IN THE COURT OF APPEALS OF IOWA

No. 3-675 / 12-1938
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILLIP LEE CARTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, James C. Ellefson, Judge.

A defendant appeals from his convictions for third-degree sexual abuse and lascivious acts with a child contending trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Jennifer Miller, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

The defendant, Phillip Lee Carter, appeals from his conviction after pleading guilty to two counts of sexual abuse in the third degree and one count of lascivious acts with a child. Carter contends his trial counsel was ineffective when he failed to advise him before pleading guilty that he could be civilly committed as a sexually violent predator pursuant to Iowa Code section 229A (2011). We affirm.

I. Background Facts and Proceedings.

The State charged Carter by trial information on June 13, 2012. At a later date the State amended and substituted the trial information to allege a total of twenty-three counts: nine counts of sexual abuse in the third degree, two counts of sexual abuse in the second degree, nine counts of lascivious acts with a child, two counts of lascivious conduct with a minor, and one count of indecent contact with a child. If convicted on all twenty-three counts, Carter could have received a sentence of over 300 years in prison.

Carter and the State reached a plea agreement, and on July 31, 2012, the district court convened for the plea hearing. Carter pleaded guilty to two counts of sexual abuse in the third degree and one count of lascivious acts with a child, in violation of Iowa Code sections 709.1, 709.3, 709.4 and 709.8, and the parties agreed to a sentence of twenty-five years in prison. The plea colloquy did not include an inquiry into whether Carter was aware of the possibility of civil commitment following the discharge of his sentence.

On August 13, 2012, Carter's trial counsel filed a motion in arrest of judgment, alleging that the plea hearing was inadequate because (1) "The defendant did not fully understand and appreciate the legal consequences of a guilty plea," and (2) "The defendant did not adequately understand the penal consequences of his plea." The court set the motion for hearing on September 10, 2012. At the hearing, the following exchange occurred:

> THE COURT: Yeah. Okay. [Defense Counsel], anything further?
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> [DEFENSE COUNSEL]: Yes. I guess I probably should respond to the accusations of my client. I would say he was fully informed of what his—what was coming down the pike as far as whether it was a forcible felony, whether he knew the elements. We had a lengthy discussion of the—those types of elements, and we went back and forth that—under a consent issue based on age alone would rise the level of the offense from a sex third, which is 10 years, no mandatory minimum to a 25-year, mandatory 17 and a half years, so he was—he was well aware of that and at the time wisely chose to take the sex third. Just for the record—for later on, just reiterate the plea agreement, that that was laid out. A 25-year prison, no mandatory minimum, and that's essentially what—what he is forfeiting today in going forward.
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> THE COURT: Or at least asking to.
>
> [DEFENSE COUNSEL]: Yes.
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> THE COURT: All right. Mr. Carter, since there seems to be some difference between you and your attorney, you're certainly not required to say anything. There may be some risks in you saying anything. I'm not at all convinced that what you say here can't be used against you if you get what you're asking for and wind up trying the case. I don't know. All I can do is call that to your attention as a possibility. But having said that, is there anything you'd like to say to me?
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> THE DEFENDANT: I was wondering if somebody could explain the civil commitment thing to me. I've never heard anything on that.
>
> THE COURT: Well, if—if you ever decide that you want to plead guilty to this, yes, but under the circumstances—I'm sure somebody can, but I'm not—I'm not sure I'm willing to take up the time to do it right now. If you're—if you're rethinking your position, I'd be happy to go over that with you, but if your position remains that you want to withdraw your plea of guilty, then—then the civil

> commitment is pretty much beside the point, I think. Is there anything else?
>
> THE DEFENDANT: I don't believe so.

The district court denied the motion in arrest of judgment by order on October 12, 2013, stating in relevant part:

> There is nothing in the plea transcript that gives any hint that the defendant did not understand what he was doing, or that the plea hearing was different in any way from what he had expected. The Court never saw or heard any signs of confusion or hesitation other than the defendant's irritation that after he had told the Court what he had done, he was being asked to pronounce the specific word "guilty." The defendant's claim of lack of understanding or a failure to appreciate what he did are completely and totally unfounded.

The court also addressed whether the plea colloquy should have included the possibility of civil commitment. The court concluded that because "[c]ivil commitment is not a definite, immediate, or automatic result of this conviction," such a discussion was not required. Carter appeals, claiming his trial counsel was ineffective when he failed to advise him of the possibility of civil commitment before he entered his guilty plea. Carter asks this court to vacate his convictions, sentence, and judgment and remand his case to the district court for trial.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Discussion.

To succeed in an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). The defendant's failure to prove either element is fatal;

therefore, we may resolve the claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Judicial scrutiny of counsel's performance is highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The defendant must show "counsel's representation fell below an objective standard of reasonableness" as determined by "prevailing professional norms." *Id.* at 688.

A. Deficient Performance.

"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). However, 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 582-83.

A consequence is "direct," rather than "collateral," when it is definite, immediate, and largely automatic in effect. *Id.* at 583. In *Mott*, the Iowa Supreme Court recognized that the distinction made based on "direct" versus "collateral" consequences was controversial. *Id.* Nevertheless, the court adhered to the 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.* The Iowa Supreme Court reaffirmed this holding in *State v. Ramirez*, 636 N.W.2d 740, 746 (Iowa 2001), where the court

declined the opportunity to overrule *Mott* and upheld the direct-versus-collateral-consequences rule.

Contrary to *Mott* and *Ramirez*, the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), held trial counsel was ineffective in failing to inform the defendant about possible deportation following a guilty plea. *Padilla*, 130 S. Ct. at 1486.[1] With regard to the collateral-consequences rule, the Court noted it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'" *Id.* at 1481. The Court did not rule on the propriety of the distinction, however. Instead it found deportation was unique in being a "severe" and "nearly . . . automatic result for a broad class of noncitizen offenders." *Id.* The Court thus found it "'most difficult' to divorce the penalty from the conviction in the deportation context." *Id.*

Carter in effect urges this court to abrogate the direct-versus-collateral-consequences distinction and hold that his trial counsel's failure to inform him of the possibility of civil commitment after his prison term constituted constitutionally defective professional assistance. The *Padilla* decision does not support such a conclusion, and Carter provides no other authority in support of such a change in Iowa law.

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[1] Both *Mott* and *Ramirez* dealt with trial counsel's failure to inform the defendant of deportation consequences to a plea agreement. In both cases, our supreme court upheld the collateral consequences rule in general and found that deportation was a collateral consequence. *Padilla* did not overturn the collateral consequences rule, but concluded that the possibility of deportation was so severe and relatively certain that the consequence rose to a level of constitutional protection.

Civil commitment as a sexually violent predator under Iowa Code chapter 229A is not a definite, immediate, or automatic result of conviction. 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 sexual violent predator." Iowa Code § 229A.4(1). The attorney general then must decide whether to file a petition alleging the person is a sexually violent predator. *Id.* After the attorney general files a petition, the district court must make a preliminary determination as to whether probable cause exists to believe the person named is a sexually violent predator. *Id.* § 229A.5(1). If probable cause exists, the person is transferred to an appropriate facility for evaluation. *Id.* § 229A.5(5). The court then holds a jury or bench trial where the State must prove beyond a reasonable doubt that the person is a sexually violent predator. *Id.* § 229A.7(3)–(5). A sexually violent predator is a person who (1) has been convicted of or charged with a sexually violent offense, and (2) suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility. *Id.* § 229A.2(11).

The possibility of Carter's civil commitment as a sexually violent predator at the conclusion of his twenty-five year prison sentence is not a definite, immediate, or automatic result of his conviction. It is merely a potential collateral consequence; therefore, under the collateral consequences rule, his trial counsel

was not ineffective by failing to inform him about it.[2] We agree with the Fourth Circuit Court of Appeals 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.

Cuthrell v. Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). Other courts 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).

Furthermore, the possibility Carter might face civil commitment as a sexually violent predator has no effect on the range of his punishment. The civil commitment statute is not punitive or criminal in nature. *See In re Det. of Garren*, 620 N.W.2d 275, 283 (Iowa 2000) ("[W]e hold the Sexually Violent Predator Act is civil in nature, not criminal."). The primary purpose of chapter 229A "is protection of the public, which is achieved through the confinement of [sexually violent predators] for long-term treatment." *In re Det. of Fowler*, 784 N.W.2d 184, 188 (Iowa 2010).

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[2] *Blaise v. State*, No. 10-0466, 2011 WL 2078091 (Iowa Ct. App. May 25, 2011) (no duty to inform a defendant about the possibility of civil commitment before he pleaded guilty to harassment in the first degree).

In light of the foregoing, trial counsel had no duty to inform Carter of the possibility of civil commitment as a sexually violent predator before Carter entered his plea. Trial counsel's performance was not deficient.

B. Resulting Prejudice.

Even if trial counsel had a duty to inform Carter of the possibility of civil commitment at the conclusion of his twenty-five year sentence, the record discloses nothing, and the defendant asserts no facts, indicating he was prejudiced as a result.

IV. Conclusion.

The defendant's trial counsel had no duty to inform Carter of the possibility of civil commitment prior to Carter's entry of a guilty plea because civil commitment is a collateral consequence of the conviction. Trial counsel's performance was not deficient, and Carter was not prejudiced. We therefore affirm the conviction of the district court.

AFFIRMED.