

**IN THE COURT OF APPEALS OF IOWA**

No. 3-395 / 11-0582  
Filed July 24, 2013

**RONALD LEE ERVING,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his conviction for assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Janet M. Lyness, County Attorney, and Andrew B. Chappell, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Mullins, J., and Sackett, S.J.\*

\*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**PER CURIAM****I. Background Facts & Proceedings**

On July 6, 2006, Ronald Erving was charged with assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (2005), an aggravated misdemeanor. He entered a guilty plea to the charge on August 3, 2006, but then filed a motion in arrest of judgment, claiming that at the time he entered the plea he was not aware that he would be subject to a special sentence under section 903B.2. The court permitted him to withdraw his plea.

Erving and his defense counsel prepared to go to trial. In a deposition of the victim they learned she had been bruised in the assault. The prosecutor indicated that she intended to amend the trial information to charge Erving with a class "D" felony, unless Erving pleaded guilty to the aggravated misdemeanor, in which case the State would recommend he would be sentenced to the time he had already served. Erving decided to plead guilty to the aggravated misdemeanor charge rather than potentially face five years in prison for the class "D" felony.

Erving signed a written guilty plea, which was filed with the court on August 18, 2006. The written plea contained the statement:

I understand that I have the right to be present and personally inform the Court of my plea and to speak for myself regarding sentencing, as is my right under Iowa Rule of Criminal Procedure 2.8(2)(b), and I hereby waive my right to be present at sentencing.

The judgment and sentence was filed on September 11, 2006. Erving was sentenced to forty-five days in jail, with credit given for forty-five days already

served. He was required to register as a sex offender, and was given a ten-year special sentence pursuant to section 903B.2.

Erving filed an application for postconviction relief on September 11, 2009, claiming he received ineffective assistance of counsel.<sup>1</sup> He claimed he did not expressly waive his right to be present during the guilty plea proceeding, or his right to an in-person colloquy. The district court denied Erving's application for postconviction relief. The court found, "Filing of the written guilty plea indicates the approval of the Applicant as to waiver of the in-person guilty [plea] procedures of the Rules of Criminal Procedure." The court also found Erving had not shown he was prejudiced by counsel's performance. The court concluded Erving had failed to show he received ineffective assistance of counsel. Erving appealed the decision of the district court.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's

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<sup>1</sup> On appeal, the State does not contest the timeliness of Erving's application for postconviction relief.

breach of duty, he would not have pleaded guilty, but would have elected to stand trial. *State v. Utter*, 803 N.W.2d 647, 654 (Iowa 2011).

### **III. Merits**

Erving claims he received ineffective assistance because his defense counsel failed to recognize that he had not expressly waived his right to be present for the guilty plea hearing. He asserts the written plea only waived his presence at sentencing. He contends he was prejudiced because if he had been able to present his plea to a judge, he could have asked about the consequences of his plea. Erving also states that if he had been aware of all of the consequences of his plea he would have gone to trial, instead of pleading guilty.

Even if the written guilty plea prepared by defense counsel did not expressly waive Erving's right to be present for the plea proceedings, see *State v. Mensah*, 424 N.W.2d 453, 455 (Iowa 1988), we determine he has not shown he was prejudiced by counsel's performance. We may consider the prejudice prong of a claim of ineffective assistance of counsel first. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Although the written guilty plea signed by Erving waived his right to be present at sentencing, Erving testified at the postconviction hearing that he had been present at the sentencing hearing. A portion of the sentencing hearing was read into the record at the postconviction hearing which showed the court specifically asked Erving at the sentencing hearing if there was anything he would like to add. The record shows Erving had the ability to ask questions

about his conviction and sentence at the time of the sentencing hearing, but did not take advantage of this opportunity.

We further note that Erving does not explain what he believes he could have learned during an in-person colloquy with a judge that had not been explained to him by defense counsel. His lack of specificity precludes his claim for postconviction relief. See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (“The applicant must state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome.”). We conclude Erving has not shown he received ineffective assistance of counsel.

We affirm the decision of the district court denying Erving’s application for postconviction relief.

**AFFIRMED.**