IN THE COURT OF APPEALS OF IOWA

No. 3-633 / 12-0192
Filed July 24, 2013

JOHN CIHA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

John Ciha appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Robert Hruska, Assistant County Attorney, for appellee State.

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

DOYLE, P.J.

John Ciha appeals from the district court's denial of his application for postconviction relief following his 2009 plea of guilty to burglary in the third degree as an habitual offender. Ciha contends his trial counsel was ineffective in coercing him into pleading guilty. Upon our review, we affirm the order denying Ciha's application for postconviction relief.

I. Background Facts and Proceedings

In November 2008, the Cedar Rapids Police Department was investigating a series of scrap metal thefts from C.E.I. Manufacturing. John Ciha was listed as a possible suspect because a black Dodge pickup truck that he drove, registered to his mother, was seen near C.E.I. at the time of the thefts. On the evening of November 26, an officer who kept surveillance over the truck noticed the vehicle was no longer parked at Ciha's residence. The truck was then observed parked near C.E.I., which was closed at the time.

Officers surveyed the enclosed fenced in area of C.E.I. and observed two men, later determined to be Ciha and Jeremy Carstens, removing scrap aluminum metal from a trailer and piling it by a fence on the east side of the property.[1] When the officers announced their presence, Ciha fled. He was found hiding wedged above the rear axles of a semi-trailer. Carstens told police they intended to put the scrap metal in Ciha's pickup truck, which was parked across the street, and that Ciha told him he could "make fat cash." The State charged Ciha with burglary in the third degree as an habitual offender.[2]

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[1] Carstens told police they had entered C.E.I. by crawling underneath the fence.
[2] Ciha was convicted of felony offenses in 1984, 1988, and 2000.

Ciha initially entered a plea of not guilty. He subsequently became aware of the court's drug treatment program. He believed the program would provide him a better chance for rehabilitation than prison and learned an important aspect of the program was taking responsibility for one's actions. In light of his "extensive criminal record," Ciha believed that pleading guilty would place him in a better position to be accepted into the drug court program.[3] However, Ciha was aware the State was still going to recommend a prison sentence.[4] The presentence report recommended the drug court program.

At the plea hearing, Ciha apparently got cold feet and wavered on his decision to plead guilty. Defense counsel responded by telling him that if he did not plead guilty then he "should get a different lawyer because [the county attorney] was not willing to negotiate." Ciha entered a plea of guilty, which the court accepted.

The court sentenced Ciha to fifteen years in prison, denying his request to be placed into the drug court program. This court affirmed the conviction on direct appeal. *State v. Ciha*, No. 09-1759, 2010 WL 2925989, at *2 (Iowa Ct. App. July 28, 2010).

Ciha filed a postconviction relief action, raising various claims of ineffective assistance of trial counsel, including a claim that counsel "coerced [him] into pleading guilty." The district court denied Ciha's claim, finding counsel had breached a duty by threatening Ciha but that Ciha failed to prove a likelihood

[3] Ciha was ultimately accepted into the program, subject to the district court's approval.
[4] The State did agree to dismiss some misdemeanor charges.

he would have gone to trial absent counsel's threat to withdraw. As the court found:

> Ciha's final ground is an allegation that Chipokas threatened to withdraw as Ciha's attorney if Ciha failed to plead guilty. Ciha's wife, Wanda, claims to have heard the threat, though Attorney Chipokas denies making it. Ciha is quoted by the pre-sentence investigator as saying, "He did not believe his guilty plea to be fair and appropriate 'because my lawyer said if I didn't plead then I should get a different lawyer because Jerry (the county attorney) was not willing to negotiate.'"
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> There is persuasive authority that an attorney's threat to withdraw may render a guilty plea involuntary. Here, the Court finds that Chipokas did make such a threat. The fact that Wanda Ciha testified as to the threat and John recounted it to the pre-sentence investigator convinces this Court that Wanda and John's testimony to this point is credible. The Court finds this constitutes a violation of a fundamental duty of counsel to maintain loyalty to a client, not take any action to the client's detriment and make sure that a guilty plea is the product of an informed, voluntary choice.
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> The final issue is whether Ciha has convinced this Court that, absent Chipokas's breach of duty, Ciha would have pleaded guilty and would have gone to trial. This Court finds this issue to be close. The Minutes of Testimony show that Ciha was caught in the act of burglary and he was a three-time convicted felon. He had already failed to object to his attorney not taking depositions. The County Attorney was not going to offer any charging or sentencing concession on the burglary charge and the sentencing enhancement other than to dismiss some unrelated misdemeanors. Ciha's only practical hope was to position himself for a favorable recommendation to Drug Treatment Court. Though not absolutely required, the odds of a favorable result would be greater after a plea of guilty than a guilty verdict after trial due to the preference for a drug court participant to take responsibility for his or her actions. There is no question that Ciha was hesitant to plead guilty knowing that the prosecutor was going to recommend prison. Judge Dillard questioned Mr. Ciha at great length during the plea proceeding to determine that his plea was voluntary, that he understood what the State was going to recommend, that he was satisfied with Mr. Chipokas's representation and, ". . . there is no penalty for you to go to trial." Despite the importance of the waiver of trial, this Court finds that, given the extent of Judge Dillard's colloquy, Mr. Ciha's almost thirty years of experience with the criminal justice system that included felony guilty pleas and a felony jury trial, and Ciha's equivocation at the postconviction hearing about whether he would have gone to trial absent the threat to withdraw, he has not shown

> that absent counsel's breach of duty, the result would have been different.

(Citations omitted.) Ciha now appeals.[5]

II. Standard of Review

We conduct a de novo review of ineffective-assistance-of-counsel claims. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

III. Discussion

Ciha contends his trial counsel was ineffective in coercing him into pleading guilty by threatening to withdraw from representing him if he refused to enter the plea.[6]

To prevail on his claim of ineffective assistance of counsel, Ciha must show counsel (1) failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). "There is a presumption the attorney acted competently, and prejudice will not be found unless there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ennenga*, 812 N.W.2d at 701 (internal quotation marks omitted). Ciha must prove both the "essential duty" and "prejudice" elements by a preponderance of the evidence. *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011).

In this case, the district court made a factual finding that counsel had threatened to withdraw if Ciha did not enter a plea of guilty and concluded Ciha had proved counsel breached an essential duty. *See Heiser v. Ryan*, 951 F.2d

[5] Due to a clerical error, Ciha's notice of appeal was not timely filed. The Iowa Supreme Court granted Ciha's motion for delayed appeal in March 2012.
[6] We note the issues on appeal were exceptionally well briefed by the parties.

559, 561 (3d Cir. 1991); *United States v. Estrada*, 849 F.2d 1304, 1306 (10th Cir. 1988); *Iaea v. Sunn*, 800 F.2d 861, 867 (9th Cir. 1986). On appeal, the State asks us to "reject" the court's finding and conclude the court's "acceptance of the defendant's self-serving claim was not supported by the record." Although we do have some skepticism regarding trial counsel's alleged "coercion,"[7] in light of our deference to the court's credibility assessment, we do not disturb that finding.

We turn instead to the prejudice prong of Ciha's claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003) ("Failure to demonstrate either element is fatal to a claim of ineffective assistance."). In order to prove this element of his ineffective-assistance-of-counsel claim, Ciha must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lado v. State*, 804 N.W.2d 248, 251 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (internal quotation marks omitted). Specifically, to demonstrate prejudice in the context of this case, Ciha "must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (interpreting the *Strickland* test as applied to challenges to guilty pleas); *see State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006) ("After the *Hill*

[7] For instance, immediately following the allegedly improper statement by counsel, Ciha engaged in a thorough plea colloquy before the district court during which he posited his "decision to plead guilty [was his] own voluntary decision" and that no one had "threatened [him] in any way to get [him] to plead guilty to this charge."

decision, we [have] applied the “reasonable probability” standard to ineffective-assistance-of-counsel claims.”).[8]

The district court determined Ciha failed to prove a likelihood he would have gone to trial absent counsel’s alleged threat to withdraw.[9] We agree. Ciha has an extensive criminal record and was aware of the evidence against him in this case. Ciha was a suspect in prior thefts from C.E.I. because his pickup truck had been observed near the business at the time the thefts occurred. On the day at issue, Ciha’s pickup truck was again found parked near C.E.I. when the business was closed. Ciha’s accomplice told officers they had crawled under the fence to steal scrap metal and put it in Ciha’s truck to “make fat cash.” Ciha admitted at the postconviction hearing that “it doesn’t look good” “that I’m hiding under a semi truck” when officers found him. Clearly, the minutes of testimony provide sufficient evidence from which a jury could find Ciha guilty of burglary in the third degree.

We acknowledge Ciha’s “plan” to get into the court’s drug treatment program, where he claims he would have had a better chance for rehabilitation, and that he “really didn’t know” whether or not he wanted to go to trial. Obviously Ciha was aware he could not sentence himself, and in this case, the court imposed a prison sentence.[10] Considering the facts and circumstances of this

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[8] We decline to adopt a requirement that Ciha establish a showing of probable success at trial in order to establish prejudice, where such requirement has not been specifically recognized by the United States Supreme Court or the Iowa Supreme Court. We further decline Ciha’s invitation to find this to be one of the “rare instances” where prejudice is presumed without precedent to do so. *Straw*, 709 N.W.2d at 138.

[9] We do not find, as Ciha claims, that the district court applied an incorrect standard in evaluating whether prejudice had been established.

[10] As this court concluded on Ciha’s direct appeal:

case, we agree with the district court that Ciha has failed to prove a reasonable probability he would not have pleaded guilty and would have insisted on going to trial despite counsel's alleged improper conduct. Accordingly, Ciha has failed to prove he was prejudiced by counsel's failure. We affirm the order denying Ciha's application for postconviction relief.

AFFIRMED.

> In our abuse of discretion review, we find the district court considered all the relevant sentencing factors, including the information contained in the presentence investigation report, the arguments of counsel, Ciha's extensive criminal history with repeated probation and parole revocations, Ciha's need for rehabilitation, and the need to protect the community. Further, we find the district court was well within its discretion and Ciha's argument provides no basis for resentencing.

Ciha, 2010 WL 2925989, at *1 (citations omitted).