IN THE COURT OF APPEALS OF IOWA

No. 1-256 / 10-0466
Filed May 25, 2011

PAUL MICHAEL BLAISE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (North) County, Michael J. Schilling, Judge.

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

Curtis Dial of Law Office of Curtis Dial, Keokuk, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael P. Short, County Attorney, and Robert J. Glaser, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

Paul Blaise appeals the district court's denial of his application for postconviction relief following his guilty plea to first-degree harassment. He claims he received ineffective assistance of counsel because his trial attorney did not advise him when pleading guilty that he could be civilly committed as a sexually violent predator. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The background facts of this case were detailed by this court in *In re Detention of Blaise*, No. 07-0188 (Iowa Ct. App. Apr. 22, 2009):

> Paul Blaise has a long history of sexually aberrant behavior, going back as early as 1989. He was convicted of sexual abuse in the third degree in 1991 after abusing a nine-year-old girl and was sentenced to a ten-year term of imprisonment. After his release, he was in and out of jail and prison for a variety of offenses, including sexually related offenses. Even while incarcerated, Blaise was unable to contain his sexual deviance and sexual assault threats, and as a result, he received numerous disciplinary reports for sexual misconduct.
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> On October 17, 2005, less than six months after his latest release from jail, Blaise was picking up cans in a Fort Madison park when he approached a stranger and began talking to her. He asked the woman several inappropriate questions about sex. Additionally, he asked the woman if she would perform various sexual acts if someone threatened her with a gun. The woman became frightened and contacted the police, and Blaise was arrested shortly thereafter in the park while in possession of a gun. He pleaded guilty to first-degree harassment and was sentenced to a two-year term of imprisonment.
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> On October 16, 2006, while Blaise was serving his sentence for the harassment offense, the State filed a petition alleging Blaise was a sexually violent predator under Iowa Code chapter 229A (2005).

A jury later found Blaise's 2005 harassment offense was a sexually motivated crime, and then found Blaise to be a sexually violent predator. The district court entered an order of commitment.[1]

In May 2007, Blaise filed an application for postconviction relief from his harassment conviction that was later amended by his court-appointed counsel. In an affidavit filed in support of the application, Blaise stated his trial counsel

> did not inform me at the time of my plea or while discussing my decision to enter a guilty plea the full range of possible penalties, including the civil commitment process, which has ultimately resulting in my continued placement at Cherokee, Iowa.
>
> . . . .
>
> If I had been advised of the civil commitment procedures I would not have entered a plea of guilty, and would have stood trial on this charge.

The matter proceeded to an evidentiary hearing before the district court. Blaise's trial counsel testified that he did not discuss civil commitment with Blaise, explaining:

> First of all, it was something that actually occurred after our representation of him and after his sentencing. It's not an element of the harassment first degree charge, and it's a determination that would have to be made by the Court at a later date.

He continued, "It was a totally collateral issue."

Following the hearing, the district court entered a ruling denying Blaise's application. The court found as follows:

> When Blaise pled guilty and when he was sentenced, the institution of a civil commitment proceeding was neither a definite, immediate, nor largely automatic consequence of the plea. . . . Under these circumstances, the consequence of an SVP commitment was not direct, but collateral at best. Mr. Sallen [Blaise's trial counsel] did

[1] Blaise successfully appealed that order based on newly discovered evidence about the State's expert witness and was granted a new commitment trial. *See In re Detention of Blaise*, No. 07-0188 (Iowa Ct. App. Apr. 22, 2009).

> not have a crystal ball to read the future, to know what the prison authorities, the review committee, and the ultimate fact finder would decide about the harassment charge to which Blaise pled guilty. Therefore, under the prevailing case law in Iowa and across the country, the Court concludes that Sallen did not breach an essential duty by not informing Blaise of the possibility he would be civilly committed as an SVP.

The court additionally concluded Blaise failed to prove he was prejudiced, finding "Blaise's statement that he would have gone to trial if he had known about the possibility of a civil commitment is not credible."

Blaise appeals.[2]

II. Scope and Standards of Review.

"We normally review postconviction proceedings for errors at law." *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel,[3] we review the claim de novo. *Id.*

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[2] In his brief, Blaise states error was preserved by the filing of his notice of appeal. "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (Fall 2006) (footnote omitted) (explaining that "[a]s a general rule, the error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court"). Nevertheless, there is no question error was properly preserved in this case.

[3] Blaise does not indicate whether his ineffective-assistance-of-counsel claim is limited to the federal constitution, or whether it involves the state constitution as well. As our supreme court recently stated in *King v. State*, ____ N.W.2d ____, ____ (Iowa 2011):

> When there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved, but consider the substantive standards under the Iowa Constitution to be the same as those developed by the United States Supreme Court under the Federal Constitution. Even in these cases in which no substantive distinction had been made between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.

III. Discussion.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 158. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id*. at 159. We conclude the first is lacking here.

"Counsel's duties in connection with a defendant's guilty plea include advising the defendant of available alternatives and considerations important to counsel or the defendant in reaching a plea decision." *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986). "When the ineffectiveness claim is based on alleged failure to advise a defendant of the consequences of a guilty plea, the rule is that, if the consequences flow 'directly' from the plea, the plea may be held invalid." *Mott v. State*, 407 N.W.2d 581, 582 (Iowa 1987). On the other hand, if "the fallout from the plea is 'collateral,' counsel is generally not held to be ineffective for failing to inform the defendant about it." *Id.* at 585-83.

The distinction between "direct" and "collateral" consequences of a plea turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *Id*. at 583. In *Mott*, which involved an attorney's failure to inform a defendant of the deportation consequences of a guilty plea, the court recognized the "drawing of lines on the basis of direct versus collateral consequences . . . is not without its detractors." *Id.* But it nevertheless held,

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(Internal citations omitted); *see also State v. Ochoa*, 792 N.W.2d 260, 266 (Iowa 2010) (rejecting "lockstep" approach to interpretation of state constitutional provisions).

> While there is some merit in the argument that deportation is such a serious consequence of the plea that it is more akin to a direct result, we adhere to our rule that failure to advise a defendant concerning collateral consequences, even serious ones, cannot provide a basis for a claim of ineffective assistance of counsel.

Id. That holding was reaffirmed by *State v. Ramirez*, 636 N.W.2d 740, 746 (Iowa 2001), in which the Iowa Supreme Court declined the opportunity to overrule *Mott* and continued to adhere to the collateral consequences rule.

The United States Supreme Court's recent decision in *Padilla v. Kentucky*, ____ U.S. ____, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) calls the continued viability of the collateral consequences rule applied in *Ramirez*, *Mott*, and countless other cases in Iowa and elsewhere into question.[4] *Padilla* considered the same claim made by the defendants in *Mott* and *Ramirez*: whether trial counsel performed ineffectively in failing to provide advice to the defendant about the "virtually mandatory" deportation consequences of a guilty plea to a drug offense. *Padilla*, ____ U.S. at ____, 130 S. Ct. at 1478, 176 L. Ed. 2d at 290. The Court held "constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation." *Id.* In so holding, the Court noted it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* at ____, 130 S. Ct. at 1481, 176 L. Ed. 2d at 293. But it avoided answering whether such a distinction is appropriate because of the unique nature of

[4] Eleven circuits, more than thirty states (Iowa among them), and the District of Columbia subscribe to the collateral consequences rule. Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699 (2002).

deportation, which it characterized as a particularly severe penalty closely connected to the criminal process. *Id.* at ____, 130 S. Ct. at 1481-82, 176 L. Ed. 2d at 293-94.

Blaise does not urge this court to apply *Padilla* to his claim.[5] Instead, he argues that civil commitment should be considered as more akin to a direct rather than collateral consequence of his guilty plea because of its severe consequences, which effectively increased the length of his punishment. We disagree, though not without some reservations in light of *Padilla*.

Commitment as a sexually violent predator under Iowa Code chapter 229A was not a definite, immediate, or automatic result of Blaise's conviction for first-degree harassment. *See Mott*, 407 N.W.2d at 583. For a person "presently confined," chapter 229A proceedings are commenced only after a review committee "has determined that the person meets the definition of a sexually violent predator." Iowa Code § 229A.4(1). It is then up to the attorney general to decide whether to file a petition alleging the person is a sexually violent predator. *See id.* (stating "the attorney general *may* file" such a petition (emphasis added)). After a petition is filed, the district court must make a preliminary determination as to whether probable cause exists to believe that the person named in the petition is a sexually violent predator. *Id.* § 229A.5(1). If probable cause exists, the person is transferred to an appropriate facility for an evaluation. *Id.* § 229A.5(5). A jury or bench trial is then held to determine whether the State

[5] We note *Padilla* was decided after the district court entered its ruling denying Blaise's postconviction relief application. The retroactivity of *Padilla* is an open question among the federal courts. No circuit court of appeals has ruled on the matter, and the district courts are split. *See Phillips v. State*, No. A10-1012, 2011 WL 781197 n.2 (Minn. Ct. App. Mar. 8, 2011).

proved beyond a reasonable doubt that the respondent is a sexually violent predator. *Id.* § 229A.7(3)-(5).

As is clear from the foregoing, Blaise's commitment as a sexually violent predator was far from a foregone conclusion following his conviction for first-degree harassment, which is not listed as a per se sexually violent offense in the statute. *See* Iowa Code § 229A.2(10). We agree with the Fourth Circuit Court of Appeals in *Cuthrell v. Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir. 1973) that

> the fact that the acceptance of the petitioner's plea of guilty to the crime of criminal assault placed him in a class, where he *might*, as a result of the judgment in an entirely separate *civil* proceeding . . . be committed . . . for treatment and not punishment was such a collateral consequence of his plea that the failure of the trial court to advise him of such possibility will not render his plea involuntary.

Other courts, before *Padilla*, have reached the same conclusion. *See, e.g.*, *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004); *George v. Black*, 732 F.2d 108, 110-11 (8th Cir. 1984); *Martin v. Reinstein*, 987 P.2d 779, 805 (Ariz. Ct. App. 1999); *In re Hay*, 953 P.2d 666, 676 (Kan. 1998); *State v. Bare*, 677 S.E.2d 518, 531-32 (N.C. Ct. App. 2009); *State v. Myers*, 544 N.W.2d 609, 610-11 (Wis. Ct. App. 1996); *see also* Chin & Holmes, 87 Cornell L. Rev. at 705 (noting civil commitment is deemed a collateral consequence by most courts).

Furthermore, Blaise's commitment as a sexually violent predator had no effect on the range of his punishment for harassment. *See Ramirez*, 636 N.W.2d at 744 (stating deportation did not have an effect on the range of defendant's punishment "'because it is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he

has no responsibility'" (citation omitted)). The primary purpose of chapter 229A "is protection of the public, which is achieved through the confinement of SVPs for long-term treatment." *In re Detention of Fowler*, 784 N.W.2d 184, 188 (Iowa 2010). The statute is not punitive or criminal in nature. *See Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006) ("By enacting Iowa's SVP statute, the legislature did not intend to punish sexually violent predators."); *In re Detention of Garren*, 620 N.W.2d 275, 283 (Iowa 2000) ("[W]e hold the Sexually Violent Predator Act is civil in nature, not criminal.").

In light of the foregoing, we agree with the district court that trial counsel had no duty to inform Blaise that he might possibly be subject to civil commitment as a sexually violent predator in pleading guilty to first-degree harassment.[6] That being said, we think it is desirable for counsel to advise defendants of such matters and encourage them to do so in the future. *See, e.g.*, *Ramirez*, 636 N.W.2d at 745 (urging the same in the context of deportation).

The district court's denial of Blaise's application for postconviction relief is affirmed.

AFFIRMED.

[6] Our conclusion might be different were the Supreme Court's analysis in *Padilla* applied. *Compare Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010) (finding under *Padilla* "that even if registration as a sex offender is a collateral consequence of a guilty plea, the failure to advise a client that his guilty plea will require registration is constitutionally deficient performance" because of the similarities between registration as a sex offender with deportation) *with Maxwell v. Larkins*, No. 4:08-CV-1896-DDN, 2010 WL 2680333 (E.D. Mo. July 1, 2010) (stating commitment as a sexually violent predator does not implicate the Supreme Court's concerns in *Padilla* because it "is a multi-level process, culminating in a jury or bench trial, in which the fact finder must determine, beyond a reasonable doubt, that the offender is a sexually violent predator").