

IN THE COURT OF APPEALS OF IOWA

No. 3-284 / 10-1094
Filed July 10, 2013

ROGER B. ENNENGA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Calhoun County, Joel E. Swanson,
Judge.

Applicant appeals the decision of the district court denying his application
for postconviction relief from his conviction for escape. **AFFIRMED.**

Robert E. Peterson, Carroll, for appellant.

Roger Ennenga, Newton, pro se.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Cynthia Voorde, County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Bower, J., and Huitink, S.J.*

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

HUITINK, S.J.**I. Background Facts & Proceedings.**

Roger Ennenga was previously convicted of a felony and placed in the custody of the Iowa Department of Corrections. In October 2007 he was an inmate at a correctional facility in Calhoun County, Iowa. He was allowed out of prison to work at a private company. Ennenga and other prisoners were transported from the correctional facility to the worksite and back again, and they were supervised while working. Ennenga left the jobsite on October 30, 2007, and went to South Dakota, where he was captured a few hours later.

Ennenga was charged with escape, in violation of Iowa Code section 719.4(1) (2007), as a habitual offender. He entered into a plea agreement with the State in which he pleaded guilty to escape, and the habitual offender portion of the charge was dropped. Ennenga was sentenced to a term of imprisonment not to exceed five years, to be served consecutively to other sentences. His direct appeal was dismissed as frivolous. See Iowa R. App. P. 6.1005.

On September 21, 2009, Ennenga filed an application for postconviction relief, claiming he received ineffective assistance because his defense counsel did not fully investigate the charge of escape and permitted him to plead guilty to the charge when there was not a sufficient factual basis for it. He claimed defense counsel improperly advised him to plead guilty to escape, in violation of section 719.4(1), a class "D" felony, when he was only guilty of voluntary absence from a facility, in violation of section 719.4(3), a serious misdemeanor.

A hearing was held June 9, 2010. Defense counsel testified that with the habitual offender enhancement, Ennenga was facing up to fifteen years in prison,

and he was offered a plea bargain for five years. Defense counsel stated that before he advised Ennenga to plead guilty to escape he had researched the issue of whether Ennenga was potentially guilty of voluntary absence from a facility and attempted to get a plea deal for the lesser charge. However, after further research and discussions with the county attorney, defense counsel came to believe escape was the correct charge, and he recommended Ennenga accept the plea bargain.

Ennenga testified he believed he was only guilty of voluntary absence from a facility. He stated he believed by being out of the prison working he was on furlough. Ennenga recognized this was an issue at the time he pleaded guilty.

On June 16, 2010, the district court denied his request for postconviction relief, finding Ennenga had not shown he received ineffective assistance of counsel. The court found the evidence showed defense counsel conducted extensive research on the issue of whether Ennenga was guilty of escape or voluntary absence from a facility. The court also found the evidence supported a finding that Ennenga was guilty of escape. Ennenga now appeals.

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 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.

Ennenga claims defense counsel failed to adequately explain to him the law relating to the escape charge. He asserts that if counsel had conducted sufficient research on this issue, counsel would have come to the conclusion that Ennenga was on a work furlough, and the proper charge against him should have been voluntary absence from a facility under section 719.4(3). He also claims there was not an adequate factual basis in the record to support the charge of escape under section 719.4(1).

Section 719.4(1) "obviously applies when a person convicted or charged with a felony intentionally departs without authority from a detention facility or institution to which the person has been committed on the conviction or charge." *State v. Burtlow*, 299 N.W.2d 665, 669 (Iowa 1980). This section applies to unauthorized departures from physical restraint. *Id.* "Physical restraint" is involved "whenever an individual either is or *would be* subjected to immediate physical restraint if an attempt to flee from the authorities was made." *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). "In those cases a danger of injury to persons or property exists," and the legislature may punish a breach more severely. *Burtlow*, 299 N.W.2d at 669.

Section 719.4(3), on the other hand, "applies when a prisoner is absent without authority from a place he is required to be, even if he has not left the premises of the institution or detention facility." *Id.* A prisoner who knowingly

and voluntarily fails to return to a facility from a furlough under a work release program comes within section 719.4(3). *Id.* When the offense is a failure to return from authorized release, there is not the same danger of injury to persons or property. *Id.*; see also *State v. Francois*, 577 N.W.2d 417, 421 (Iowa 1998) (noting that “the threat posed by criminals who fail to return after an authorized release is less than that posed by a confined criminal, but is not nonexistent”).

The primary distinction between section 719.4(1) and 719.4(3) is the degree of liberty enjoyed by the offender prior to the commission of the offense. *Francois*, 577 N.W.2d at 421. Ennenga claims he was out of prison on furlough and section 719.4(3) should apply. He relies upon *State v. Knipe*, 349 N.W.2d 770, 772 (Iowa 1984), which includes the statement, “an inmate out on furlough has received the privilege of authorized permission to leave the institution whereas the escaped inmate has not.”

We note the only evidence Ennenga was on furlough was his own testimony. He testified he was signed out of the prison and that was a form of furlough. There was no evidence, however, that he had been placed on a furlough under the State work-release program, as discussed in *Burtlow*, 299 N.W.2d at 699.

Ennenga’s testimony shows he was transported to the worksite and back to the prison by persons authorized by the prison and he was supervised while working. He was required to wear special clothing while working and was provided meals while he was there. He was not permitted to go anywhere else but to work and back. The evidence shows Ennenga was under physical restraint at the time he left custody, and the proper charge against him was

escape under section 719.4(1). See *State v. Smith*, 690 N.W.2d 75, 77-78 (Iowa 2004) (finding defendant had escaped when he left the courthouse after being ordered to be placed in custody because he was subject to immediate physical restraint at the time he fled); *Breitbach*, 488 N.W.2d at 449 (finding defendant who was approached by officers with a warrant for his arrest had escaped when he ran from officers, since a defendant under arrest would be subjected to immediate physical restraint).

We conclude the district court properly concluded Ennenga failed to show he received ineffective assistance. Ennenga did not show defense counsel had failed to properly research and investigate whether he had committed escape or voluntary absence from a facility, or that defense counsel had permitted him to plead guilty to escape when there was no factual basis for that charge. We affirm the decision of the district court denying Ennenga's application for postconviction relief.

AFFIRMED.