**IN THE COURT OF APPEALS OF IOWA**

No. 3-965 / 12-1929
Filed December 18, 2013

**DRAKE L. EAVES,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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

Drake Eaves appeals the denial of his postconviction relief application. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Michael P. Short, County Attorney, and Artemio Santiago, Assistant County Attorney, for appellee State.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

**VAITHESWARAN, J.**

Drake Eaves appeals the denial of his postconviction relief application.

## *I. Background Proceedings*

The State received a complaint that sixteen-year-old Eaves sexually abused his two toddler-aged siblings. The State charged Eaves with two counts of second-degree sexual abuse, a class B felony. His application for waiver to juvenile court was denied and Eaves subsequently pled guilty to one count of assault with intent to commit sexual abuse without injury, an aggravated misdemeanor. The written guilty plea cited Eaves's obligation to register as a sex offender pursuant to Iowa Code sections 692A.1(3) and 692A.2(1) (2005),[1] but made no mention of a mandatory ten-year sentence authorized by Iowa Code section 903B.2. No hearing was held in connection with the plea agreement or prior to imposition of sentence. In a written order, the district court imposed a suspended two-year prison sentence, placed Eaves on unsupervised probation, and ordered him to register as a sex offender. The order did not mention the section 903B.2 sentence.

The State later applied to revoke Eaves's probation based on Eaves's arrest for another crime. The State also moved to correct Eaves's sentence to add the special sentence authorized by section 903B.2. Following a hearing, the district court revoked the suspended sentence, ordered Eaves to serve the two-year period of incarceration, and amended the judgment entry to include the section 903B.2 special sentence.

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[1] Those provisions have since been amended and are found at sections 692A.101(1)(a)(5) and 692A.103(1) (2013).

Eaves filed a postconviction relief application, alleging "[i]neffective assistance of counsel [sic]. Lawyer did not look into everything." He specifically asserted there was "[n]o physical evidence, lawyer shared information with person pushing the charges." The application was not supplemented or amended. Following a hearing, the district court denied the application.

On appeal, Eaves contends his plea attorney was ineffective in (A) failing "to address the special sentencing provisions of Iowa Code § 903B.2" and object to the absence of "a sentencing hearing before accept[ance] of the written plea of guilty" and (B) failing to "investigate the claims against [him]" where counsel had "a higher duty to a juvenile criminal client than an adult criminal client."[2] To prove his claim, Eaves must establish a breach of an essential duty and prejudice. *See Strickland v*. *Washington*, 466 U.S. 668, 687 (1984).

## *II. Analysis*

### *A. Iowa Code section 903B.2*[3]

Rule 2.8(2)(b)(2) obligates a district court to engage in a colloquy with a defendant concerning certain issues including "[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the

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[2] Eaves also addresses a statute of limitations concern raised but not resolved by the district court. The State acknowledges the prosecutor did not raise the issue and the district court did not decide it. Accordingly, we decline to consider it. Similarly, we decline to consider Eaves's assertion that "a 16 year old does not have the capacity to execute and be bound by a written plea of guilty." Eaves did not raise this claim in his application or at the hearing on the application and the district court did not decide it. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [the appellate court] will decide them on appeal.").

[3] The State argues this claim was not preserved for our review. We disagree. Although the issue was not raised in Eaves' application, it was raised at the hearing and was decided by the district court. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (observing an issue is preserved when the court "considered it and necessarily ruled on it").

statute defining the offense to which the plea is offered." While the court may streamline the colloquy in misdemeanor cases that include a written plea agreement, the court may not dispense with the colloquy. *State v. Meron,* 675 N.W.2d 537, 543-544 (Iowa 2004).

The question here is whether the district court had an obligation to inform Eaves of the special sentence set forth in section 903B.2. That provision states:

> A person convicted of a misdemeanor or a class "D" felony offense under chapter 709 . . . shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa Department of Corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

This court has held that the section 903B.2 sentence is part of a defendant's sentence. *State v*. *Hallock*, 765 N.W.2d 598, 605 (Iowa Ct. App. 2009). It was enacted in June 2005 and became effective on July 1, 2005. *See* 2005 Iowa Acts ch. 158, § 40. The provision was clearly applicable to Eaves, as the district court recognized in correcting the original sentence to incorporate it.

The court's corrective action cured an otherwise illegal sentence but did not mitigate the concern Eaves raises here. In *Hallock*, we stated the defendant "should have been informed of the provision before the court took his plea." *Hallock,* 765 N.W.2d at 605-06. The district court judge who accepted Eaves's plea did not inform Eaves of the section 903B.2 sentence. This omission was a violation of the court's obligation under Rule 2.8(2)(b)(2) and Eaves's attorney

breached an essential duty in failing to bring the violation to the court's attention. *See id.* at 606. As the postconviction court stated:

> The Court is required to ensure the Defendant understands the direct consequences of his plea. The sentence under Section 903B.2 was a direct consequence of Eaves' plea of guilty to a violation of Chapter 709. Thus, both the trial Court and [defense counsel] had the duty to inform Eaves of the 10-year special sentence. [Trial counsel] also had the duty to correct the failure by the trial Court to inform Eaves of the special sentence.

We turn to the prejudice prong of the *Strickland* test. In this context, Eaves must show "there is a reasonable probability that, but for counsel's errors, he . . . would not have pleaded guilty and would have insisted on going to trial." *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). The district court concluded Eaves failed to satisfy this prong. The court cited the extremely favorable sentence Eaves received and Eaves's lack of concern about the special sentence:

> Eaves tendered his plea as part of a plea agreement for a suspended sentence. By pleading guilty to a misdemeanor, Eaves avoided the harsher sentences, including mandatory prison time that would follow if convicted of sexual abuse. Significantly, Eaves gave a 25-page deposition and never once asserted nor testified that he would not have pled guilty if [trial counsel] and/or the Court had advised him of the 10-year special sentence required by Iowa Code Section 903B.2. Interestingly, however, Eaves did assert in his deposition that he would not have pled guilty had he known he would be required to register as a sex offender. Nothing in the Application filed by Eaves suggested that he ever intended to argue he would not have pled guilty because of the 10-year special sentence. Under these circumstances, the Court concludes that Eaves failed to establish by a preponderance of the evidence that a reasonable probability existed that, but for [trial counsel]'s error, he would not have entered his guilty plea and would have insisted on going to trial.

(Citations omitted.) The court's ruling on this prong is supported by the record. Eaves's attorney testified Eaves "was facing a maximum of 50 years in prison

. . . . His primary concerns, again, at that time were, number one, getting out of—out of confinement; and number two, not having a felony record . . . ." The plea agreement addressed these concerns. Nowhere in the record is there any indication that Eaves would have proceeded to trial had he known about the section 903B.2 sentence. We conclude Eaves failed to satisfy the prejudice prong of his ineffective-assistance-of-counsel claim. *See Hallock,* 765 N.W.2d at 605 ("Hallock failed to prove, or to even assert, that there is a reasonable probability that, but for counsel's error, he would not have entered an *Alford* plea and would have insisted on going to trial . . . By pleading to the lesser assault with intent charge, Hallock avoided imposition of the mandatory minimum seven-tenths sentence and mandatory lifetime supervision. Under all the circumstances presented to us, we find no reasonable probability Hallock would have rejected the plea agreement and insisted on going to trial had he been informed at his plea hearing of the special sentence provision of section 903B.2.").

***B. Trial Counsel's Investigation; Greater Duty to Minor Defendant***

Eaves contends his trial attorney was ineffective in failing to "investigate the claims against [him]" and counsel had "a higher duty to a juvenile criminal client than an adult criminal client." The district court assumed the issue was preserved for our review and addressed the merits. We do the same.

With respect to the failure-to-investigate aspect of the claim, Eaves argues, given the timing of the plea relative to the filing of the trial information, his attorney "could not have had any ability to perform discovery and adequately assess the State's case." Eaves attorney refuted this assertion. He testified that he reviewed the State's information and considered the fact that Eaves's mother

"never denied the statements in the police report." He determined that Eaves had the opportunity to be alone with the children and concluded there was a potential that Eaves "could have been convicted on the aggravated misdemeanor because that did not require any injury or penetration or basically any evidence of injury." While Eaves questions his attorney's credibility, credibility is peculiarly within the district court's domain and it is evident from the postconviction court's ruling that the court gave credence to the attorney's testimony. We defer to that aspect of the court's ruling. *See State v. Lane*, 726 N.W.2d 371, 379 (Iowa 2007) ("While we are not bound by these determinations, we give deference to the credibility determinations by the district court.").

We turn to Eaves's assertion that his attorney "owed a higher duty to [him] due to [his] age." Eaves cites no authority for this proposition. Certainly, the Iowa Supreme Court has accepted the notion that juveniles may not appreciate the consequences of their actions to the same extent as adults and, at the same time, may be more capable of change than adults. *See State v. Pearson*, 836 N.W.2d 88, 96-97 (Iowa 2013). But the court has not accepted the broad assertion raised here that juveniles are "owed a higher duty" of representation in all circumstances. To the contrary, the recent spate of opinions on juveniles has been confined to the sentencing context. *See Miller v. Alabama*, 560 U.S. ---, ---, 132 S. Ct. 2455, 2464-69 (2012), *Graham v. Florida*, 560 U.S. 48, 68-69 (2010), *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005); *see also Pearson*, 836 N.W.2d at 95-97, *State v. Null*, 836 N.W.2d 41, 60-68 (Iowa 2013); *State v. Bruegger*, 773 N.W.2d 862, 877-78 (Iowa 2009). In the absence of authority supporting a

higher duty to investigate, we conclude counsel did not breach an essential duty in failing to recognize a higher duty owing to juveniles.

In any event, Eaves is hard-pressed to argue that he would have proceeded to trial based on this claimed breach. As noted, he faced up to fifty years on the original charges. The plea agreement afforded him a suspended two-year prison term, which Eaves agreed was a "pretty good deal." We conclude Eaves has not established the prejudice prong of this claim.

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

**AFFIRMED.**