

IN THE COURT OF APPEALS OF IOWA

No. 3-474 / 12-1566
Filed September 5, 2013

DENG KON TONG,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Michael J. Moon,
Judge.

Deng Kon Tong appeals the district court order denying his application for
postconviction relief. **AFFIRMED.**

Nicolas G. Fontanini of Jordan & Mahoney Law Firm, P.C., Ames, for
appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney
General, and Stephen Holms, County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Deng Kon Tong appeals the district court order denying his application for postconviction relief. Tong argues the district court should have found his trial counsel was ineffective for failing to provide him with a translator during his plea hearing. We find Tong understood the English language sufficiently and participated fully in the plea hearing. Tong has failed to demonstrate his comprehension of the English language was so poor to render his plea unintelligent or involuntary. We affirm.

I. Background Facts and Proceedings

Deng Kon Tong was born in Sudan and moved to the United States in either 2003 or 2004. At the time criminal charges were filed in this matter, Tong was attending Ames High School and classified as a senior. Tong was charged with two counts of burglary in the second degree, one count of theft in the second degree, and one count of unlawful use of a credit card.

Tong entered a guilty plea on February 2, 2009, pursuant to a plea agreement. As part of the agreement Tong pleaded guilty to one count of burglary in the second degree and was granted a deferred judgment and probation. The remaining counts were dismissed.

In his application for postconviction relief, after his probation was revoked, Tong claimed Arabic as his first language and English as his second language. During his postconviction relief trial, however, he claimed Arabic as his first language, Dinka¹ as his second language, and English as his third language. He

¹ A Western Nilotic language spoken in Southern Sudan.

argues his trial counsel was ineffective because he did not honor Tong's request for an interpreter.

II. Standard of Review

We ordinarily review postconviction proceedings for errors at law; however when the requested relief is based upon a constitutional violation, we review de novo. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

III. Discussion

Tong argues his trial counsel refused to provide him with an interpreter and this failure prevented him from understanding the plea proceedings. He contends English is his third language, and as a result his plea was not entered voluntarily and intelligently.

Claims of ineffective-assistance-of-counsel require us to determine whether counsel's actions undermined the process to such a degree we can no longer be confident the proceedings produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on such a claim, Tong must show his trial counsel performed deficiently and the deficient performance prejudiced his defense. *Id.* at 687. Our supreme court has recognized that an ineffective interpreter can support an ineffective-assistance-of-counsel claim. See *Ledezma v. State*, 626 N.W.2d 134, 149 (Iowa 2001). Failure to have an interpreter when needed would also qualify.

English is either Tong's second or third language. Though he claims to have had difficulty understanding certain concepts during the plea hearing, he participated fully and responded intelligently to questions posed by the judge. He

interacted with his counsel and used the English language fluently. The record discloses the high school he was attending used English exclusively and he was a senior at the time of his arrest.² Tong also participated in other legal proceedings, including a jury trial, without the aid of an interpreter. Testimony by his trial counsel that Tong's difficulty in understanding certain legal concepts, such as aiding and abetting, was similar to what counsel had seen in native English speakers is credible and compelling. Though Tong may have struggled to understand some of the more legally complex portions of the proceedings, the difficulty was not a result of a language barrier. We are also persuaded by the fact Tong did not request an interpreter during the plea hearing. *See Thongvanh v. State*, 494 N.W.2d 679, 681 (Iowa 1993) (counsel was not ineffective due to adequacy of translation where defendant did not object at the time of the translation). If the court or Tong's counsel had become aware an interpreter was necessary, it would have been mandatory for one to have been provided. *See* Iowa Code § 622A.2; Iowa Ct. R. 47.2. Tong did not raise the issue before the court, and his skill with the English language was sufficient to allow him to adequately participate in the proceedings. Based upon Tong's abilities at the time, we cannot say his counsel was ineffective for failing to secure an interpreter.

AFFIRMED.

² During the postconviction trial Tong alluded to the fact his classes may have been specifically configured for non-native English speaking students; however no direct evidence of this fact was produced.