IN THE COURT OF APPEALS OF IOWA

No. 7-752 / 06-1866
Filed October 24, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUNDELL EARLEST BUCHANAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, David Fahey (plea) and Mary Ann Brown (sentencing), Judges.

Lundell Earlest Buchanan appeals his conviction and sentence, following a guilty plea, for possession of cocaine, third offense. **AFFIRMED.**

Jeffrey M. Lipman of Lipman Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Darin Stater, County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Lundell Earlest Buchanan appeals his conviction and sentence, following a guilty plea, for possession of cocaine, third offense. He claims the district court incorrectly ordered his sentence to run consecutively to a previous sentence, because in accepting his plea of guilty the court did not advise him of the possibility of a consecutive sentence. More specifically, he claims his plea of guilty was therefore not voluntarily and intelligently made, as required by Iowa Rule of Criminal Procedure 2.8(2)(*b*) and due process of law. He also claims his trial counsel was ineffective for failing to bring the sentencing issue to the court's attention and failing to file a motion in arrest of judgement. We affirm Buchanan's conviction and preserve his ineffective assistance claim for a possible postconviction proceeding.

In September 2006 the parties agreed that Buchanan would be allowed to plead guilty to possession of cocaine, third offense, in violation of Iowa Code section 124.401(5) (2005) (a class "D" felony), a lesser-included offense of the charge of possession cocaine with intent to deliver (a class "C" felony), and the State would withdraw that part of its charge which alleged Buchanan was subject to sentencing as an habitual offender based on prior felony convictions. The parties also agreed to "jointly recommend a five-year prison sentence and that it would run concurrently with the charges that [Buchanan]'s presently serving time on." At the time of the plea agreement Buchanan was already serving sentences for a Linn County conviction for assault with intent to commit sexual abuse and a Johnson County drug conviction.

At the plea proceeding the district court mentioned the joint recommendation for a concurrent sentence. However, the court did not inform Buchanan that the maximum possible sentence for the current charge was five years, that the sentencing court could reject the parties' recommendation, or that the sentence imposed on Buchanan's plea of guilty could be ordered to run consecutively to his existing sentence. The court did advise Buchanan of his right to file a motion in arrest of judgement. No motion in arrest of judgment was filed.

In October 2006 the court sentenced Buchanan to five years in prison, to be served *concurrently* with the Linn County sentence and *consecutively* to the Johnson County sentence. The court's rationale was that Buchanan's sexual assault conviction involved behavior unrelated to the case at hand, but his current drug offense showed he had not learned from his prior drug conviction, thus justifying a consecutive sentence. Buchanan appeals, raising the claims previously identified.

Although generally failure to move in arrest of judgment following a guilty plea bars a direct appeal from a conviction, that failure does not bar a challenge to a guilty plea if it resulted from ineffective assistance of counsel. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). Accordingly, we will address Buchanan's claim as an ineffective assistance of counsel claim.

When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa

1998). To prove trial counsel was ineffective the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez,* 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

> Due process requires the defendant enter his guilty plea voluntarily and intelligently. "If a plea is not intelligently and voluntarily made, the failure by counsel to file a motion in arrest of judgment to challenge the plea constitutes a breach of an essential duty." In order to ensure a guilty plea is voluntarily and intelligently made, the court must articulate the consequences of the plea to the defendant.

State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006) (citations omitted). Iowa Rule of Criminal Procedure 2.8(2)(*b*) provides the court with a blueprint for a guilty plea proceeding. The rule provides in relevant part:

> Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> . . . .
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

Substantial compliance with this rule is required. *Straw,* 709 N.W.2d at 134; *State v. Kirchoff,* 452 N.W.2d 801, 804 (Iowa 1990).

The State here suggests that this case is factually indistinguishable from *Straw*, and concedes that the district court did not substantially comply with rule 2.8(2)(*b*)(2) when it did not mention during the plea colloquy the maximum possible punishment Buchanan could face by pleading guilty to the charge in this case.[1] Accordingly, when Buchanan's attorney did not bring this matter to the court's attention or file a motion in arrest of judgement on this ground his counsel failed to perform an essential duty. *Straw,* 709 N.W.2d at 134.

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[1] While we accept the State's concession for this case, we do not necessarily agree the facts of this case are indistinguishable from those in *Straw*. In *Straw*, in the case before the district court the defendant pled guilty to and was sentenced on two separate charges. *Straw,* 709 N.W.2d at 131. The court ordered the sentences on the two convictions to run consecutively to each other and consecutively to a sentence on a separate, unrelated conviction. *Id.* (It is unclear from *Straw*, however, whether the plea and sentencing in the unrelated case occurred together with the pleas and sentencings in the case before the court or occurred at a different time, a different location, or both.) *Straw* relies in part on *State v. White,* 587 N.W.2d 240, 246 (Iowa 1998), in which the defendant pled guilty to and was sentenced on two separate charges. In *White* our supreme court concluded that due process requires district courts to expressly inform defendants of any possibility that sentences on more than one charge might be ordered to be served consecutively.

The facts in this case are arguably distinguishable from those in *White* and *Straw* because Buchanan pled guilty to and was sentenced on only one charge in this case. Accordingly, because of the differences between the multiple charges, pleas, and sentences involved in the cases before the district court in *White* and *Straw* and the single charge, plea, and sentence involved in the case before the district court here, we find it unnecessary to decide whether the holdings of *White* and *Straw* should be extended to cases involving a single charge, plea, and sentence.

Buchanan requests that we adopt the reasoning of the dissent in *Straw* and apply a prejudice per se rule to this breach of an essential duty. *See Straw*, 709 N.W.2d at 138-45 (Lavorato, C.J., dissenting). We decline to do so.

As set forth above, Buchanan can succeed on his ineffectiveness claim only by establishing *both* that his counsel failed to perform an essential duty and that prejudice resulted. *Wemark*, 602 N.W.2d at 814; *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985). There is nothing in the record before us as to whether Buchanan's trial counsel told him about the possibility of consecutive sentences. Such evidence of whether Buchanan was aware of that possibility is significant to any prejudice analysis. *See Straw*, 709 N.W.2d at 138. As in *Straw*,

> This case exemplifies why claims of ineffective assistance of counsel should normally be raised through an application for postconviction relief. In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing.

Id.

We affirm Buchanan's conviction and preserve his above-described claim of ineffective assistance of counsel for a possible postconviction relief proceeding.

AFFIRMED.