IN THE COURT OF APPEALS OF IOWA

No. 8-755 / 07-0168
Filed October 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN BRUCE ROWLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Hamilton County, William J. Pattinson, Judge.

Defendant appeals his sentences for the crimes of second-degree murder and willful injury and the denial of his claim for postconviction relief. **AFFIRMED.**

Patrick C. Peters of Payer, Hunziker, Rhodes & Peters, L.L.P., Ames, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Patrick Chambers, County Attorney, and Jonathan Beaty, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

Steven Rowley was charged with one count of first-degree murder for the death of his wife, Kathryn. Rowley subsequently entered into a plea agreement with the State whereby the trial information was amended to charge him with two counts: second-degree murder, in violation of Iowa Code section 707.3 (1995); and willful injury, in violation of section 708.4. Rowley entered *Alford* pleas to both charges.[1] The parties agreed the district court could find a factual basis for the pleas in the minutes of testimony. Rowley was sentenced to a term of imprisonment not to exceed fifty years on the second-degree murder charge, and ten years on the willful injury charge, to be served consecutively. Rowley's direct appeal was dismissed as frivolous. *See* Iowa R. App. P. 6.104.

On March 9, 2000, Rowley filed a 102-page pro se application for postconviction relief. One of the many issues raised in the application was the claim that his defense attorneys should have filed a motion in arrest of judgment to challenge his guilty pleas. The application stated, "Both before and during the hearing Plaintiff's attorneys reiterated the information received that Plaintiff would actually only serve about 110 months, or about 10-12 years." Rowley also stated, "A large part of Plaintiff's decision was, in fact, based on the notion that the time actually served would be about five years to 110 months."

The district court determined Rowley had failed to show he received ineffective assistance due to his counsel's failure to file a motion in arrest of

[1] In an *Alford* plea a defendant pleads guilty, but does not admit liability for the underlying facts of the criminal prosecution. *See North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970).

judgment. The court denied Rowley's request for postconviction relief. Rowley's appeal was dismissed by order of the Iowa Supreme Court under Iowa Rule of Appellate Procedure 6.104, based on the court's conclusion the appeal was frivolous.

Rowley filed a second application for postconviction relief on October 10, 2002.[2] The district court granted summary judgment to the State, finding the application was untimely under the three year statute of limitations found in section 822.3. We affirmed the decision of the district court, noting "It is clear Rowley's claims could have been raised in the first postconviction action, and in fact were raised in that action." *Rowley v. State*, No. 04-0799 (Iowa Ct. App. Apr. 28, 2005).

On June 23, 2004, while the appeal on the second postconviction action was pending, Rowley filed a motion to correct an illegal sentence. He claimed that willful injury is actually a lesser included offense of second-degree murder, and that under section 701.9 the sentence for willful injury should merge into the sentence for second-degree murder. The district court determined it did not have jurisdiction to consider the motion because of the pending appeal. Rowley appealed that decision. In the meantime, an opinion had been filed in the second postconviction appeal, and we remanded the case to the district court for a ruling on the merits of Rowley's motion. *See State v. Rowley*, No. 04-1394 (Iowa Ct. App. Mar. 1, 2006).

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[2] The second postconviction action raised issues relating to judicial misconduct by the presiding judge at the time of the plea negotiations.

On remand Rowley filed a motion to amend to include an application for postconviction relief (third postconviction action). He claimed he received ineffective assistance because defense counsel provided him with incorrect and misleading information about how much time he would actually have to serve on his sentences. He asserted that if he had been correctly informed about how long he would have to serve in prison before he was paroled, he would not have pled guilty.

The district court entered a ruling on December 28, 2006, denying Rowley's motion to correct an illegal sentence. The court determined willful injury is not a lesser included offense of second-degree murder because the crime of willful injury requires a specific intent to cause bodily injury that creates a substantial risk of death, and second-degree murder does not have this specific intent element. In the alternative, the court found Rowley knowingly pled guilty to two separate crimes, and the minutes of testimony provided factual support for two separate and distinct offenses. The court set for a separate hearing Rowley's application for postconviction relief.

Rowley appealed the court's decision on his motion to correct an illegal sentence. The district court concluded it no longer had jurisdiction to consider the third application for postconviction relief. The Iowa Supreme Court granted Rowley's motion for a limited remand to permit the district court to address this issue. The State argued Rowley's claim was barred by section 822.3. The district court addressed the issue on the merits, finding the defense attorneys made no promises that Rowley would serve a certain amount of time. The court

found, "I do not believe that Mr. Rowley relied upon any estimation of his incarceration and further I do not find that any such reliance would have been warranted under the circumstances."

II. Illegal Sentence

Rowley contends the district court erred by refusing to grant his motion to correct an illegal sentence. An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(*a*). A failure to follow the merger statute, section 701.9, creates an illegal sentence because "[w]here a lesser-included offense is merged with the greater offense, a conviction on the lesser-included offense is void." *See State v. Anderson*, 565 N.W.2d 340, 344 (Iowa 1997). We review the district court's decision for the correction of errors at law. *See State v. Bullock*, 638 N.W.2d 728, 731 (Iowa 2002).

Section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Rowley claims willful injury under section 708.4 is a lesser included offense of second-degree murder under section 707.3, and under section 701.9 his conviction for willful injury should be merged into his conviction for second-degree murder.

We first express doubt that willful injury is a lesser included offense of second-degree murder. Second-degree murder requires only general criminal intent. *State v. Klindt*, 542 N.W.2d 553, 555 (Iowa 1996). On the other hand,

willful injury is a specific intent crime. *State v. Smith*, 739 N.W.2d 289, 292 (Iowa 2007). The crime of willful injury has as an element the specific intent to cause serious injury to another. Iowa Code § 708.4; *State v. Floyd*, 466 N.W.2d 919, 924 (Iowa Ct. App. 1990). Rowley argues the requirement of malice aforethought in second-degree murder is the equivalent of the specific intent element of willful injury. We note, however, "intent to cause serious injury and malice aforethought remain distinct elements, and the presence of one does not establish the other." *State v. Escobedo*, 573 N.W.2d 271, 279 (Iowa Ct. App. 1997).

Even if willful injury is a lesser included offense of second-degree murder, Rowley is not benefitted because the evidence supports his guilty plea to two separate crimes. Section 701.9 does not apply when there are two separate and distinct crimes. *State v. Bundy*, 508 N.W.2d 643, 643-44 (Iowa 1993). Whether one offense is a lesser included offense of another is irrelevant when the State files the two charges as separate offenses and proves them both. *State v. Truesdell*, 511 N.W.2d 429, 432 (Iowa Ct. App. 1993). "Where the alleged acts occur separately and constitute distinct offenses there can be no complaint that one is a lesser included offense of the other." *State v. Spilger*, 508 N.W.2d 650, 652 (Iowa 1993).

Where a defendant pleads guilty to two crimes, the record must minimally support a factual basis for two separate crimes. *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000). An *Alford* plea is conditioned on the court's ability to find

factual support for every element of the offense in the record from sources other than the defendant. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

At the plea proceedings, the parties agreed the court could consider the minutes of testimony to provide the factual basis for Rowley's guilty pleas. The medical examiner determined Kathryn had several injuries to her head, and defense-type injuries to her arms. Thus, there was evidence that Rowley struck several blows at Kathryn, one of which was intended to cause serious injury, and another which resulted in her death. There was evidence that noises from the Rowleys' apartment would end at times and then start up again. We also note that the parties' plea agreement was that Rowley would plead guilty to two separate and distinct crimes, and the trial information was specifically amended to conform to the plea agreement.

We conclude Rowley has not shown the district court erred by denying his motion to correct an illegal sentence. Rowley was properly sentenced for two separate offenses.

III. Postconviction Relief

Rowley claims the district court should have granted his application for postconviction relief based on his claim of ineffective assistance of counsel during the plea proceedings. He asserts his claim is not barred by the three-year limitations period in section 822.3 because he did not know he received erroneous advice from his attorneys about how much time he would serve on his sentence until that specific time period had expired. On the issue of whether a

postconviction action is time barred, we review for the correction of errors at law. *State v. Harrington*, 659 N.W.2d 509, 519 (Iowa 2003).

The State raised the issue of the application of section 822.3 before the district court, and we conclude this issue has been preserved for our review. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). The relevant portion of section 822.3 provides:

> All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

Newly discovered evidence is a ground that "could not have been raised" previously. *See Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994). A party must show that the newly-discovered evidence is relevant to the conviction. *Harrington*, 659 N.W.2d at 521.

In the first postconviction action, Rowley raised a claim that his defense attorneys should have filed a motion in arrest of judgment to challenge his guilty pleas, and pointed out his attorneys "reiterated the information received that Plaintiff would actually only serve about 110 months, or about 10-12 years." In the third postconviction action, Rowley is claiming he received incorrect and misleading information from his attorneys about how much time he would actually be required to serve on his sentences.

We determine that based on the allegations in the first postconviction action Rowley was aware of the issue he now raises at that time, and the issue he is raising in the third postconviction action is not an issue that "could not have

been raised within the applicable time period." *See* Iowa Code § 822.3. We find Rowley's third postconviction action should have been dismissed on the basis it was untimely.

We note, however, that the district court denied Rowley's third postconviction action on the merits, finding he failed to show he received ineffective assistance of counsel. On claims of ineffective assistance of counsel, our review is de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). A postconviction applicant claiming ineffective assistance of counsel during guilty plea proceedings must show counsel breached an essential duty and must prove prejudice by showing but for counsel's actions the applicant would have insisted on going to trial instead of entering a guilty plea. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

If we were to address Rowley's claims on the merits, we would find he failed to show his attorneys breached an essential duty by providing him with incorrect or misleading information. At the postconviction hearing Rowley testified his defense attorneys did not guarantee or promise him anything regarding the time he would serve. The two defense attorneys testified Rowley was informed that there were no guarantees, and he could actually serve more or less time than they estimated.

We affirm the district court's decision finding Rowley failed to show he was entitled to postconviction relief.

AFFIRMED.