IN THE COURT OF APPEALS OF IOWA

No. 9-260 / 07-1421
Filed May 29, 2009

JUSTEN FAGAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Iowa County, Amanda Potterfield, Judge.

Applicant appeals from the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Philip B. Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, and Tim McMeen, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

Potterfield, J. takes no part.

SACKETT, C.J.

Postconviction relief applicant, Justen Fagan, appeals from the district court's order dismissing his claim of ineffective assistance of counsel. Fagan claimed his trial attorney was ineffective in explaining a plea bargain offered by the State. Fagan rejected the offer and, following a jury trial, was convicted of first-degree robbery. The district court dismissed the claim, finding Fagan did not prove he was prejudiced by counsel's conduct. We affirm.

I. BACKGROUND. The State charged Fagan with committing first-degree robbery while armed with a dangerous weapon, first-degree theft, first-degree burglary, eluding or attempting to elude law enforcement, attempted escape, and criminal mischief in the fourth degree. During the week prior to trial, the county attorney extended a plea offer to Fagan. The offer required Fagan to plead guilty to second-degree robbery, second-degree burglary, eluding, and attempted escape. The robbery and burglary convictions each would require an indeterminate term of imprisonment of ten years.[1] The eluding and attempted escape convictions each would require an indeterminate term of imprisonment of five years.[2] Under the proposed agreement, the sentences would run consecutively for a total of thirty years.

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[1] Robbery in the second degree and burglary in the second degree are class "C" felonies. Iowa Code §§ 711.3 (defining second-degree robbery); 713.5 (defining second-degree burglary). The maximum indeterminate sentence for a class C felony, not subject to habitual offender enhancements, is ten years. *Id.* §§ 902.9(4); 902.3 (requiring the court to commit a person convicted of a felony to the department of corrections for an indeterminate term not to exceed the limits as fixed by section 902.9, unless otherwise provided for by statute).

[2] Eluding and attempted escape are class "D" felonies. Iowa Code §§ 321.279(3) (defining eluding); 719.4 (defining attempted escape). The maximum indeterminate

Fagan's attorney, Fred Stiefel, discussed the offer with Fagan by phone. Fagan rejected the offer. Stiefel then faxed a letter to Fagan documenting their conversation. The letter stated that Fagan did not want to plead guilty to a burglary charge and that Fagan wanted to be "out of prison before [his] children are age 18." In further explaining the county attorney's offer, Stiefel wrote,

> 3. Robbery, Second Degree is a forcible felony. You must do all of that sentence before being eligible for parole (actually 95%). This would be 9 ½ years.
>
> 4. I cannot predict for sure how much time you would serve with this "deal." This would be up to the Iowa Board of Parole.
>
> 5. Your present charge (Robbery, First Degree) has a penalty of 25 years with no parole or early release.
>
> 6. In all likelihood, if you accepted the "deal" you would serve less time than 25 years.
>
> 7. The 30 years would not begin until you complete your Illinois sentence.

Stiefel's statement that if Fagan pleaded guilty to second-degree robbery under the plea offer, he would have to serve 95% or nine-and-a-half years of the sentence before being eligible for parole, was incorrect.[3] He admitted this at the postconviction trial. However, Stiefel testified that he correctly stated the

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sentence for a class D felony, not subject to habitual offender enhancements, is five years. *Id.* §§ 902.9(5); 902.3 (requiring the court to commit a person convicted of a felony to the department of corrections for an indeterminate term not to exceed the limits as fixed by section 902.9, unless otherwise provided for by statute).

[3] Robbery in the second degree is subject to a mandatory minimum term of imprisonment. Iowa code section 902.12(5) requires a person convicted of robbery in the second degree to serve 100% of the indeterminate maximum term except as permissibly reduced under section 903A.2. Iowa Code section 903A.2(1)(b) allows an inmate serving a sentence for robbery in the second degree to accumulate earned time up to 15% of the indeterminate maximum term required in 902.12. The effect of these statutes is to require one convicted of second-degree burglary to serve 85% of the indeterminate maximum term, not 95%, as Stiefel stated in the letter.

mandatory minimum required for a conviction of second degree robbery in phone conversations with Fagan before he sent the letter and after he sent the letter. Fagan acknowledged that Stiefel did correct this misstatement in a phone conversation after the letter was faxed, but claimed at that point the offer had expired so he could not accept the proposed plea.

Fagan was convicted by a jury of first-degree robbery.[4] He later pleaded guilty to eluding and attempted escape. Fagan filed an application for postconviction relief asserting he received ineffective assistance of counsel when Stiefel gave him incorrect advice about the consequences of accepting the plea. A trial on the application took place on July 10, 2007. The district court found Fagan failed to prove he was prejudiced by counsel's conduct and dismissed the claim. Fagan appeals.

II. ERROR PRESERVATION AND STANDARD OF REVIEW. The State contends Fagan did not preserve error on specific claims that (1) the district court applied an incorrect burden of proof, and (2) improperly took judicial notice that defense counsel was "respected." The State argues, in order to preserve these claims, Fagan should have filed a motion to amend or enlarge findings under Iowa Rule of Civil Procedure 1.904(2).

A motion to enlarge or amend findings is necessary to preserve error "'when the district court *fails to resolve* an issue, claim or other legal theory properly submitted for adjudication.'" *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (quoting *Explore Info. Servs. v. Iowa Ct. Info. Sys.*, 636 N.W.2d 50,

[4] We affirmed his robbery conviction in *State v. Fagan*, No. 2-575 (Iowa Ct. App. Aug. 14, 2002).

57 (Iowa 2001)). There is a distinction between the use of the motion "to *challenge a ruling* made by the district court and to *address the failure of the district court to make a ruling*." *Id.* (emphasis supplied). A motion under rule 1.904(2) is not available when it "amounts to nothing more than a rehash of the legal question." *Id.* at 538; *see Explore Info. Servs.*, 636 N.W.2d at 57. Legal conclusions are properly challenged by filing a timely notice of appeal. *See Explore Info. Servs.*, 636 N.W.2d at 57.

Fagan's claims that the district court applied an incorrect standard of proof and improperly took judicial notice of the trial attorney's reputation are specific arguments attacking the court's legal reasoning. The assertions aim to identify where the court erred in reaching its legal conclusion that Fagan did not receive ineffective assistance of counsel. The arguments stem from the substantive claim presented to, and ruled upon, by the court. The timely notice of appeal was the appropriate vehicle to challenge the court's ruling.

Postconviction actions are generally reviewed for errors at law. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). When constitutional rights are implicated however, such as the right to effective assistance of counsel, we make a de novo review of the totality of the circumstances. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

III. INEFFECTIVE ASSISTANCE OF COUNSEL. Fagan contends his trial counsel was ineffective in explaining the plea offered by the county attorney in three respects: (1) by not explaining applicable earned time statutes, (2) by not strongly recommending Fagan accept the plea, and (3) by incorrectly informing

Fagan that he would have to serve a 95% mandatory minimum sentence for robbery in the second degree. The district court determined that Fagan "failed to prove that he was prejudiced by any omission in the advice given by trial counsel regarding the State's plea offer." Fagan contends he did prove he was prejudiced and the court erred in finding otherwise. He argues the court applied an incorrect standard of proof when evaluating the evidence of prejudice, and it improperly took judicial notice that Stiefel was a "respected" defense attorney.

To establish an ineffective-assistance-of-counsel claim, Fagan must prove by a preponderance of the evidence that his counsel failed to perform an essential duty, and prejudice resulted. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006); *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). If no prejudice is evident from the circumstances, we do not need to evaluate whether trial counsel abrogated an essential duty. *State v. Oetken*, 613 N.W.2d 679, 684 (Iowa 2000).

Prejudice is shown when the applicant proves "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (citation omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (citation omitted). The applicant need not show the result would be different, more likely than not, had counsel performed competently. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697 (1984)). "Rather, '[t]o satisfy this requirement, an applicant must meet 'the burden of showing that

the decision reached would *reasonably likely* have been different absent the errors.'" *Id.* at 143-44 (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699) (emphasis supplied). But, the applicant's burden of proof remains the same. "[I]n making the decision whether there is a reasonable probability that the result of the trial would have been different, the burden of proof is on the defendant to establish this standard by a preponderance of the evidence." *Id.* at 145.

We need not decide whether the district court applied the proper standard. On our de novo review of the record, we find Fagan has not met the required burden. Fagan has not shown, by a preponderance of evidence, that there is a *reasonable probability* that he would have accepted the plea offer, had Stiefel not committed the alleged errors. Even if Stiefel explained how Fagan could "earn time," more strongly encouraged Fagan to accept the offer, and correctly stated that the burglary conviction would require him to serve a mandatory minimum of 85% of the maximum indeterminate term, the evidence indicates a strong likelihood that Fagan still would have rejected the offer.

The testimony consistently showed Fagan was well aware of the evidence against him and that a conviction following trial was highly probable. It indicated that despite knowing this, Fagan did not want to plead guilty to any burglary charge. The letter written by Stiefel to Fagan documenting why Fagan was rejecting the offer also stated "you want out of prison before your children are age 18." The testimony indicated Fagan wanted to enjoy his children while they were still young. According to Fagan, under the agreement and if he

accumulated the maximum amount of earned credit, his sentence could have been completed in sixteen years. At that point, his youngest child would have been seventeen.

The evidence indicates Fagan opted to reject the plea offer because it was not as favorable as he wanted and he therefore chose to go to trial. Having chosen to stand trial instead of accepting the plea offer, it is more difficult to see the harm any ill advice caused because the trial process ensured Fagan was protected by certain constitutional safeguards. *See State v. Kraus*, 397 N.W.2d 671, 674 (Iowa 1986). The district court found the credible evidence demonstrated Fagan rejected the plea offer based on its unfavorable terms rather than due to any failures of his counsel. The court's describing Fagan's counsel as "respected" was part of this credibility determination and did not rise to the level of taking judicial notice of an adjudicative fact. The court is free to make credibility determinations and in our review, we give weight to its findings. Iowa R. App. P. 6.14(6)(*g*); *Ledezma*, 626 N.W.2d at 141. We agree with the district court and affirm its dismissal of the postconviction petition.

AFFIRMED.