IN THE COURT OF APPEALS OF IOWA

No. 1-567 / 10-0933
Filed September 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DIONTE JABARI GREEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

The defendant challenges his failure to be considered for a Youthful Offender Program. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

Dionte Green challenges his failure to be considered for a Youthful Offender Program administered by the Fifth Judicial District Department of Correctional Services and the Polk County Attorney's Office.[1]

I. Background Facts and Proceedings

Two young men, one with a gun, approached another man who was walking along the street near a Des Moines high school. They demanded money and, after obtaining it, took off running. One of the men was later identified as Dionte Green.

The State charged Green with first-degree robbery. Prior to trial, Green agreed to plead guilty to second-degree robbery.

At a plea hearing, the district court advised Green of the rights he would be giving up by virtue of the plea, asked him to admit the underlying facts supporting the crime of second-degree robbery, and told him he could still withdraw his guilty plea and proceed to trial if he wished. Green reiterated that he wanted to plead guilty.

The district court advised Green he had a right to file a motion in arrest of judgment "to attack the legality or the accuracy of this guilty proceeding" and told him the time frame for doing so and the effect of failing to file the motion. Green did not file the motion.

At a subsequent sentencing hearing, Green's attorney suggested for the first time that twenty-year-old Green would be an "excellent candidate for the Youthful Offender Program." He conceded

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[1] This is not the same program discussed in Iowa Code section 907.3Al.

> there really is no mechanism in place for us to go back, file a motion in arrest of judgment where we have an agreement where the parties will go back and withdraw his plea, allow him to confess, and allow him to go forward in the YOP program. That doesn't exist.

The attorney also conceded that because Green had already entered a plea to a forcible felony, "the court ha[d] no discretion to consider him for anything other than prison." Finally, the attorney conceded he had spoken to Green, and Green did not wish to "withdraw his plea or even risk going to trial on the First Degree Robbery."

At this point, the district court asked the prosecutor about the Youthful Offender Program and whether the court had to go along with it if the County Attorney deemed the defendant eligible. The prosecutor responded,

> Well, the way it would work is the defendant would not really come before the Court on the Robbery 2 ever. He would make a confession to the Robbery 2, be accepted into the YOP program, and then he would have to complete the program successfully before he ever came back to the court.
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> So in a way we would be avoiding going before the court until . . . the defendant successfully completes or does not complete the YOP program.

The prosecutor stated Green was informally considered for the program but was rejected because a gun was involved in the crime. While the prosecutor acknowledged there might be exceptions allowing perpetrators of violent crimes to participate, he stated "those would have to be very, very fact specific, and there would have to be a reason for that."

The district court imposed a prison term not to exceed ten years. Green filed a notice of appeal.

More than a month after filing the notice of appeal, Green filed a "bill of exception" in the district court, seeking to incorporate into the record documents showing that another individual, purportedly involved in a violent crime, was admitted to the Youthful Offender Program. The State responded by seeking an evidentiary hearing to submit its responsive testimony. Following the hearing, the district court granted the bill of exceptions, allowing all the evidence proffered by Green and the State to become a part of the record.[2]

II. Voluntariness of Plea

On appeal, Green contends "the State misrepresented [his] eligibility for the Youthful Offender Program" and, for that reason, his "plea of 'guilty' to Robbery in the Second degree was not made voluntarily or intelligently." Because Green did not file a motion in arrest of judgment to challenge the voluntariness of the plea, we must view his argument under an ineffective-assistance-of-counsel rubric. *See State v. Straw*, 709 N.W.2d 128, 132–33 (Iowa 2006).

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[2] "Generally, an appeal divests a district court of jurisdiction." *State v. Mallett*, 677 N.W.2d 775, 776 (Iowa 2004). "Restoration of district court jurisdiction may be accomplished by only two means: the litigants' stipulation for an order of dismissal or an appellate court's order for limited remand." *Id.* at 777. Green filed his "bill of exception" more than a month after filing his notice of appeal. He did not dismiss his appeal nor did he seek or obtain an order for a limited remand to expand the record. Accordingly, we believe the district court was divested of jurisdiction to consider the "bill of exception" filed by Green. We recognize that an exception to the general rule allows a district court to maintain "jurisdiction over disputes between the parties that are merely collateral to the issues on appeal," such as "the modification of an order for restitution in a criminal case." *Id.* Green's challenge is putatively to the voluntariness of his plea. This is clearly not a collateral matter. Therefore, in our view, this exception does not apply. However, the question of the district court's post-appeal jurisdiction was not raised by the State. Accordingly, we will assume without deciding that the bill-of-exception proceedings in the district court were appropriate.

To establish ineffective assistance of counsel, Green must prove (1) a breach of an essential duty and (2) resulting prejudice. *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. *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). Green cannot establish either prong.

When a plea agreement does not directly affect the sentencing powers of the court, "the decision to reduce the charges primarily rests with the discretion of the prosecutor." *State v. Hager*, 630 N.W.2d 828, 834 (Iowa 2001). In this case, the prosecutor made it clear that Green's participation in the Youthful Offender Program was never on the table. The prosecutor's statements about the program were made in response to a question from the court at sentencing. They were not part of plea discussions or the plea proceeding. Additionally, the prosecutor did not misrepresent Green's eligibility for the program. While he mentioned that violent offenders were generally excluded, he noted there were case-specific exceptions to this general rule.

It is also clear the Youthful Offender Program was not an option the court could choose at sentencing, even if Green had wanted it. Green's attorney confirmed this fact, as did the prosecutor, who explained that participation in the

Youthful Offender Program was a means of diverting some offenders away from court, well before the guilty plea and sentencing stages. His testimony was corroborated by a State witness at the bill-of-exception hearing, who stated the program was a “pretrial diversion program for first-time felons” that was “supervised by the Department of Corrections.” She provided a list of criteria developed by the county attorney’s office for participation in the program. Among the criteria was the following:

> *Upon successful completion of YOP*, the offender must enter a plea of guilty to the Target Charge identified in the Plea Agreement which, in most cases, is a non-felony. The County Attorney’s Office will recommend that the offender be placed on a formal probation for either one or two years and, in most cases, receive a deferred judgment.

(Emphasis added.) Because Green’s participation in the Youthful Offender Program was not part of Green’s plea agreement and was not a sentence the court could order, defense counsel did not breach an essential duty in failing to insist on it and in challenging the plea as involuntary because it was not included.

As noted, Green also had to show a reasonable probability that, but for his attorney’s errors, he would not have pled guilty. *Carroll*, 767 N.W.2d at 641. At sentencing, Green’s attorney confirmed that Green had no desire to withdraw his plea. Accordingly, there was no showing of *Strickland* prejudice.

We conclude counsel was not ineffective in failing to challenge the voluntariness of Green’s guilty plea.

III. Additional Issues

Green next contends “[b]oth the Department of Corrections and Polk County Attorney abused their discretion by arbitrarily and capriciously denying

Dionte Green admission into the Youthful Offender Program and Dionte Green exhausted his administrative remedies." He also contends that "[b]ecause the Youthful Offender Program operates as a 'hybrid program' consisting of both a judicial and administrative function, the District Court must ensure that it functions constitutionally." We agree with the State that Green did not preserve error on these issues. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) ("[W]e will not consider a substantive or procedural issue for the first time on appeal.").

We affirm Green's judgment and sentence for second-degree robbery.

AFFIRMED.