IN THE COURT OF APPEALS OF IOWA

No. 9-1006 / 09-0407
Filed December 30, 2009

MACK BASS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Applicant appeals the dismissal of his application for postconviction relief. **AFFIRMED.**

Dawn Wilson, Cedar Rapids, and Denise Gonyea, Grinnell, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Mack Bass appeals the dismissal of his petition for postconviction relief. Bass raises a number of challenges to his conviction for second-degree robbery in 2003, following a trial on the minutes of testimony. For the reasons stated herein, we affirm the order of the district court.

I. Background Facts and Proceedings.

On January 21 and 23, 2003, two night-time armed robberies occurred at a Dell Oil convenience store in Waterloo. According to the minutes of testimony, on the 21st, Bass arranged for himself and his roommate Darrell Anderson to be picked up by a former girlfriend, K.F. Bass changed his clothes, explaining to K.F. that he and Anderson had to go to a gas station. Bass instructed K.F. to drive them to Dell Oil, stating the trip would not take long. Bass and K.F. stayed in the car, while Anderson walked over to the convenience store.

According to B.L., who was working that night, a masked man entered and held a handgun to her head, forcing her to open the drawer and give him all the cash. B.L. was the mother of Anderson's former girlfriend.

When Anderson reappeared outside, Bass told K.F. to drive up to him and pick him up. After Anderson got in the car, Bass asked him if he got any money.

Although B.L. did not recognize Anderson as the masked gunman, she remembered that individual speaking with a "low" voice, and she later confirmed that Anderson had the same physical build as the person captured on the store's surveillance video.

On January 23, 2003, Bass asked a different former girlfriend, R.L.P., to drive Anderson and himself to the same Dell Oil. This time K.L., the aunt of

Anderson's former girlfriend, was working inside instead of B.L. (K.L.'s sister-in-law). Anderson entered the store in normal clothing without disguising his identity. He engaged K.L. in friendly conversation and then left the store and headed back to R.L.P.'s car.

According to R.L.P., Anderson and Bass had a conversation outside the car. Thereafter, Bass got back into the car, and Anderson walked back into Dell Oil. When Anderson saw another customer come into the store, he asked him if he was a security guard. The customer said he was not and left. A few minutes later, according to R.L.P., Bass got out of the car and headed toward Dell Oil.

K.L. was at the cash register with Anderson next to her when a masked man came in. He waved a gun at her and told her loudly, "Give me your money now!" Anderson repeatedly encouraged K.L. to do exactly what the gunman said. However, K.L. had trouble getting the cash drawer to open. Meanwhile, K.L. had activated the silent alarm. The masked gunman apparently noticed this and headed for the store exit, with Anderson telling K.L. to "leave the cash drawer open" in case he came back.

R.L.P. reported that Bass came back to the car and told her to go. R.L.P. questioned Bass as to why he was leaving Anderson behind, and he told her to "just go." R.L.P. noticed that Bass was putting something in his pants. Later Bass pulled out the gun and told R.L.P. "he was going to rob the store but he saw the woman push the button and just wanted to get out [of] there."

When the police arrived at the Dell Oil, Anderson was still there. He explained that he had come back into the store and remained with K.L. because she had told him "she was afraid of working alone," a claim disputed by K.L.

The next day, after both R.L.P. and Anderson had given statements to the police incriminating Bass, Bass was arrested. Under videotaped police questioning, Bass eventually admitted he had been in the Dell Oil store the previous night and had attempted to rob it with a BB pistol, although he claimed Anderson had pressured him to do so. Items of clothing and a pellet gun used in the robbery were subsequently recovered.

Bass was charged with first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (2003) in connection with the January 23, 2003 robbery. He filed a motion to suppress, claiming the *Miranda* warning he had received was defective. The district court denied the motion, and a jury trial was set for July 15, 2003.

That morning, a hearing took place in chambers with the attorneys and Bass present. The district court stated on the record that it had learned of a plea offer that Bass could plead guilty to the lesser-included offense of second-degree robbery and the State would recommend a mandatory minimum of seventy percent rather than eighty-five percent. As part of the proposed agreement, the State would not attempt to charge Bass for the January 21 robbery. The court explained that it had reviewed the minutes of testimony and suggested to Bass that he seriously consider this proposal. However, the court added that it had made one additional suggestion to which the attorneys were agreeable:

> [T]hat was, if they were interested, I was willing to have Mr. Bass submit this case on the minutes of testimony rather than plead guilty. I explained to Mr. Bass that the effect of that would be, first of all, I would find him guilty based on what I found in the minutes. I would find him guilty of second degree robbery because that's the agreement of the parties, and I would bind myself to accept the state's recommendation that the mandatory minimum sentence

> would be 70 percent rather than 85 percent. The difference which I think is important to Mr. Bass is that by doing it in this matter he preserves for appellate review the ruling which was made on the motion to suppress. Whereas if he pled guilty, he would lose that; he would lose the ability to appeal on that issue and have that issue determined by an appellate court.

Subsequently, Bass waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The court filed a "trial memorandum" stating,

> The defendant submitted the case to the court to be tried on the minutes of testimony. This has the effect of preserving the suppression issue for appeal. The defendant submitted the case on the minutes with the understanding that the court will find him [guilty] of the offense of robbery in the second degree.

Eight days later, the court filed a verdict finding Bass guilty of second-degree robbery. Bass was sentenced to a term of imprisonment not to exceed ten years with a seventy percent mandatory minimum.

Bass appealed the denial of his motion to suppress. This court affirmed. *State v. Bass*, No. 03-1659 (Iowa Ct. App. Dec. 22, 2004). Subsequently, Bass applied for postconviction relief. Bass's application, as amended, asserted that he received ineffective assistance of trial and/or appellate counsel (1) when counsel failed to raise the issue that Bass "was not informed of the ramifications of waiving his right to a jury trial," (2) when counsel failed to raise the issue that the jury would not have been allowed to consider the testimony of a codefendant (Anderson) without further proof of guilt, (3) when counsel refused to conduct depositions, and (4) when counsel refused to review videotapes.

On January 26, 2009, the district court held an evidentiary hearing on Bass's application for postconviction relief. The district court found Bass had properly waived his right to a jury trial. The district court further noted that by

doing so, Bass received a benefit, in that he was able to take advantage of the State's plea offer while preserving his right to appeal the denial of the motion to suppress. On the accomplice issue, the district court found there was a large amount of other evidence against Bass in addition to Anderson's potential testimony. Thus, knowing he could not be convicted only on Anderson's testimony "would not have been of any benefit to [Bass] or changed the outcome in this case." Finally, the district court found that Bass's trial counsel had personally reviewed the entire prosecution file in the case, including the videotapes, that he had interviewed the witnesses, and stated "there is no evidence that the taking of depositions would have revealed anything to Petitioner's attorney that he did not already know or that would have been beneficial at trial." Accordingly, the district court dismissed the application. Bass appeals.

II. Standard of Review.

We review Bass's ineffective-assistance-of-counsel claims de novo. *See Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We give weight to the district court's factual findings, especially when concerning credibility assessments. *Id*.

III. Analysis.

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant is required to show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d at 142. "Failing to perform an essential

duty means counsel's performance fell outside of the normal range of competency." *State v. McCoy*, 692 N.W.2d 6, 14 (Iowa 2005). To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Although defendant is required to prove both elements, we do not always need to address both elements. *Ledezma*, 626 N.W.2d at 142. If a claim lacks prejudice, the claim may be decided on that ground alone without deciding whether the attorney performed deficiently. *Id*.

Bass's principal argument on appeal is that he entered either a guilty plea or a forbidden "hybridization" of a guilty plea and a stipulated bench trial on July 15, 2003, *see State v. Nikkel*, 597 N.W.2d 486, 486 (Iowa 1999), without the court having complied with the Iowa Rule of Criminal Procedure 2.8(2)(*b*) requirements for guilty pleas. As Bass points out, the district court advised him at the July 15, 2003 hearing and in its trial memorandum that it was going to find Bass guilty based on the minutes of testimony. Thus, Bass submits that his actions on July 15 really amounted to a plea of guilty. He was giving up any claim of innocence.

However, we agree with the State that this claim should be rejected for two reasons. First, this is *not* a claim Bass asserted below in his application for postconviction relief. Bass's claim below was that he "was not informed of the ramifications of waiving his right to a jury trial." The district court rejected that contention as not supported by the record, and we reject it as well. Bass did not

advance his current argument, namely, that he had entered a de facto plea of guilty without receiving the procedural protections applicable to such pleas. Unsurprisingly, the district court did not rule on this unraised claim, since it had no opportunity to do so. We thus hold that Bass's current claim is not properly before us. *See State v. Lewis*, 675 N.W.2d 516, (Iowa 2004) (discussing that on appeal we will not decide a case based upon a ground, even a constitutional ground, not raised by a party in the district court); *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding that an appellate court will not consider an issue raised for the first time on appeal).

Even if the claim were before us, we would not find it meritorious. The fact is: Bass did not plead guilty. Had he done so, he would not have been able to appeal the denial of his motion to suppress. *See Nikkel*, 597 N.W.2d at 487 (noting that a suppression ruling cannot be reviewed where the defendant pleads guilty). Having received the benefits of appellate review on the denial of his motion to suppress, Bass is ill-positioned to argue that he actually pled guilty.

It is true that the district court told Bass it had already reviewed the minutes and was going to find him guilty. As a practical matter, though, a guilty verdict is frequently a foregone conclusion when the defendant stipulates to trial on the minutes. Often, the only purpose of such a trial is to preserve the right to appellate review of a denial to motion to suppress. *See State v. Andrews*, 705 N.W.2d 493, 498 (Iowa 2005). However, our supreme court has repeatedly held that a guilty plea colloquy is not required before the court accepts such a stipulation. *See State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997); *State v. Everett*, 372 N.W.2d 235, 237 (Iowa 1985). If anything, the district court's

statements to Bass benefited him by letting him know exactly where he stood. Moreover, the district court subsequently entered detailed findings of fact, conclusions of law, and a verdict. It is clear that the district court based its verdict on the minutes and Bass has never claimed that the verdict was not supported by the minutes. *See Everett*, 372 N.W.2d 237 (holding "it still remained for the finder of fact to determine whether the elements of the offense were shown beyond a reasonable doubt").

Bass's argument that he entered into a de facto plea of guilty, thus necessitating a guilty plea colloquy, is essentially the same argument that our supreme court rejected in *Everett*. The defendant there urged that his prior stipulation to a trial on the minutes had the "practical impact" of a guilty plea and was "the same as" a guilty plea. 372 N.W.2d at 235-36. The court, however, declined to follow those federal cases that had required a guilty plea colloquy when the factual stipulation was "the functional equivalent of a guilty plea." *Id*. at 236-37. Instead, it decided to follow a different and more numerous line of federal cases that did not impose such a requirement *even when* the stipulation constituted a "de facto plea[] of guilty." *Id.* at 237 (quoting *United States v. Terrack*, 515 F.2d 558, 561 n.3 (9th Cir. 1975)). While *Everett*, and later *Sayre*, mentioned there could be an "extreme" case requiring a colloquy, such as when the defendant stipulates that the "evidence was sufficient to convict," *Everett*, 372 N.W.2d at 237; *Sayre*, 566 N.W.2d at 195-96, we do not have such an extreme case here. Bass did not stipulate that the evidence was sufficient to convict, and the district court had to go ahead and determine that it would be sufficient to

convict. In short, even if Bass's guilty plea argument were properly before us, we would not find it to be of merit.

Bass's remaining arguments on appeal are not substantial. There was considerable evidence of Bass's guilt apart from any testimony Anderson might have provided. This included Bass's own videotaped confession, the anticipated testimony of K.F. and R.L.P., the Dell Oil surveillance video, Bass's clothing, and the gun. As Bass testified during the postconviction hearing, "I had no defense." Thus, any alleged failure to advise Bass about the accomplice corroboration rule did not prejudice him. Also, we agree with the district court that Bass's trial counsel prepared appropriately for trial, and there is no evidence Bass was prejudiced by any lack of preparation.

For the foregoing reasons, we affirm.

AFFIRMED.