IN THE COURT OF APPEALS OF IOWA

No. 2-329 / 11-0785
Filed June 27, 2012

FERLIN SHERIDAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Ferlin Sheridan appeals the district court dismissal of his application for postconviction relief and asserts claims of ineffective assistance of trial and postconviction counsel. **AFFIRMED.**

Martha McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill Esteves, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Ferlin Sheridan appeals the district court dismissal of his application for postconviction relief. Sheridan alleges his trial counsel rendered ineffective assistance by failing to inform him of a plea offer. He also claims his postconviction counsel rendered ineffective assistance by failing to develop the record regarding what advice trial counsel gave concerning the State's plea offer. We conclude Sheridan was informed of the only plea offer tendered, and even if trial counsel or postconviction relief counsel were ineffective, no prejudice resulted, as Sheridan has not suggested or demonstrated that he would have ever accepted the plea offer tendered. We affirm.

I. Background Facts and Proceedings.

After Sheridan's televisions were stolen, Sheridan and two of his friends entered Steven Jackson's home to see if they were in his possession. An altercation arose. Jackson's girlfriend called the police. Officers arrived at the scene and arrested Sheridan and his friends as they were emerging from Jackson's home.

On November 4, 2007, Sheridan was charged with burglary in the first degree, willful injury, and assault while participating in a felony. Before trial, the State offered a fifteen-year sentence without the habitual offender enhancement in exchange for a guilty plea, which Sheridan did not accept. After a February 2008 trial, he was convicted on all three counts and sentenced to a term of imprisonment not to exceed twenty-five years.

Sheridan appealed his conviction, alleging there was insufficient evidence to support a burglary conviction. This court rejected that argument, finding the

jury determined the victim's testimony that Sheridan and his friends did not have permission to enter his house was more credible than Sheridan's codefendant's testimony to the contrary.

On September 1, 2011, Sheridan filed an application for postconviction relief, claiming his trial counsel rendered ineffective assistance by (1) failing to inform him of a plea offer of a ten-year sentence; (2) failing to seek suppression of brass knuckles found at the crime scene; and (3) failing to seek suppression of his criminal history. On appeal, Sheridan only advances a claim of ineffective assistance of trial counsel with respect to the plea issue. He further contends his postconviction counsel was ineffective in failing to develop the record regarding the adequacy of trial counsel's advice concerning the plea offer.

The State filed a motion for summary judgment and an affidavit from Sheridan's trial counsel confirming that he informed Sheridan of the only offer from the State, which was for a fifteen-year sentence. There was never an offer for a ten-year sentence.

Sheridan's postconviction counsel filed a motion to withdraw and brief in support, citing his inability to find ethical grounds on which to base a resistance to the State's motion. The court granted the motion to withdraw and the State's motion for summary judgment, citing the reasoning provided in the brief in support of postconviction counsel's motion to withdraw.

II. Standard of Review.

Generally, we review postconviction proceedings, including summary dismissals of applications for postconviction relief, for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, applications that raise an

ineffective-assistance-of-counsel claim present a constitutional challenge, which we review de novo. *Id.*

III. Discussion.

A. Summary Judgment.

Summary judgment is properly granted in a postconviction relief action "when . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6 (2011). A genuine issue of material fact "is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper." *Summage v. State,* 579 N.W.2d 821, 822 (Iowa 1998).

B. Ineffective Assistance—Trial Counsel.

Sheridan alleges ineffective assistance of his trial and postconviction counsel. To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted from the failure. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). The claim fails if either element is lacking. *Strickland*, 466 U.S. at 700; *Fountain*, 786 N.W.2d at 266. The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011).

The Sixth Amendment right to effective assistance of counsel extends to all critical stages of criminal proceedings, including the consideration of plea offers. *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012); *State v. Kraus*, 397

N.W.2d 671, 673 (Iowa 1986). "[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 132 S. Ct. at 1408.[1] Trial counsel is also constitutionally required to provide advice regarding (1) the sentence a plea offer would produce; (2) a higher sentence that conviction might entail; and (3) the chances of conviction. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting).

An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *Strickland*, 466 U.S. at 697; *Anfinson v. State,* 758 N.W.2d 496, 499 (Iowa 2008). Accordingly, we need not determine whether counsel's performance was deficient before examining the prejudice prong of an ineffectiveness claim. To resolve this case, we focus on the prejudice prong of Sheridan's claim.

To establish prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *accord Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 694; *accord State v. Maxwell*, 743

[1] Before a guilty plea is entered, the defendant's understanding of the following can be established on the record: (1) a plea offer; (2) the process that led to such an offer; (3) advantages and disadvantages of accepting or declining; and (4) sentencing or other consequences that could result based on conviction, after entering a guilty plea. *Frye*, 132 S. Ct. at 1406. The same factors can and should be used to establish the existence of formal offers on the record, before a defendant elects to go to trial. *Id.* at 1409.

N.W.2d 185,196 (Iowa 2008). Specifically, when ineffective advice results in a rejected plea offer, a defendant must show:

> that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012); *See Frye,* 132 S. Ct. at 1409 (explaining that defendant must demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they are authorized to exercise that discretion under state law).

The State's motion to dismiss noted that the prosecution never made an offer for Sheridan to serve a ten-year sentence in exchange for a guilty plea. The only offer made was for a fifteen-year sentence. The motion was supported by an affidavit from Sheridan's trial counsel confirming those facts and detailing a chronology of counsel's conversations with Sheridan about the case and the State's offer.

Most notably, however, Sheridan refuted his own allegation. Sheridan stated in open court that trial counsel told him of a plea offer prior to trial. There were no genuine issues of material fact in dispute regarding Sheridan's allegations of ineffective assistance of counsel before the court at the postconviction hearing. Thus, the district court's summary dismissal of Sheridan's application for relief, grounded in trial counsel's failure to communicate a ten-year offer, was proper.

However, Sheridan's appeal also asserts a claim of ineffective assistance for trial counsel's failure to adequately advise him during plea negotiations. This issue was not raised in Sheridan's application for postconviction relief, except to the extent that Sheridan was not informed "of a 10 year plea that was on the table." This appeal issue was also not argued to the district court, nor specifically addressed by the district court in its ruling. Because the issue was not asserted or ruled upon below, we will not address it. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

C. *Ineffective Assistance—Postconviction Relief Counsel.*

If postconviction counsel is ineffective, the applicant may raise an ineffective-assistance claim in an appeal from the postconviction court's denial of his application for relief. *Dunbar v. State*, 515 N.W.2d 12, 16 (Iowa 1994).

On appeal, Sheridan raises the specific issue that he was not fully informed of the weight of the evidence against him and that his chance of conviction was so great that, "the entire 'Dream Team' would not have been able to gain an acquittal in the face of the evidence" against him.

We agree there was no evidence provided at the postconviction hearing regarding the adequacy of trial counsel's advice about the offer that was tendered. While the affidavit listed dates and times when trial counsel spoke with Sheridan about the plea offer, there is no record of the substance of those conversations. Nor does it appear postconviction counsel attempted to develop the record on this issue. However, we decline to speculate that this lack of

evidence is indicative of ineffective assistance of postconviction relief counsel, or whether the parties simply believed the issue was not raised in Sheridan's application.

Moreover, we decline to preserve the issue for a subsequent postconviction relief action because Sheridan has not shown any prejudice by either ineffective postconviction relief counsel or ineffective trial counsel. At no time has Sheridan averred or testified that if he had been fully informed of the weight of the evidence against him that he would have accepted the fifteen-year plea offer. Where no prejudice is shown, there is no basis for an ineffective-assistance-of-counsel claim and no basis to preserve the claim for a subsequent postconviction relief action. *Dunbar*, 515 N.W.2d at 15-16.

IV. Conclusion.

Sheridan's claims of ineffective assistance of counsel fail because (1) there was never a plea offer for a ten-year sentence; (2) he was offered a plea arrangement to a fifteen-year sentence and rejected it; and (3) throughout his legal proceedings including his postconviction relief action, he has professed his innocence and has never suggested or demonstrated that he would have accepted the fifteen-year plea proposal. Because Sheridan cannot show prejudice, we affirm.

AFFIRMED.