

IN THE COURT OF APPEALS OF IOWA

No. 3-1134 / 12-1748
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RASHAWN LEE JACKSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Defendant appeals his convictions and sentences for second-degree robbery and flight to avoid prosecution. **JUDGMENT AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Rashawn Jackson, Fort Dodge, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., McDonald, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

After a jury trial, Rashawn Jackson was convicted of robbery in the second degree, in violation of Iowa Code section 711.3 (2011), a class “C” felony, and flight to avoid prosecution for a public offense, in violation of section 719.4(4), a class “D” felony. He was sentenced to a term of imprisonment not to exceed ten years on the robbery charge and five years on the flight charge, to be served consecutively. Jackson now appeals.

I. Ineffective Assistance.

Jackson contends he received ineffective assistance because his defense counsel did not object to the instruction on flight to avoid prosecution. He claims the instruction should have provided the State was required to show a prosecution against him had commenced prior to the time he fled Iowa.

We review claims of ineffective assistance of counsel *de novo*. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).

In *State v. Gleason*, 431 N.W.2d 363, 365 (Iowa 1988), the Iowa Supreme Court held, “the reasonable interpretation of section 719.4(4) is that it does not require the State to prove a prosecution had commenced before the defendant fled Iowa.” Jackson recognizes that his claim on appeal is contrary to the holding of *Gleason*, but asks that *Gleason* be overruled.

The Iowa Court of Appeals, however, does not have the ability to overturn Iowa Supreme Court precedent. *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa

Ct. App. 1990). As an intermediate appellate court, the Iowa Court of Appeals must follow the legal precedents of the Iowa Supreme Court. *In re C.L.C.*, 798 N.W.2d 329, 335 n.1 (Iowa Ct. App. 2011). We conclude Jackson has failed to show he received ineffective assistance due to counsel's failure to challenge established legal precedent in Iowa. See *State v. Brothorn*, 832 N.W.2d 187, 192 (Iowa 2013) (noting we will not find ineffective assistance due to counsel's failure to pursue a meritless issue).

II. Sentencing.

Section 901.8 provides, "If a person is sentenced for escape under section 719.4 or for a crime committed while confined in a detention facility or penal institution, the sentencing judge shall order the sentence to begin at the expiration of any existing sentence." At the sentencing hearing the court informed the defendant that based on this provision the sentence for flight to avoid prosecution had to run consecutively to the sentence for second-degree robbery.

Jackson appeals his sentences, claiming the court actually had discretion as to whether he should be required to serve his sentences consecutively and the State agrees. In *State v. Jones*, 299 N.W.2d 679, 683 (Iowa 1980), the Iowa Supreme Court determined the phrase, "existing sentence" in section 901.8 referred to a sentence the defendant was serving at the time he escaped. Because Jackson had not been sentenced for second-degree robbery at the time he fled from prosecution, the consecutive sentence provision of section 901.8 did not apply. See *State v. Smith*, 300 N.W.2d 90, 93 (Iowa 1981); see also *State v. Tedrow*, 386 N.W.2d 144, 145 (Iowa Ct. App. 1986).

We conclude the district court improperly failed to exercise its discretion due to the court's conclusion a mandatory consecutive sentence was required by section 901.8. "Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required." *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997). We therefore vacate Jackson's sentence for flight to avoid prosecution and remand for resentencing.

JUDGMENT AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.