IN THE COURT OF APPEALS OF IOWA

No. 8-825 / 07-2043
Filed November 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY LELAND BERG JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

Terry Leland Berg Jr. appeals from his conviction and sentences for the offenses of (1) possession of a precursor substance, (2) manufacturing a controlled substance, and (3) conspiracy to manufacture a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Patrick Jennings, County Attorney, and James Loomis, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Terry Leland Berg Jr. appeals from his conviction and sentences for the offenses of (1) possession of a precursor substance, (2) manufacturing a controlled substance, and (3) conspiracy to manufacture a controlled substance in violation of Iowa Code sections 124.401(4)(b) and 124.401(1)(c)(6) (2007). He contends defense counsel was ineffective in handling his guilty pleas. Upon our review, we affirm.

I. Background Facts and Proceedings.

On April 18, 2007, Berg was charged by trial information with possession of a precursor substance (Count I), manufacturing a controlled substance—methamphetamine (Count II), sale or receipt of precursor drugs for unlawful purpose (Count III), conspiracy to manufacture controlled substance—methamphetamine (Count IV), and purchasing more than the legally allowed quantity of pseudoephedrine (Count V). Berg initially entered a plea of not guilty. On October 9, 2007, Berg entered into a plea agreement, subject to court approval, with the State wherein he would plead guilty to Counts I, II, and IV, and the State agreed to dismiss the remaining charges. It was agreed that he would be sentenced to indeterminate terms of incarceration of five years, ten years, and ten years, to be served concurrently. Berg entered his plea of guilty. He was sentenced on November 1, 2007, in accordance with the plea agreement. Berg filed a notice of appeal on November 9, 2007.

In December 2007 and February 2008, the district court received letters from Berg and his father challenging the imposition of the mandatory minimum sentence on Counts II and IV and requesting reconsideration of Berg's sentence.

Following a hearing on the matter, the court on April 9, 2008, denied the request for reconsideration.

Berg appeals. He contends his counsel was ineffective in not filing a motion in arrest of judgment and in allowing Berg to plead guilty upon faulty legal advice.

II. Scope and Standards of Review.

Normally, our review of a challenge to the entry of a guilty plea is for corrections of errors at law. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). However, where the ineffectiveness of counsel is alleged in connection with the entry of the guilty plea, we perform de novo review of the entire record. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Claims of ineffective assistance of counsel raised on direct appeal are generally preserved for postconviction relief proceedings so that a sufficient record can be developed, and so attorneys whose ineffectiveness is alleged may have an opportunity to defend their actions. *State v. Allen*, 348 N.W.2d 243, 248 (Iowa 1984). We note claims of ineffective assistance of counsel need not be raised on direct appeal to preserve them for postconviction proceedings. Iowa Code § 814.7. But where such claims are advanced on direct appeal, and the record is adequate to permit our review of them, or where the record permits us to determine whether prejudice resulted from counsel's alleged unprofessional error, we may decide them on direct appeal. *Allen*, 348 N.W.2d at 248. We conclude the record in this case is adequate to decide this issue.

III. Merits.

Berg was originally charged with: possession of a precursor substance, a class "D" felony; manufacture of a controlled substance, a class "C" felony; sale or receipt of precursor drugs for unlawful purposes, a class "C" felony; conspiracy to manufacture a controlled substance, a class "C" felony; and purchase of more than the legally allowed quantity of pseudoephedrine, a serious misdemeanor. The plea agreement was silent regarding the court's ability to impose, or waive, the mandatory minimum sentence.[1] Berg's counsel apparently erroneously advised Berg that the court had no discretion to waive the mandatory minimum sentence due to Berg's prior conviction in South Dakota for possession of anhydrous ammonia. However, under Iowa Code section 901.10, the prohibition on reducing minimum sentences does not apply to foreign convictions. Iowa Code § 901.10; *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). Berg claims his counsel was ineffective in allowing him to plead without that knowledge.

The defendant must prove by a preponderance of the evidence that "(1) his counsel failed to perform an essential duty, and (2) prejudice resulted." *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). If he fails to prove either prong of the claim, it must fail. *Id.* "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). A court or counsel may not give incorrect

[1] Certain class "C" felony drug offenses are subject to a mandatory minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law. Iowa Code § 124.413.

information to a defendant regarding consequences of a guilty plea. *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983).

Assuming without deciding Berg's counsel breached an essential duty in this case, Berg must show he was prejudiced as a result. At the reconsideration hearing, Berg stated:

> I just wanted to let the Court be aware that I wasn't aware that the one-third mandatory could be waived; and with that being known, I don't believe that I would have pled to the plea agreement prior to knowing that.

His lawyer stated at the hearing, "The defendant would not have signed the plea agreement if we had been correctly informed at the time of signing." "In order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002) (quoting *Hill*, 474 U.S. at 58-59, 106 S. Ct. at 370, 88 L. Ed. 2d at 210); *see also State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). In this regard, conclusory claims of prejudice are not sufficient. *Myers*, 653 N.W.2d at 579.

We conclude Berg has failed to prove there is a reasonable probability, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Berg himself did not assert he would have insisted on going to trial. Even if he did make such an assertion, a conclusory claim of prejudice is insufficient to demonstrate the type of prejudice required to establish ineffective assistance of counsel. *See id*. For the first time, in his appeal brief, it is stated: "Had the defendant understood that the mandatory minimum imposed by the

court was discretionary and not directory, he would not have waived his trial rights and pled guilty." By entering pleas of guilty to Counts I, II, and IV, Berg avoided conviction on Count III (a class "C" felony carrying a possible term of incarceration of ten years) and on Count V (a serious misdemeanor), and he further avoided consecutive sentences on four felony convictions rather than the concurrent sentences he received.

We find no reasonable probability Berg would have rejected the plea agreement and insisted on going to trial if he had been informed that the court had the discretion to waive the mandatory minimum sentence.

AFFIRMED.