IN THE COURT OF APPEALS OF IOWA

No. 1-750 / 10-1960
Filed November 9, 2011

ROOSEVELT MATLOCK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Roosevelt Matlock appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

James T. Peters, Independence, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

Roosevelt Matlock appeals the district court's dismissal of his application for postconviction relief (PCR). We affirm.

***I. Background Facts and Proceedings*.**

By trial information filed in September and amended in December 2003, Matlock was charged with willful injury as an habitual offender and going armed with intent as an habitual offender (FECR116785). Matlock was also charged with willful injury as an habitual offender and going armed with intent as an habitual offender (FECR117741) in October 2003 following a separate incident. Concerning the habitual offender enhancements, each charge on the trial informations alleged that Matlock was subject to the sentencing provisions under Iowa Code sections 902.8 and 902.9 (2003) for having been previously convicted of three prior class "C" felonies in Iowa. Matlock's convictions, their dates, the district courts where Matlock was convicted, and the case numbers were set forth in the informations.

Minutes of testimony were filed along with the trial informations containing, among other things, the names of various witnesses and the substance of the testimony they would give if called to testify. However, the minutes, including later amendments made thereto by the State in 2003, only set forth witnesses who would testify as to Matlock's current charges. There were no witnesses set forth or exhibits attached concerning Matlock's previous convictions.

On January 27, 2004, Matlock's charges in FECR116785 were set for trial. Before trial, the State made a record concerning a plea offer it made to Matlock, explaining it

> would basically allow Mr. Matlock to have a trial on the minutes as to FECR116785 as well as . . . [FECR117741] and would be requesting at the time of sentencing, should he be found guilty on the minutes, [forty-five] years.[1]

Matlock rejected the offer initially, basically requesting the State recommend less than a forty-five-year sentence. After the State clarified that, if found guilty on all counts by the jury, Matlock could possibly face the maximum sentence length of ninety years, Matlock agreed to the State's offer.[2] The court went over the agreement with Matlock on the record, and the following exchange occurred:

> THE COURT: [I]n waving a jury, I guess I have to make sure that you understand . . . that if you go ahead and we have a trial on the merits, I'll be deciding these cases based on what's in the minutes of testimony and in the court records rather than having a jury . . . .
>
> . . . .
>
> . . . . You're not pleading guilty; you're going to let me decide whether you're guilty or not based on the records here. You understand that?
>
> [MATLOCK]: Based on the records that you have.
>
> THE COURT: Yes, sir.
>
> [MATLOCK]: And what is that, the trial information?
>
> THE COURT: Yes, sir.
>
> [MATLOCK]: And—
>
> THE COURT: And the minutes of testimony that came along with it. Rather than have those people come in and testify.

---

[1] Matlock had previously been found guilty of willful injury as an habitual offender and going armed with intent as an habitual offender by a jury in January 2004 (FECR118993) involving a different incident, but had not yet been sentenced. The State's offer included that it would recommend a fifteen-year sentence for each of the six counts charged in the three felony cases, FECR116785, FECR117741, and FECR118993. *See* Iowa Code § 902.9(3) ("An habitual offender shall be confined for no more than fifteen years."). However, the State agreed it would recommend that the two counts in each of three felony cases run concurrently with each other, and that the fifteen-year sentence in each felony case run consecutively, for a total sentence of forty-five years.

[2] The possible ninety-year sentence was derived from a potential fifteen year sentence for each of the six counts charged in the three felony cases. *See* Iowa Code § 902.9(3).

Matlock then signed a waiver of right to jury trial form, stating he understood his rights and requesting his cases be heard by the court. The court next went over the form with Matlock on the record:

> THE COURT: So, the first line indicates that you do know that you've been charged with willful injury and going armed with intent and being an habitual offender in each of [the] cases and the case numbers listed. You understand that?
> [MATLOCK]: In being a habitual offender?
> THE COURT: Yes, yes. In each of the . . . cases.
> [MATLOCK'S COUNSEL]: You understand that those are the existing charges.
> [MATLOCK]: Right.
> THE COURT: Yes, you understand that.
> [MATLOCK]: Right.

The court accepted Matlock's waiver and stated it would "hear or try the case on the minutes here" and would issue a ruling in the case. The court stated it would "use the minutes of testimony to decide about the prior convictions that have to do with being an habitual offender" and it would then issue a written ruling. The court stated it would "take the minutes of testimony and the remaining court files" and later issue its ruling.

After the record was closed, the State realized the minutes of testimony it had filed in the cases did not include information concerning Matlock's prior convictions. The State then filed a motion to amend the minutes of testimony in the cases to include witnesses regarding and records of Matlock's prior convictions. The motion to amend stated Matlock and the State "both believed that the minutes of testimony were filed regarding the witnesses for the habitual offender." The State argued that Matlock "was not asserting any claim that the minutes did not support the habitual offender allegation which [was] merely a sentencing enhancement" and that there was no prejudice to Matlock in granting

the State's motion because the amendment was "in accordance with the [parties'] belief and intent."

The next day, January 28, 2004, the district court at 3:39 p.m. filed findings of fact, conclusions of law, and judgment in both cases. In the rulings, the court granted the State's motion to amend the minutes of testimony, explaining:

> Following the hearing on [Matlock's] waiver of trial by jury, the State filed a motion to amend minutes of testimony to include the witnesses and the evidence of [Matlock's] prior convictions. However, the offenses on which the sentencing enhancement is based and the counties where the offences occurred were set out in the trial information which has been on file since November 20, 2003, and [Matlock] can neither be surprised nor prejudiced by the amended minutes.

The court found Matlock guilty on all counts as an habitual offender and set a date for sentencing on the convictions.

About twenty minutes after the district court filed its rulings, Matlock filed a resistance to the State's motion to amend the minutes of testimony. Matlock argued that he would be prejudiced by the amendment "as the court would not be able to find beyond a reasonable doubt that [Matlock] is a habitual offender without the amendment to the minutes," in violation of Iowa Rule of Civil Procedure 2.4(8)(*a*). No other motions or rulings were made concerning Matlock's resistance. Matlock was later sentenced by the district court.

Matlock appealed the district court's judgment and sentences in both cases, and the cases were remanded by this court for resentencing, based upon error not at issue here. *See State v. Matlock*, No. 04-0405 (Iowa Ct. App. Aug.

17, 2005). Matlock was later resentenced in both cases by the district court, and he again appealed. His second appeal was dismissed as frivolous.

Thereafter, on May 25, 2007, Matlock filed a pro se application for PCR raising numerous grounds. He filed a supplemental pro se PCR application on November 18, 2008, asserting, among other things, that his appellate counsel was ineffective in failing to raise a claim that the trial court erred in allowing the State to add minutes of testimony outside the stipulated facts of the parties. On September 30, 2010, almost two years later, hearing was held on Matlock's PCR claims. The district court dismissed Matlock's application by order dated October 27, 2010. As to the late amendment of the minutes of testimony, the court found Matlock was not prejudiced by the amendment because the original trial information alleged Matlock to be an habitual offender and his waiver of right to jury trial specifically included Matlock was an habitual offender.

Matlock now appeals.

II. Scope and Standards of Review.

"We normally review postconviction proceedings for errors at law." *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, we review PCR applications that allege constitutionally-based ineffective-assistance-of-counsel claims de novo. *Id*.

III. Discussion.

On appeal, Matlock contends the trial court, without hearing or opportunity to be heard by Matlock, summarily granted the State's motion to amend the minutes of testimony, and entered findings of fact and conclusions of law finding Matlock of the charges as an habitual offender. Matlock essentially argues he

agreed to trial by the court based on the minutes of testimony on file, and the court's allowance of the amendment to the minutes of testimony violated Matlock's due process rights to a fundamentally fair trial. Because his appellate counsel did not assert this claim, he contends his counsel rendered ineffective assistance of counsel. We disagree.

To succeed on an ineffective-assistance-of-counsel claim, Matlock "must prove: (1) his counsel failed to perform an essential duty and (2) prejudice resulted from such failure." *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Although Matlock must prove both failure to perform an essential duty and resulting prejudice, if his claim lacks the necessary prejudice, we "can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently." *Id*. at 851 (quoting *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008)). To establish prejudice, Matlock must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 850 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). Matlock "need only show that the probability of a different result is 'sufficient to undermine confidence in the outcome" to establish a reasonable probability that the result would have been different. *Id*. (quoting *State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003)).

Here, even assuming without deciding that Matlock's appellate counsel failed to perform an essential duty in not raising the claim, we agree with the State that Matlock cannot establish the requisite prejudice. The trial informations in both cases charged Matlock as an habitual offender. The form Matlock signed

agreeing to waive his right to a jury trial clearly stated he was charged as an habitual offender. The trial court's colloquy with Matlock concerning whether he wished to waive his rights to a jury trial clearly advised Matlock that the State sought enhancement of the crime's punishment based upon his past convictions, and Matlock's responses indicate that he understood he was charged as a habitual offender.

The State alleged in its motion to amend minutes of testimony that "[Matlock] and the State both believed that the minutes of testimony were filed regarding the witnesses for the habitual offender." In resisting the motion, Matlock did not challenge this allegation, but only asserted "the court would not be able to find beyond a reasonable doubt that [Matlock] is a habitual offender without the amendments to the minutes." Indeed, in his pro se supplemental PCR application, Matlock states: "Of course, *although true*, the district court did rule that '[Matlock] can neither be surprised nor prejudiced by the amended minutes.'" This belies Matlock's assertion on appeal "that prejudice did in fact result."

The amendment to minutes thereafter did not subject Matlock to a new offense; it merely concerned the punishment enhancement of his sentences. *See State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000).

> When a defendant faces a charge that imposes an enhanced penalty for prior convictions, our law, in turn, imposes a two-stage trial. This procedure, adopted by our legislature some forty years ago, was designed to ensure a fair trial and combat the unfair prejudice visited upon the defense by the past practice of permitting prior conviction allegations to be submitted to a jury at the same time as the current charge.

State v. Kukowski, 704 N.W.2d 687, 691 (Iowa 2005) (internal citations omitted). Iowa Rule of Criminal Procedure 2.19(9)[3] sets forth procedures for the determination of a defendant's habitual offender status, providing:

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. . . . If. . . the offender acknowledged being such person, the offender shall be sentenced as prescribed in the Code.

Matlock could have challenged his habitual offender status after the court entered its ruling granting the State's motion to amend and finding Matlock guilty of the offenses charged in the trial informations.[4] However, upon our de novo review of the record, Matlock has never disputed that he had three prior class "C" felony convictions, as set forth in the trial informations, or that he has any defense to the allegation of being a habitual offender. Accordingly, we agree with the district court that because the amendment did not charge a new or different offense, but merely constituted a predicate for enhanced punishment of which Matlock was aware and could have later challenged, Matlock failed to establish prejudice resulted from his appellate counsel's failure to challenge the

[3] Rule 2.19(9) has not been substantively amended since 2003. *See* Iowa R. Crim. P. 2.19(9) (2003).

[4] It appears Rule 2.19(9) was not followed. It would have been better practice for the court, even with a waiver of right to trial by jury, to have followed the directions of the rule.

trial court's grant of the State's motion to amend the minutes of testimony. We therefore affirm the district court's dismissal of Matlock's PCR application.

AFFIRMED.