**IN THE COURT OF APPEALS OF IOWA**

No. 7-141 / 06-0736
Filed April 11, 2007

**THOMAS DODGE,**
Applicant-Appellant,

**vs.**

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

---

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge.

Applicant-appellant Thomas Dodge appeals from the denial of postconviction relief. **AFFIRMED.**

Philip Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**EISENHAUER, J.**

Applicant-appellant Thomas Dodge appeals from the denial of postconviction relief. Dodge claims (1) his counsel was ineffective in connection with the advice about a plea offer from the State, and (2) his consecutive sentences are illegal in violation of the Double Jeopardy Clause of the United States and Iowa Constitutions. We affirm.

**BACKGROUND FACTS AND PROCEEDINGS.**

In May 1999, Dodge was charged with drug offenses in a multi-count trial information, including count I, manufacturing methamphetamine more than five grams as a second offense, count II, receipt of a precursor with intent to manufacture as a second offense, count III, possession of pseudoephedrine with intent to manufacture, and count IV, violation of the tax stamp requirement. Counts I, II and III were subject to enhancement for Dodge's prior drug felony. This enhancement allows the court to triple the length of a sentence. In addition, because Dodge had two prior felonies, counts II, III and IV were subject to enhancement for his habitual offender status. Pursuant to *State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998), the sentencing court had discretion to employ the two enhancements at the same time on counts II and III, and apply the triple enhancement to the sentences Dodge received as a habitual offender.

The case went to trial in August 1999. At the close of the trial, the State withdrew count IV. The jury found Dodge not guilty of count II. However, Dodge was found guilty of a lesser included offense of count I: manufacturing less than five grams of methamphetamine. He was sentenced to twenty years for this count. Dodge was also found guilty of count III, possession of pseudoephedrine

with intent to manufacture, and was sentenced to fifteen years with the habitual violator enhancement. The sentencing court specifically declined to enhance the sentence for count III as a second drug offense. It did, however, order the two sentences to be served consecutively, giving Dodge a total of thirty-five years in prison.

On direct appeal we affirmed the conviction and sentence. *State v. Dodge*, No. 99-1503 (Iowa Ct. App. Sept. 27, 2000). Further review was denied by the Iowa Supreme Court. Dodge then filed this postconviction relief action. The district court denied the relief after a hearing. Dodge appeals, presenting two claims: (1) he received ineffective assistance of counsel in connection with the advice he received about a plea offer from the State, and (2) his consecutive sentences were illegal in violation of the Double Jeopardy Clause of the United States and Iowa Constitutions.

**INEFFECTIVE ASSISTANCE OF COUNSEL.**

The State made a plea offer to Dodge: Dodge could plead guilty to count I without enhancement and the State would dismiss the other charges. Count I carried a sentence of up to twenty-five years in prison. It could be tripled to seventy-five years with enhancement for his prior drug offense. Dodge testified at the postconviction hearing that the State also made a twenty-year offer right before trial. However, neither Dodge's attorney nor the prosecutor had recollection of the second offer. Record of this offer has never been located.

Dodge discussed the plea offer with his counsel. Being confident that the State only had sufficient evidence to convict him on count III, Dodge's discussion with counsel focused on the potential sentence on count III. Without knowledge

of *State v. Sisk*, counsel advised Dodge that it was still a debatable issue whether the two enhancements can be applied at the same time. Dodge claims this inaccurate advice misled him to think that he was only facing fifteen years for count III. He further claims that had counsel done adequate research and advised him that he could be facing forty-five years in prison on count III, he would have accepted the plea bargain. He contends he was prejudiced by counsel's misconduct; therefore he is entitled to plead guilty as offered by the State.

We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To succeed with a claim of ineffective assistance of counsel, a defendant typically must prove the following two elements: (1) counsel failed to perform an essential duty, and (2) defendant was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The court need not address both components if the defendant makes an insufficient showing on either of the prongs. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

In the present case, we first address the prejudice element. The prejudice prong is satisfied if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Dodge asserts the prejudice is that he did not accept the guilty plea. He claims that if counsel's advice was accurate and adequate, he would have pled guilty to count I to avoid the potential forty-five years penalty on count III. His assertion raises the question whether this strategic guilty plea would have been successful. We find it would not. A

guilty plea is an admission of crime. It is itself a conviction. *State v. Straw,* 709 N.W.2d 128, 138 (Iowa 2006). One cannot plead guilty to a crime he did not commit. Iowa Rule of Criminal Procedure 2.8(2)(*b*) (1999) expressly provides that "the court . . . shall not accept a plea of guilty without first determining that the plea . . . has a factual basis." The Iowa Supreme Court also emphasizes the importance of the factual basis requirement in a guilty plea and prohibits the defendant from pleading guilty for strategic reasons. *See State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). The supreme court commented in *Hack* that allowing a plea that was not supported by the record made violated the letter and spirit of Rule 2.8(2)(*b*), and eroded the integrity of all pleas and the public's confidence in our criminal justice system. *Id.*

In this case, the plea offer only allowed Dodge to plead guilty on count I, manufacturing methamphetamine more than five grams[1]. Dodge never acknowledged guilt on that count. In fact, he was confident that he would not be convicted on count I. The verdict eventually confirmed his belief. The jury found he was not guilty on count I because the State failed to prove the five-gram quantity element.[2] Under this circumstance, even if Dodge had attempted to plea guilty to count I, the court, acting as a fact-finder, would have found there was not sufficient evidence to establish the required quantity element and rejected the plea for lack of factual basis. Therefore, we conclude that Dodge never had a valid plea offer that he could have accepted.

---

[1] The records show that Dodge once proposed to plead guilty on count III with fifteen years. The State rejected this bargain.

[2] The lab technician testified in deposition that there was not five grams of methamphetamine.

In addition, the record suggests Dodge would not have pled guilty even if the advice had been accurate. A guilty plea is not a game. After having made a choice that falls short of his expectations, the defendant cannot take a second bite at the apple simply by claiming ineffective assistance of counsel. Because of the clear self-serving nature of this assertion, we go beyond the assertion and carefully consider the circumstances surrounding the plea to determine whether Dodge would have gone to trial had counsel's performance been adequate. We find the record is contrary to Dodge's assertion. At the postconviction hearing, Dodge made the following statement explaining why he had rejected the plea offer,

> [T]he worst I could get is the 30 for the receipt of pseudoephedrine. . . . I mean what judge is going to give me 30 years with all these enhancements on a 10-year sentence? I mean I would think any judge wouldn't give me more than 20 on a 10 year sentence, you know, for the little bit of drug --- the one drug charge I had prior to that and that I was going to get more than 15 or 20. So I said: Why would I take that?

Although this statement was made in the context of his understanding as to count II, it clearly suggests that Dodge never believed the judge would triple the sentence. Dodge would not have taken the plea offer even if he had known the potential maximum sentence was forty-five years, because he did not believe the judge would apply this maximum sentence to him.

From the above analysis, we conclude that Dodge could not have and would not have pled guilty as offered by the State even if the he had received adequate advice from counsel. He was not prejudiced; therefore, his ineffective assistance of counsel claim fails. We need not address the first prong of the test.

**DOUBLE JEOPARDY.**

Dodge also claims it was a violation of the Double Jeopardy Clause of the United States and Iowa constitutions to sentence him for both manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture. Dodge raised the same issue as a claim of ineffective assistance of counsel on direct appeal. *State v. Dodge*, No. 99-1503 (Iowa Ct. App. Sept. 27, 2000). We ruled then that there was no violation of the merger doctrine since each offense of which Dodge was convicted contained an element not found in the other, and that double jeopardy did not apply to these two different crimes. *Id.* We conclude that we already decided the substance of this issue, and will not reconsider it in this postconviction proceeding.

**AFFIRMED.**