IN THE COURT OF APPEALS OF IOWA

No. 2-1036 / 12-1109
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NELSON MESSIAH HUMES,
Defendant-Appellant.

Appeal from the Iowa District Court for Calhoun County, Thomas J. Bice (plea) and Kurt L. Wilke (sentencing), Judges.

Nelson Humes contends his trial counsel was ineffective for advising him to enter into a plea agreement with a sentencing recommendation by the State for which the court had no authority to grant. **CONVICTION AND SENTENCE VACATED, CASE REMANDED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Cynthia Voorde, County Attorney, for appellee.

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

DOYLE, P.J.

Nelson Humes was an inmate serving a ten-year sentence at the North Central Correctional Facility when he assaulted and seriously injured another inmate. Humes was charged by trial information with willful injury in violation of Iowa Code section 708.4(1) (2011), a class "C" felony, which carries a maximum penalty of ten years confinement. *See* Iowa Code § 902.9(4).

The State offered Humes a plea agreement, and Humes accepted. In its colloquy with the court, the State explained the agreement to the plea judge: "It's my understanding that today [Humes] is prepared to plead guilty to the charges as filed, and the plea agreement is that the sentence would run concurrent with his current sentence." Humes's counsel responded: "The [State] has properly outlined the plea agreement between the parties." After a factual basis for the plea was established, the court accepted Humes's plea of guilty and set the matter for sentencing.

In accordance with the plea agreement, the State recommended at sentencing that Humes "receive a ten-year sentence and that sentence be run concurrent with his prison sentence that he's currently serving." The State explained, after the court questioned why it made the concurrent recommendation in view of the fact this was a separate incident from the crime for which Humes was originally convicted:

> It's just the reasonable plea agreement given the factual basis of the case.
>
> There was also a lesser offense that I propose, which is assault causing serious injury, which would have been a five-year sentence and I would have asked for that to be consecutive. And [Humes] chose to plead his charge and I agreed, as part of the agreement, to recommend ten years concurrent.

Humes's counsel advised the court that the State had "correctly outlined" the plea agreement. Thereafter, the court sentenced Humes to an indeterminate term of incarceration not to exceed ten years, and it rejected the State's recommendation of concurrent sentences. In imposing a consecutive sentence, the judge explained "this is a separate incident from the original charge, and I see no need why we should run concurrent sentences, particularly when he's already serving time in prison for one charge and then engaged in other criminal activity while he is incarcerated."

Humes now appeals. He claims his counsel rendered ineffective assistance in advising him to enter into a plea agreement with the State "for a meaningless sentencing recommendation—one which the court had no authority to grant." We review claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). In order to prove his counsel was ineffective, Humes must show both that (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *See State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To show prejudice under the second prong, Humes must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Utter*, 803 N.W.2d at 654. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* While we do not normally address claims of ineffective assistance on appeal, we will do so where the record is sufficient. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). We find this record sufficient.

A defendant may challenge the voluntary and intelligent nature of his or her guilty plea by proving "the advice he . . . received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases." *Utter*, 803 N.W.2d at 651 (quoting *State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009)). Here, the sentencing recommendation was in fact illusory because the sentencing court had no discretion to impose a concurrent sentence. Iowa Code section 901.8 provides in part: "If the person is sentenced . . . for a crime committed while confined in a detention facility or penal institution, the sentencing judge *shall* order the sentence to begin at the expiration of any existing sentence." (Emphasis added.) It is apparent from the record that Humes was not advised by his counsel that the court had no authority, pursuant to section 901.8, to grant a concurrent sentence. Counsel's failure to give such advice amounted to a failure to perform an essential duty. *See Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983) (holding an attorney's performance fell below the range of normal competency because he gave the defendant inaccurate legal advice, which the defendant relied on in waiving trial and pleading guilty).

Additionally, Humes was prejudiced by his counsel's failure to perform an essential duty. The State's plea offer gave Humes two choices: plead to the lesser offense[1] with a five-year consecutive sentence recommendation or plead to the charged offense with a ten-year concurrent sentence recommendation. He declined to plead guilty to the lesser charge with the consecutive sentence

[1] Assault causing serious injury is a class "D" felony. Iowa Code § 708.2(4). A class "D" felony carries a maximum penalty of five years confinement. Iowa Code § 902.9(5).

recommendation, and elected to plead guilty to the charged offense with the concurrent sentence recommendation. If Humes knew that the court had no authority to run his sentence concurrently, it is axiomatic that he would not have pled guilty as charged—he would have either plead to the lesser charge with the shorter sentence or he would have insisted on going to trial.

Therefore, we find Humes would not have pled guilty to the charged offense had he known the court was required to impose a sentence consecutive to the one he was currently serving. Consequently, he did not enter into the plea voluntarily or intelligently. Thus, a reasonable probability exists that, but for counsel's ineffective assistance, the result of the proceeding would have been different.

Because we conclude Humes did not enter his guilty plea voluntarily or intelligently, we vacate his guilty plea, conviction, and sentence and remand the case for further proceedings.

CONVICTION AND SENTENCE VACATED, CASE REMANDED.