IN THE COURT OF APPEALS OF IOWA

No. 3-973 / 13-0009
Filed December 5, 2013

ROBERT BOSCHERT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Robert Boschert appeals the district court's denial of postconviction relief from convictions after his guilty pleas to third-degree sexual abuse and lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Margaret Popp Reyes, Assistant County Attorney, for appellee State.

Heard by Vogel, P.J., and Potterfield and McDonald, JJ.

POTTERFIELD, J.

Robert Boschert pled guilty to third-degree sexual abuse and lascivious acts with a child. He now appeals the denial of his application for postconviction relief, contending his plea counsel and the plea court's failure to inform him he would face Iowa Code section 903B.1 (2007) lifetime parole rendered his guilty pleas unknowing and involuntary. Though not raised in the postconviction court, Boschert asks that we rule he need not prove prejudice to establish his plea counsel was ineffective. In the alternative, Boschert argues the postconviction court erred in concluding he failed to establish prejudice as a result of plea counsel's deficient performance.

We decline the invitation to amend the standard applied to a claim of ineffective assistance of guilty plea counsel, an issue not raised in the postconviction court. We find no reason to interfere with the district court's finding that Boschert failed to establish a reasonable probability he would have insisted on going to trial had counsel informed him of the lifetime parole. We therefore affirm.

I. Factual Background and Proceedings.

In December 2007, the State charged Boschert with six counts of sexual abuse in the third degree, in violation of Iowa Code section 709.4.

The parties eventually reached a plea agreement pursuant to which Boschert would plead guilty to the Count I charge of third-degree sexual abuse, in violation of Iowa Code sections 709.1(3) and 709.4(2)(b), a class 'C' felony, as well as an amended Count II charge of lascivious acts with a child, in violation of section 709.8(3). The plea agreement provided for an open sentence, leaving

the parties free to argue for concurrent or consecutive sentencing. At the plea hearing, March 17, 2008, the district court did not advise Boschert of the special sentencing provisions of Iowa Code sections 903B.1 and 903B.2.[1]

On April 28, 2008, the court sentenced Boschert to indeterminate terms of imprisonment not to exceed ten years on Count I and five years on Count II, with the sentences to be served consecutively. During the sentencing proceeding, the court stated:

> With respect to the Lascivious Acts With a Child, the five-year sentence, the Court is required, pursuant to code section 903B.2 to impose a special sentence which will take effect upon the completion of the underlying sentence, and that is a ten-year special sentence under that particular Code section.
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> Likewise, with respect to the Sexual Abuse Third sentence, the Court is required by virtue of code section 903B.1 to add a second sentence, a special sentence, which is a sentence of life, which is imposed, again, to take place once the underlying sentence is completed.

Boschert stated he "[m]ostly" understood the proceedings and did not have any questions for the court.[2] Boschert did not appeal.

On May 24, 2010, Boschert filed an application for postconviction relief, asserting (after amendment) plea counsel was ineffective in failing to (1) inform

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[1] Iowa Code section 903B.1 provides that a person convicted of a class 'C' felony or greater 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 the rest of the person's life, with eligibility for parole as provided in chapter 906." Section 903B.2 provides for a special sentence of ten years for persons convicted of a misdemeanor or class 'D' felony offense under chapter 709.

[2] At his deposition, Boschert asserted he whispered to his plea attorney during sentencing, asking what was going on with the lifetime sentence, but his attorney assured him that it was just a mistake and that he would take care of it. Boschert explained he did not ask the sentencing court about the life sentence because he understood it was just a misstatement by the court. Boschert testified that he did not file an appeal within thirty days of sentencing because he thought an appeal was just if he wanted to challenge the prison sentences of ten and five years, and he thought his attorney had taken care of the "lifetime thing."

him concerning the chapter 903B special sentences of parole, (2) file "appropriate motions," (3) file a notice of appeal, (4) stay in contact with Boschert, and (5) adequately inform Boschert about his rights to file a motion in arrest of judgment and to file an appeal.

On October 30, 2012, the postconviction court issued a ruling and determined Boschert was not informed of the special sentencing provisions of Iowa Code sections 903B.1 and 903B.2 at the time he pled guilty. Specifically, the postconviction court found plea counsel did not inform Boschert of the special sentences prior to the plea, and the plea court did not inform Boschert during the plea proceedings as required under Iowa Rule of Criminal Procedure 2.8(2)(b)(2). The court concluded plea counsel breached an essential duty in failing to inform Boschert and in failing to file a motion in arrest of judgment challenging the defect in the plea court's rule 2.8(2)(b) colloquy.[3]

However, the postconviction court also determined that Boschert did not meet his burden of proving, pursuant to *Hill v*. *Lockhart*, 474 U.S. 52 (1985), that he would have rejected the plea offer and insisted on going to trial if he had been informed of the special parole provisions of chapter 903B.

Pursuant to postconviction counsel's subsequent request that the court reconsider the portion of its ruling pertaining to the prejudice component of Boschert's claim, the court stated that even "[i]n the context of a guilty plea that was not knowingly and voluntarily entered," *Hill* requires the applicant to "prove that there is a reasonable probability that, but for counsel's error, he would have

[3] The postconviction court determined Boschert failed to prove his other claims. Boschert does not assert error regarding those claims.

rejected the plea bargain and instead would have chosen to go to trial."[4] The postconviction court again concluded Boschert had failed to satisfy the prejudice prong of his ineffective-assistance-of-counsel claim.

Boschert now appeals.

II. Scope and Standards of Review.

Generally, we review postconviction proceedings for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, applications raising an ineffective-assistance-of-counsel claim present a constitutional challenge, which we review de novo. *Id.*

III. Discussion.

A. Ineffective-assistance-of-counsel standard. Our supreme court recently outlined the type of claims that survive a guilty plea in *Castro*, 795 N.W.2d at 792-93:

> Generally, a criminal defendant waives all defenses and objections to the criminal proceedings by pleading guilty, including claims of ineffective assistance of counsel. *Wise v. State*, 708 N.W.2d 66, 70 (Iowa 2006). One exception to this rule involves

[4] Boschert asks that we rule he need not prove prejudice to establish his plea counsel was ineffective. He contends the United States Supreme Court has clarified *Hill* is not the proper formulation of the prejudice standard in every guilty plea case. *See Missouri v. Frye*, 132 S. Ct. 1399, 1410 (2012) ("*Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations."). Boschert argues the Supreme Court has not considered the question raised here: whether the prejudice requirement of a different outcome is satisfied where counsel's breach left the defendant actually uninformed of a direct consequence of his guilty plea, rendering the guilty plea unknowing, involuntary, and void under due process principles. However, Boschert did not raise this claim in the postconviction court; therefore, the claim is not properly before us and we do not address it. *See State v. Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012) ("We do not review issues that have not been raised or decided by the district court."); *State v. Rutledge,* 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.").

> irregularities intrinsic to the plea—irregularities that bear on the knowing and voluntary nature of the plea. *Id*.
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> In *State v*. *Carroll*, 767 N.W.2d 638, 642 (Iowa 2009), we clarified how the intrinsic-irregularity exception applies to postconviction relief claims of ineffective assistance of counsel predicated on the failure of counsel to perform certain pre-plea tasks that ultimately render the plea involuntary or unknowing. This clarification was a response to our opinion in *Speed v*. *State*, 616 N.W.2d 158 (Iowa 2000), in which we said "claims arising from . . . counsel's failure to investigate or file a motion to suppress do not survive the entry of a guilty plea." *Speed*, 616 N.W.2d at 159. In *Carroll*, we explained that ineffective-assistance-of-counsel claims survive the guilty plea when a postconviction relief applicant can show trial counsel breached a duty in advance of the guilty plea that rendered the plea involuntary or unintelligent. *Carroll*, 767 N.W.2d at 644.

The *Castro* court observed the distinction between ineffective-assistance-of-counsel claims that do not survive and those that do survive "is the existence of a showing that the pre-plea ineffective assistance of counsel rendered the plea involuntary or unintelligent." 795 N.W.2d at 793. The *Castro* court continued:

> The *component of the claim involving the voluntariness of the plea is largely tied to the prejudice element of all ineffective-assistance-of-counsel claims*. This element means criminal defendants who seek postconviction relief after pleading guilty *must establish the guilty plea would not have been entered but for the breach of duty by counsel*.

Id. (emphasis added) (citing *Carroll*, 767 N.W.2d at 644). The court restated, "[A]ll postconviction relief applicants who seek relief as a consequence of ineffective assistance of counsel must establish counsel breached a duty and prejudice resulted." *Id.* at 794. Thus, "[t]he burden to prove the prejudice element ultimately requires a postconviction relief applicant who has entered a plea of guilty to establish a reasonable probability of a different outcome (stand for trial instead of pleading guilty) if the breach had not occurred." *Id.* The *Castro* requirement that the postconviction relief applicant must establish breach

of duty *and* prejudice was recently reaffirmed in *Lamasters v*. *State*, 821 N.W.2d 856, 866 (Iowa 2012). We are obligated to follow the decisions of our supreme court. *See State v*. *Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *State v*. *Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent.").

B. *Breach of Duty*. The postconviction court determined Boschert was not informed of the special sentencing provisions of Iowa Codes sections 903B.1 and 903B.2 at the time he pleaded guilty. The postconviction court concluded plea counsel thus breached an essential duty in failing to properly inform Boschert and in failing to file a motion in arrest of judgment challenging the defect. This conclusion is consistent with our ruling in *State v*. *Hallock*, 765 N.W.2d 598, 605-06 (Iowa Ct. App. 2009) (rejecting the State's argument that section 903B.2 is a collateral consequence to a guilty plea and concluding plea counsel's failure to correct the plea court's failure to inform the defendant of the special sentencing was a breach of an essential duty).

C. *Prejudice*. Citing *State v*. *Myers*, 653 N.W.2d 574, 579 (Iowa 2002) (following *Hill*, 474 U.S. at 59), this court noted the defendant "must show a reasonable probability that, but for counsel's error, he would not have entered a plea and would have insisted on going to trial." *Hallock*, 765 N.W.2d at 606. Because Hallock did not assert he would have insisted on going to trial, and in light of the plea agreement's significant advantages, we concluded there was "no reasonable probability [the defendant] 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." *Id.*

Boschert contends he did prove the prejudice prong—he testified that had he known of the lifetime parole provision, "[t]here's no way" he would have entered the plea. The postconviction court concluded otherwise:

> As part of the plea agreement, the State amended Count II from Sexual Abuse in the Third Degree to Lascivious Acts with a Child. In addition, the State agreed to dismiss Counts III, IV, V, and VI, which were each Class C Forcible Felonies. Each of the counts being dismissed under the plea agreement carried a sentence of up to ten years in custody. Each of the counts being dismissed under the plea agreement required a custodial sentence rather than probation.
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> Applicant offered evidence in his deposition testimony that "there's no way" he would have pleaded guilty had he known of the lifetime special sentences. Boschert Dep. 65:6. June 6, 2012. Applicant explained that based on his past unsuccessful record with probation, he "clearly can't do probation," so he wouldn't "have taken that risk"[5] had he known of the special lifetime parole sentence. Boschert Dep. 65:8-23. June 6, 2012.
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> The plea agreement was highly favorable to Applicant. By taking the plea, Applicant avoided the imposition of a sentence of potentially sixty years in prison. The parties ultimately agreed to a sentence of ten years for [ ] Count I and a sentence of five years for the amended Count II, with the understanding the judge would determine whether these sentences should be served concurrently or consecutively. Even if the sentences of the plea agreement were to be served consecutively, Applicant reduced his potential sentence by forty-five years by accepting the plea agreement. In Applicant's own words, he explains his motivation for taking the plea:
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> > . . . I just weighed [it] out, you know, do I take the chance of the jury or the judge or whoever believing these people and me getting 60 years in prison as opposed to just going and doing two [based on his

[5] We observe the court's quote is a paraphrase. Boschert testified in an evidentiary deposition, taken after he had served about three and one-half years of his sentence:

> My whole outlook on life has changed in the last five or six years. I don't know if it's just because I've been off drugs for five or six years, but —
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> Q. So with your history of not being a very good probationer— A. I would never take that risk.

> attorney's calculation] and being home with my family[.] . . . So I didn't want to take the chance.
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> Boschert Dep. 23:21-25:2. June 6, 2012.
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> The preponderance of the credible evidence does not show that the Applicant would have rejected the plea offer and insisted on going to trial, had he been informed of the special parole provisions of Chapter 903B at the time he entered his guilty pleas. Under all the circumstances presented, the court finds no reasonable probability Applicant would have rejected the plea agreement and instead insisted on going to trial had he been informed of the special sentences of Iowa Code §§ 903B.1-903B.2.

Upon our de novo review, we do not interfere with the postconviction court's factual finding that the applicant failed to prove he would have rejected the plea agreement and instead insisted on going to trial had he been informed of the special sentences.

We appreciate the obstacles an applicant faces in meeting the burden of proof when the applicant's assertions that he or she would not have accepted the plea agreement and would not have pled guilty is judged in the context of the strength of the State's case or the advantages to the applicant of the plea agreement. Here, though, Boschert's claim is undermined by his own statements and the facts. Boschert was charged with six counts of third-degree sexual abuse for engaging in intercourse or oral sex with a twelve-year-old girl between November 17 and December 1, 2007. The minutes of evidence indicate spermatozoa were found on the girl's shorts and the DNA matched Boschert's profile. In addition, blood was found on the child's underwear. As noted by the postconviction court, Boschert was facing a possible term of incarceration of sixty years and was offered a plea agreement that would result in a ten-year and a five-year sentence. Boschert testified he accepted the plea offer because he "didn't want to take the chance" he would receive a sentence of sixty years. We

agree with the postconviction court's conclusion that Boschert has failed to prove he would have insisted on going to trial. We therefore affirm the denial of postconviction relief.

AFFIRMED.