IN THE COURT OF APPEALS OF IOWA

No. 8-926 / 08-0362
Filed December 17, 2008

JAMES P. SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Joel D. Yates, Judge.

Applicant appeals from the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Ryan J. Mitchell of Orsborn, Milani & Mitchell, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, and Karen Doland, Assistant Attorney General, Mark Tremmel, County Attorney, Richard Scott, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Applicant, James Smith, appeals from the district court's dismissal of his application for postconviction relief. He claims the court erred in rejecting his claim of ineffective assistance of counsel and by determining it had no jurisdiction over challenges to actions by the Department of Corrections since Smith had not exhausted administrative remedies. We affirm.

BACKGROUND. On July 28, 2005, Smith pleaded guilty to stalking, in violation of Iowa Code section 708.11 (2005), operating while intoxicated, first offense, in violation of Iowa Code section 321J.2, and burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A. He was sentenced to a term of imprisonment not to exceed five years on the stalking conviction, one year of incarceration on the operating while intoxicated conviction, and a term not to exceed two years on the burglary conviction. The sentences were ordered to run concurrently.

While serving his sentence, the Department of Corrections determined Smith's crime had a sexual component and he should participate in a sex offender treatment program. This recommendation was based on the minutes of testimony which stated the victim would testify that Smith had raped her. Smith began the program but was removed when the department staff found Smith failed to take responsibility for his offense and had a poor attitude toward treatment. The department then prohibited Smith from accumulating any earned time pursuant to Iowa Code section 903A.2(1)(a) (2007).

Smith filed an application for postconviction relief on April 16, 2007, and thereafter submitted an amended application through counsel on September 12, 2007, raising three issues. He claimed he was entitled to relief because (1) he received ineffective assistance of counsel when his trial attorney did not inform him prior to entering a guilty plea that he may be required to participate in the sex offender treatment program, (2) the Department of Corrections had no authority to impose sex offender treatment under the circumstances, and (3) the Department of Corrections had no authority to conclude Smith could no longer accumulate earned time when he was removed from the program. The matter was heard before the district court on January 24, 2008. The district court dismissed Smith's application. It concluded Smith's trial counsel was not ineffective in failing to inform Smith about the sex offender treatment program because it was a collateral, as opposed to a direct consequence of the plea. On Smith's remaining claims, the court denied relief because it found Smith had failed to exhaust administrative remedies provided by the code. Smith appeals.

STANDARD OF REVIEW AND PRESERVATION OF ERROR. We generally review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); *Bader v. State*, 559 N.W.2d 1, 2 (Iowa 1997). However, a claim that applicant was deprived of a constitutional right, such as the effective assistance of counsel, is reviewed de novo. *Ledezma*, 626 N.W.2d at 141. For these claims we make an independent review of the totality of the circumstances. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998); *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995).

A party must file a motion in arrest of judgment to challenge a guilty plea. Iowa R. Crim. P. 2.8(2)(*d*); *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000). Smith did not file a motion in arrest of judgment. However, we may still consider his claim because allegations of ineffective assistance of counsel during the guilty plea process are an exception to this error preservation requirement. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

INEFFECTIVE ASSISTANCE OF COUNSEL. To succeed on a claim of ineffective assistance of counsel, an applicant must prove by a preponderance of the evidence that counsel failed to perform an essential duty and that prejudice resulted. *State v Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984)); *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004). We can affirm the district court's dismissal of the claim if the applicant fails to prove either element. *Anfinson v. State*, ___ N.W.2d ___, ___ (Iowa 2008); *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008). In our analysis of the first element, we measure counsel's conduct "'against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner.'" *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004) (quoting *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003)).

There is a breach of an essential duty if a plea is not voluntarily or intelligently made and counsel fails to file a motion in arrest of judgment to challenge it. *State v. Philo*, 697 N.W.2d 481, 488 (Iowa 2005); *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001). To be voluntarily and intelligently entered the

defendant must have a full understanding of the consequences of the plea. *Philo*, 697 N.W.2d at 488. This includes the court informing the defendant of "[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 2.8(2)(*b*)(2); *Kress*, 636 N.W.2d at 21. In a claim that counsel failed to advise a defendant of the consequences of entering a guilty plea, "the rule is that, if the consequences flow 'directly' from the plea, the plea may be held invalid." *State v. Mott*, 407 N.W.2d 581, 582 (Iowa 1987) (citing *Saadiq v. State*, 387 N.W.2d 315, 324-25 (Iowa 1986)). Counsel does therefore have a duty to inform a defendant of direct consequences of the plea. *Saadiq*, 387 N.W.2d at 326. Counsel is generally held not to be ineffective for failing to advise defendant about matters "collateral" to the plea. *Mott*, 407 N.W.2d at 582-83; *Saadiq*, 387 N.W.2d at 326. "[T]he distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Mott*, 407 N.W.2d at 583 (citations omitted). However, even failure to inform a defendant of collateral consequences can invalidate a plea if an attorney affirmatively misled the defendant about the consequences. *Id.* at 583; *see Meier v. State*, 337 N.W.2d 204, 206-208 (finding defendant received ineffective assistance of counsel and vacating the plea when counsel misinformed defendant about how long he would have to serve under a mandatory minimum sentence).

Smith argues he was affirmatively misled by his trial attorney because the attorney never informed him he may have to complete sex offender treatment. He also asserts he was misled because his attorney advised him that he would most likely serve no more than eight to ten months if he behaved. Smith claims he relied upon the estimation of serving eight to ten months in deciding to make the plea and was misled because completion of the sex offender treatment program takes twelve to fifteen months at a minimum.

We find no merit to Smith's claim. Smith has not cited any authority to support the proposition that requiring sex offender treatment is a direct consequence of the plea. First, though under rule 2.8(2)(*b*)(2) a defendant must be informed of maximum and minimum punishments, sex offender restrictions are not generally characterized as punishment under the law. *See Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006) (determining Iowa's sexually violent predator statute was not punitive because its purpose is to protect society and foster treatment rather than impose punishment); *State v. Seering*, 701 N.W.2d 655, 667-69 (Iowa 2005) (finding sex offender residency restriction is not punishment for purposes of the ex post facto clause).

In addition, numerous repercussions of a plea have been held to be collateral consequences that a defendant need not be informed of prior to entering a plea. *See State v. Carney*, 584 N.W.2d 907, 908-09 (Iowa 1998). These include limitations on a defendant's parole eligibility, deportation consequences, prohibitions on carrying firearms, ineligibility for deferred judgment or probation, consequences of related pending charges against the

defendant, and how the conviction may impact future convictions. *Id.*; *Kinnersley v. State*, 494 N.W.2d 698, 700 (Iowa 1993) (limitation on parole eligibility); *Mott*, 407 N.W.2d at 583 (deportation); *Saadiq*, 387 N.W.2d at 325 (prohibition from carrying a firearm); *State v. Woolsey*, 240 N.W.2d 651, 653-54 (Iowa 1976) (ineligibility for deferred judgment or suspended sentence and probation due to prior convictions); *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975) (penal consequences of companion charge or effect of instant charge on the strength of prosecution's proof in companion case); and *State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972) (effect of conviction upon future convictions). In comparing the program requirement to the consequences suffered in these cases, we hold the consequence of the sex offender treatment program does not have a definite, immediate, or automatic effect on the range of Smith's punishment. It is therefore not a direct consequence of the plea that Smith needed to be informed of prior to entering his guilty plea.

Smith appears to concede that imposition of the sex offender treatment program is collateral but argues he is entitled to relief because his attorney affirmatively misled him about the length of time he was likely to serve. Smith testified that his attorney said he would serve eight to ten months if he behaved. The attorney testified that he may have stated this generally but would have urged that the amount of time served depended on Smith's behavior. He testified that he would have advised Smith that he would get credit for time already served but would not have told him eight to ten months would be the definite amount served on a five-year sentence.

We do not find the attorney's advice to be a misstatement of the law or affirmatively misleading. Smith did receive credit for time served and accumulated credit for good behavior. His attorney provided no assurance of early release. In *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983), a plea was vacated where it was undisputed that the attorney provided erroneous legal advice as to how much time the defendant would have to serve for a mandatory minimum sentence. Here, there is no claim that the attorney's information was legally erroneous. We therefore find Smith's attorney did not breach an essential duty and Smith did not receive ineffective assistance of counsel.

AUTHORITY OF DEPARTMENT OF CORRECTIONS. Smith next argues the Department of Corrections was without authority to order sex offender treatment and to stop Smith's accumulation of earned time when Smith was removed from the program. Smith claims he could not be ordered to participate in the sex offender treatment program when the crimes he pleaded guilty to had no elements of a sexual nature. The State argues, and the district court found, the claims were not properly before the court since Smith had not exhausted the administrative remedies available to resolve these matters.

The director of the Department of Corrections is required to "[e]stablish and maintain acceptable standards of . . . rehabilitation" in Iowa's prisons. Iowa Code § 904.108(d). Under this directive, the department must complete a risk assessment on certain offenders convicted of sex crimes. Iowa Admin. Code 201-38.3(2). After completion of the risk assessment, the offender must be given notice of the findings, a copy of the completed risk assessment, and informed of

the offender's right to appeal the assessment. Iowa Admin. Code r. 201-38.3(4). The administrative appeal process is set forth in Iowa Administrative Code rule 201-38.3(5). Grounds for appeal are limited to contesting

> 1. Whether the risk assessment factors have been properly applied; or
> 2. Accuracy of the information relied upon to support the assessment findings; or
> 3. Errors in the procedure.

Iowa Admin. Code r. 201-38.3(4)(c)(4).

Generally, before an inmate can seek postconviction relief, he must exhaust the administrative remedies available. *Miller v. Iowa Dist. Ct.*, 603 N.W.2d 86, 88 (Iowa 1999) (citing *James v. State*, 479 N.W.2d 287, 292 (Iowa 1991)). However, this requirement is applied only if (1) there is an administrative remedy for the claimed wrong, and (2) applicable statutes either expressly or impliedly require exhaustion of administrative remedies. *James*, 479 N.W.2d at 292. Appeals of prison disciplinary actions, including the loss of earned time, must be taken through the administrative process. *Id.*; *Aschan v. State*, 446 N.W.2d 791, 794 (Iowa 1989). Failure to pursue administrative remedies prior to seeking judicial review deprives the district court of jurisdiction. *Aschen*, 446 N.W.2d at 792.

In analyzing Smith's claim under the two prongs, we find it is included in the rule requiring exhaustion of administrative remedies. Iowa Administrative Code rule 201-38.3(5)(g) explains that an administrative law judge or presiding officer can grant relief by reversing or modifying the result of the risk assessment. The administrative process set forth for appealing risk assessments implies that

this procedure must be taken prior to seeking judicial review. Challenges to discipline under the earned time statute must be brought through the administrative process. *See* Iowa Code § 903A.3; *Aschan*, 446 N.W.2d at 794. We find Smith's claims also fall within the grounds for appeal in the administrative rule because his complaint relates to whether the risk assessment should be applied to him and whether the department should rely on the minutes of testimony when making an assessment.

Smith states his claim is not bound by this rule because his claim concerns whether the department *had the authority* to impose a sanction. He notes in *State v. Overton*, 493 N.W.2d 857, 859 (Iowa 1992), the court determined exhaustion of administrative remedies was not required prior to judicial review "when an issue concerns the institution's authority to impose the challenged sanction." The problem with this argument is that the sex offender treatment program cannot be characterized as a sanction or punishment. *See Doe v. State*, 688 N.W.2d 265, 270 (Iowa 2004) (noting that sexually violent predator treatment program policies were designed to be rehabilitative and not punitive).

We recognize Smith's claim cannot be easily categorized as a challenge to the department's action or a challenge of the department's authority. His question really concerns whether the risk assessment procedures apply to him since he was not convicted of a sex offense. However, we find the department and administrative review process is better suited to evaluate this issue in the first instance.

> [I]t is appropriate for courts to recognize the unique problems of penal environments by invoking a policy of judicial restraint. We should accord prison administrators wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Overton, 493 N.W.2d at 860 (citing *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447, 474 (1979)).

CONCLUSION. We affirm the district court. Smith's counsel did not breach an essential duty in failing to inform Smith that he may be required to participate in sex offender treatment or by advising Smith that he would likely be released early if he behaved. We also find the district court properly concluded it was without jurisdiction to rule on Smith's claims about whether he could be required to participate in sex offender treatment and could be prevented from accruing earned time after being removed from the program. These claims must be pursued in administrative proceedings prior to a court's judicial review.

AFFIRMED.