smith to the forty-year sentence recommended by the prosecution, consisting of twenty-five years on Count I plus fifteen years each on Counts II and III, the sentences on the latter two counts running concurrently. The sentence imposed by the court did not include the mandatory section 903B.1 lifetime parole term.

Later, the district court entered an order finding that Smith's sentence did not comply with section 903B.1, set it aside, and scheduled a resentencing hearing for December 18, 2006. At that time, Smith asked to withdraw his guilty plea, and the hearing was continued to January 16, 2007. Five days before the scheduled resentencing hearing, Smith filed a motion in arrest of judgment and a formal application to withdraw his guilty plea. The district court then entered an order granting Smith a new trial, holding that: (1) the omission of the section 903B.1 lifetime parole term was an illegal sentence that could be corrected at any time; (2) Smith was not informed of the section 903B.1 sentence, causing his plea to be unknowing; and (3) the improper plea invalidated the entire agreement and not just the sexual assault plea. The State appealed. On appeal, the

[1] Section 903B.1 requires that a person convicted of a Class C felony under section 709, such as third-degree sexual abuse, be sentenced to a special lifetime parole term.

supreme court found Smith had waived his right to file a motion in arrest of judgment and remanded the case for resentencing, but stated that Smith could bring a postconviction relief action challenging his guilty plea following resentencing. *State v. Smith*, 753 N.W.2d 562, 565 (Iowa 2008).

After procedendo issued, the district court resentenced Smith as before to forty years' imprisonment, consisting of twenty-five years on the burglary charge, and fifteen years on the sexual abuse and domestic abuse assault charges to be served concurrently. The court added the lifetime parole term required by section 903B.1.

Smith then filed a postconviction relief application. Smith argued (1) he received ineffective assistance because he was coerced into pleading guilty and (2) he received ineffective assistance of counsel because his counsel failed to file a motion in arrest of judgment raising the district court's failure to advise him of the section 903B.1 sentence. An evidentiary hearing was held on September 28, 2009, during which Dryer and Smith testified.

On September 28, 2009, the district court ruled on Smith's application. The district court rejected Smith's claim that he was coerced into pleading guilty. The court credited Dryer's testimony that at no time did she indicate a lack of faith in Smith's case or tell Smith that he should plead guilty, and further rejected Smith's testimony on this issue. The court noted that

> during the testimony of [the victim] Mr. Smith in a voice loud enough to be heard by certain members of the jury told Ms. Dryer he did not want to put [the victim] through the stresses of a trial and that he, Mr. Smith, desired to enter pleas of guilty.

Nonetheless, the district court found for Smith on his other ineffective assistance of counsel claim. In the court's view, a breach of duty had occurred because Smith should have been informed of the section 903B.1 sentence. As to the prejudice prong, the district court stated,

> The court is not able to accept the State's argument that had Smith been so informed, it would not have mattered and he would have entered a guilty plea to Count II [sexual abuse]. The court accepts Smith's testimony that had he been aware of the applicability of section 903B.1, he would not have entered a plea of guilty to Count II.

But the court did not vacate Smith's entire guilty plea—only the plea on Count II. As the court explained,

> Section 903B.1 has applicability only to Count II, Sexual Abuse in the Third Degree as a Habitual Offender. It has no applicability to either Count I or Count III, and thus, any set aside of Smith's guilty plea to Count II has no applicability to Counts I and III.
>
> . . . Striking, per the above findings and conclusions, the sentence of count II because of the failure to comply with section 903B.1 of the Code, defendant has not been prejudiced by the present sentence. Counts II and III were ordered to run concurrent to one another, but consecutive to Count I. Striking the sentence of the applicant on Count II, Smith nonetheless remains committed to the custody of the director of the Department of Corrections on Count I for not more than twenty-five years and on Count III for not more than fifteen years with a mandatory minimum of three years, with the sentence on Count III to run consecutive to the sentence on Count I. Thus, under the original sentencing order Smith was required to serve a total of not more than forty years with a mandatory minimum of three years as restructured per the above findings and conclusions, he still remains committed to the custody of the director of the Department of Corrections for not more than forty years with a mandatory minimum of not less than three years, not more than twenty-five years on Count I, followed by a consecutive sentence of not more than fifteen years with a mandatory minimum of three years on Count III.
>
> The State has the right to retry defendant on Count II if it desires.

Smith appeals and asserts the district court should have vacated his guilty pleas and sentences on all of the charges. The State cross-appeals and asserts Smith never carried his burden to show prejudice.

II. Standard of Review.

We review postconviction relief proceedings for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). However, when there is an alleged denial of constitutional right, such as an ineffective-assistance-of-counsel claim, we make our own evaluation of the totality of the circumstances in a de novo review. *Id.*

III. Ineffective Assistance of Counsel Claim.

Smith argues that the district court erred in separating his guilty plea on Count II from his other two guilty pleas. According to Smith, once the court found ineffective assistance of counsel, it had to vacate the entire plea. *See, e.g., State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006) (holding the proper remedy when ineffective assistance of counsel occurs in connection with a guilty plea to one charge, due to lack of a factual basis, is to invalidate the entire plea bargain). The State, meanwhile, argues there was no ineffective assistance of counsel at all. We turn first to the State's argument, because if it is correct, we need not reach Smith's argument.

To succeed on an ineffective-assistance-of-counsel claim, an applicant has the burden to prove by a preponderance of the evidence that: "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *Everett*, 789 N.W.2d at 158 (quoting *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008)). "'Unless a defendant makes both showings, it cannot be said that the conviction

. . . resulted from a breakdown in the adversary process that renders the result unreliable.'" *Maxwell*, 743 N.W.2d at 195. "The two-pronged analysis applies to ineffective-assistance claims arising out of the plea process." *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008).

The State does not challenge the district court's finding that Smith's trial counsel failed to perform an essential duty. Before accepting a guilty plea, the court must inform the defendant of the maximum possible punishment for the offense. Iowa R. Crim. P. 2.8(2)(*b*)(2). A section 903B.2 sentence is not merely collateral, but is part of a sentence and, thus, the defendant must be informed of the provision before the court accepts a guilty plea. *State v. Hallock*, 765 N.W.2d 598, 605 (Iowa Ct. App. 2009). The court did not inform Smith of the section 903B.1 sentence, and trial counsel did not inform Smith, alert the court to its omission, or file a motion in arrest of judgment. *See State v. Straw*, 709 N.W.2d 128, 134 (Iowa 2006) (stating that when counsel failed to perform an essential duty when it did not bring a lack of compliance with Iowa Rule of Criminal Procedure 2.8(2)(*b*) to the court's attention).

The State contends, though, that Smith failed to establish prejudice, i.e., that there was a reasonable probability he would not have pled guilty had he been informed of the section 903B.1 sentence. *See Hallock*, 765 N.W.2d at 606; *Straw*, 709 N.W.2d at 137 ("Under the 'reasonable probability' test, the defendant, who has already admitted to committing the crime, has the burden to prove he or she would not have pled guilty if the judge had personally addressed the maximum punishment for his or her crimes."). Upon our review, we agree.

At the time of trial, Smith was forty-nine years old. He does not dispute he understood he was pleading guilty to three felonies, subject to the State's recommendation of a forty-year prison term. It seems implausible to us that the lifetime special parole term would have been a dealbreaker, had Smith been told about it. Smith's own testimony at the postconviction relief hearing indicates his real concern had to do with the possibility of being charged with first-degree kidnapping, which would carry a lifetime sentence without parole:

> Q. If you had known that there was a special sentencing provision that required you to be on lifetime parole, would you still have pled guilty at the time you did? A. No, ma'am. I wouldn't have pled guilty to that. I didn't even really want to plead guilty to the 40 years.
>
> Q. But you did because? A. Because I was being told I was going to get a life sentence for the First Degree Kidnapping. Said I was making a mistake for going to trial.
>
> Q. And you're saying Ms. Dryer told you that during [the victim's] testimony? A. Those are her exact words.
>
> . . . .
>
> Q. . . . you must have thought [the victim] was doing a very good job because you were concerned about being convicted of Kidnapping in the First Degree and serving life, so you took the plea. A. I did not commit a Kidnapping First Degree. If I did, give it to me then. Where is it at?
>
> Q. At the time she was testifying, you were the only one that interrupted the proceedings and wanted to enter a plea; correct? A. That's wrong. My lawyer was telling me if I didn't take the deal, that I was going to get a First Degree Kidnapping and I have been through the law book and I haven't committed to First Degree Kidnapping. The only thing you can charge me with is false imprisonment.
>
> Q. Do you recall during the plea colloquy with the judge at the time of your plea that you told him the reason you were pleading and the reason you took the plea offer is because you didn't was any life sentence so you were asking the court to accept you plea offer? A. Yeah. I do recall that. Anybody in their right mind would accept the plea bargain if they thought they were going to get First Degree Kidnapping. They were illiterate to the law as I was at that time. I'm not illiterate to the law anymore. I know my constitutional rights now.
>
> . . . .

> Q. So you were taking this [plea deal] regardless [of] whether anybody told you about lifetime parole or not. That didn't even matter to you, did it? A. My lawyer hadn't told me the truth in trial. I wouldn't have—she had let me went on the trial, I would have pursued going to trial.
>
> Q. What are you saying she didn't tell you the truth about? A. What do I think she didn't tell me the truth about? She knew there wasn't never no First Degree Kidnapping I had committed anyway. You know that—I know that as of now. I have been down here for three years—

Thus, after being asked a leading question about the section 903B.1 special parole term, Smith quickly moved away from that topic and elaborated on his real complaint—the claim that his attorney misled and coerced him into believing he would be charged with and convicted of first-degree kidnapping.

Dryer disputed this allegation. She did testify that prior to trial, she communicated the State's plea offer to Smith, as well as the fact that the State was considering charging him with first-degree kidnapping. But according to her testimony, she told Smith she did not believe the State would have a strong case for a kidnapping charge. She explained, "I certainly never told him that he was going to be found guilty of it because I personally felt that there were some weaknesses with those allegations." Smith declined the plea offer and went to trial.

The victim was the first witness called, and Dryer described the victim's testimony as "very believable." During the victim's testimony, according to Dryer, Smith became more emotional and leaned over to Dryer and whispered very loudly that "he wanted this to stop [and] he didn't want her to go through this anymore." Smith then repeated himself loudly enough that Dryer was sure some of the jurors heard. Dryer informed the court that the defense needed a break.

In talking privately with Smith, Dryer told him that the offer for the twenty-five year sentence had expired, and he could end up with a fifty-five year sentence. She told him that she would be able to cross-examine the victim, and explained the defense strategy and what she planned on raising during cross-examination of the victim. Yet, Smith was "adamant" that he wanted to plead guilty. Dryer also testified that Smith had a lengthy criminal history involving serious crimes and was not a novice to the system.

This record does not support a finding that the section 903B.1 parole term would have altered Smith's decision to plead guilty. Smith's concern at the time was the years of *incarceration* he would face. At the guilty plea proceeding, Smith indicated he was pleading guilty to avoid a first-degree kidnapping charge, which if proved would carry with it a lifetime sentence of imprisonment without parole. Even during the postconviction relief hearing, Smith's testimony focused again on the kidnapping charge and that he now regretted his guilty plea because he had changed his mind as to the viability of a kidnapping charge. The section 903B.1 special parole term was, at most, a sidelight, introduced only on leading questioning by counsel.

We cannot agree with the district court's statement that it "accepts Mr. Smith's testimony that had he been aware of the applicability of 903B.1, he would not have entered a plea of guilty to Count II." For one thing, Smith's testimony, quoted above, does not really say that. Moreover, the court elsewhere found Smith's testimony "not believable." It rejected Smith's postconviction testimony in every other meaningful aspect. It found credible Dryer's testimony that Smith wanted to plead guilty after hearing the victim's direct testimony. Even if Smith

had unequivocally testified at the postconviction relief hearing that he would not have pled guilty had he been aware of the section 903B.1 lifetime parole term, a court does not have to accept this kind of self-serving claim. *See Kirchner*, 756 N.W.2d at 206 ("Kirchner offered no evidence to support his self-serving statement that he would have accepted the plea deal had he known the great likelihood of his conviction of first-degree kidnapping."); *State v. Tate*, 710 N.W.2d 237, 241 (Iowa 2006) (holding that a statement, standing alone, that is a conclusory claim of prejudice is not sufficient to satisfy the prejudice element). Taking the record as a whole, including Smith's testimony, Dryer's testimony, and the circumstances surrounding the original trial and plea hearing, it cannot sustain a finding that Smith would have rejected the plea bargain had he known of the mandatory parole term.

We therefore find that Smith did not establish the prejudice prong of his ineffective-assistance-of-counsel claim, and conclude that his application for postconviction relief should have been dismissed.

IV. Conclusion.

Because we find Smith did not establish prejudice, he cannot prevail on his ineffective-assistance-of-counsel claim. We reverse and remand for dismissal of Smith's postconviction relief application. Thus, we need not reach Smith's argument that in addition to vacating Smith's conviction and sentence on the sexual abuse charge, the district court should have vacated convictions and sentences on the other charges as a remedy for ineffective assistance of counsel.

REVERSED AND REMANDED.