IN THE COURT OF APPEALS OF IOWA

No. 1-542 / 09-0855
Filed August 10, 2011

ROGER SWALLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner, Judge.

A postconviction relief applicant claims that his trial counsel was ineffective in allowing him to enter a guilty plea that was not knowing, voluntary, and intelligent. **AFFIRMED.**

Carla S. Pearson of Pearson Law, P.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Susan D. Nehring, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Roger Swalley entered an *Alford*[1] plea to one count of second-degree sexual abuse and two counts of lascivious acts with a child. He did not file a motion in arrest of judgment to challenge the plea. Following imposition of sentence, he filed a direct appeal, which was dismissed as frivolous.

Swalley filed a postconviction relief application raising several issues. He proceeded to an evidentiary hearing on a single issue: whether his *Alford* plea was entered knowingly, intelligently, and voluntarily. He raised the issue under an ineffective-assistance-of-counsel rubric.

The district court concluded Swalley failed to establish that his attorney's "conduct and advice was outside the normal range of competency." The court denied the postconviction relief application in its entirety. On appeal, Swalley frames his argument as follows:

> [T]he plea was involuntary because it was based upon his belief that his coerced confession would be used as evidence against him, because his attorney did not properly investigate the claim of coercion of the confession, did not properly investigate the credibility of the statements against him, and because he was told that he could not get a fair trial in his county, but his attorney made no request for change of venue to the Court.

He also suggests his plea was involuntary because he was actually innocent. This suggestion is essentially an argument that his plea lacked a factual basis.

To establish ineffective assistance of counsel, a postconviction relief applicant must prove (1) a breach of an essential duty and (2) resulting prejudice.

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[1] An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001).

Strickland v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A breach of essential duty will be found where an attorney does not ensure that a plea is voluntarily and intelligently made and is supported by a factual basis. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Prejudice will generally be found in the guilty plea context if there is "a reasonable probability that, but for counsel's alleged errors, [the defendant] would not have pled guilty and would have insisted on going to trial." *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (citation omitted); *accord State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009). Where there is an absence of a factual basis, prejudice is presumed. *See State v. Straw*, 709 N.W.2d 128, 138 n.4 (Iowa 2006).

Our de novo review of the record reveals the following facts. Swalley was charged with seven counts of second-degree sexual abuse. These counts carried a maximum prison term of up to 175 years. Swalley agreed to plead guilty to one count of second-degree sexual abuse and two counts of lascivious acts with a child in exchange for dismissal of the remaining counts and an agreement to have the prison terms run concurrently. Under this plea agreement, Swalley faced a maximum prison term of not more than twenty-five years.

During the plea proceeding, the district court engaged in a detailed colloquy with Swalley. The court began by asking Swalley the following question:

> Do you understand with regard to all these offenses that you do have a right to take these matters to a jury trial, where a jury of twelve persons would have to be convinced unanimously beyond a reasonable doubt that you committed all of these offenses and the jury would be instructed to accord you the presumption of innocence before considering the State's evidence? Do you understand you have this right to a jury trial?

Swalley responded, "Yes." The court also asked Swalley whether he understood "that by admitting to these criminal offenses today, there will not be a trial and thus you would be giving up those rights?" Swalley again answered, "Yes." The court continued by asking, "[H]as anybody made any promises to you or in any way tried to force you or coerce you to get you to plead guilty?" Swalley answered, "No." The court explained to Swalley that the plea agreement was negotiated "basically to get you a lesser sentence" and the plea was entered as an *Alford* plea because "you're unwilling to admit to everything that you're being accused of."

The court next asked about the factual basis for the plea. Swalley agreed he had reviewed the minutes of testimony and if the witnesses were to testify as set forth in the minutes he would likely be convicted. According to those minutes, Swalley confessed to a police officer that he had engaged in sexual activity with his children. Swalley's wife was also slated to testify that she learned her husband had been sexually molesting her children and another child. An employee of a child protection center was to testify about interviews she held with the children. Some of the children were also listed as witnesses.

At the conclusion of the plea colloquy, Swalley agreed he would rather accept the sentence than run the risk of going to trial and receiving a much longer sentence. The court concluded by asking Swalley, "[I]s it your desire that I accept your *Alford* plea rather than go to trial on the other offenses, on the offenses of Sexual Abuse in the Second Degree and two counts of Lascivious Acts with a Child?" Swalley answered, "Yes."

Following this proceeding, Swalley professed his innocence in a letter to the court. At the subsequent sentencing hearing, the district court questioned Swalley's attorney about Swalley's statements and twice asked Swalley directly whether he was willing to proceed with sentencing. Both times, Swalley responded that he was.

Based on this record, we conclude the plea was made knowingly, voluntarily, and intelligently. We further conclude the plea was supported by a factual basis. *See State v. Hansen*, 221 N.W.2d 274, 276 (Iowa 1974) ("An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); *see also North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162, 168 (1970) ("Alford denied that he had committed the murder but reaffirmed his desire to plead guilty . . . ."). Accordingly, counsel did not breach an essential duty in failing to challenge the plea on these grounds.

In reaching this conclusion, we have considered Swalley's present assertion that his attorney made several mistakes which rendered his plea involuntary.[2] He specifically asserts that his attorney should have moved to suppress his confession on the ground that it was preceded by a coercive telephone call from a representative of the Iowa Department of Human Services indicating his children would be taken away. He also asserts his attorney should have moved for a change of venue in light of several high-profile sex abuse

[2] As the State points out, Swalley's argument on appeal is not precisely the argument he made in the district court. We will nonetheless address the issue as framed on appeal.

cases in Linn County. Finally, he contends his attorney should have tested the strength of certain statements referred to in the minutes of testimony. At the postconviction relief hearing, Swalley's attorney cogently explained his reasons for handling these matters as he did. No useful purpose would be served by summarizing that testimony here. Suffice it to say that the attorney's decisions on these matters amounted to reasonable strategic decisions which did not render the plea involuntary. *See State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

While our opinion could end here, we briefly turn to the prejudice prong. Swalley's assertion that he would have proceeded to trial had his attorney not made the claimed mistakes rings hollow given the maximum prison terms Swalley would have faced had he been found guilty of the seven charged counts. Given these possible sentences, we conclude there is no reasonable probability that Swalley would have turned down the plea agreement and insisted on going to trial.

We affirm the district court's denial of Swalley's application for postconviction relief.

AFFIRMED.