

**IN THE COURT OF APPEALS OF IOWA**

No. 7-133 / 06-0331  
Filed April 11, 2007

**STEVEN SISK,**  
Applicant-Appellant,

**vs.**

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

---

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, K. D. Briner, and Jon C. Fister, Judges.

Steven Sisk appeals from the dismissal of his application for postconviction relief in district court. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant State Appellate Defender, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

**BAKER, J.**

Steven Sisk appeals from the dismissal of his application for postconviction relief in district court, claiming ineffective assistance of counsel.

**I. Background and Facts**

On February 24, 2004, Sisk pled guilty to burglary in the second degree, pursuant to Iowa Code sections 713.1 and 713.5 (2003) (as a habitual offender pursuant to Iowa Code section 902.8) and theft in the first degree, pursuant to Iowa Code sections 714.1 and 714.2. Pursuant to a plea agreement, the trial court imposed consecutive sentences totaling twenty-five years.<sup>1</sup> The court suspended the sentences and placed Sisk on supervised probation.

On or before May 27, 2004, Sisk violated the terms of his probation by striking his girlfriend several times in the head with a clothes iron, causing significant injuries. He was arrested, and his initial appearance was on June 6, 2004. On September 27, 2004, Sisk's probation was revoked, and he was ordered to serve the suspended sentences.

On June 15, 2004, at the time he was facing revocation of his probation, Sisk filed a pro se application for postconviction relief. He claimed that his Eighth Amendment rights regarding excessive fines, excessive bail, and the infliction of unusual punishment had been violated. On July 27, 2004, an attorney was

---

<sup>1</sup> The State was prepared to prove that, on August 16, 2003, Sisk walked into the home of Etheleen Wright. The house was occupied by Wright and Sisk's girlfriend, Victoria Wise. Sisk did not have a key and did not have permission to enter the house any time he chose. Sisk went to the basement, where Wise lived, stood over Wise, and demanded money. He then pushed Wise down on the bed, choked her, punched her in the face numerous times, and took money from her. Sisk agreed that, if the witnesses testified consistently with the minutes of the testimony, the evidence would establish his guilt. He agreed that the plea was in his best interests, and that he had nothing to gain and much to lose by going to trial, which would expose him to the possibility of imprisonment for thirty-five years.

appointed to represent Sisk. On September 22, 2004, in his application for postconviction relief, Sisk claimed he had been denied effective assistance of counsel because his trial counsel allowed him to enter his guilty plea unknowingly, unintelligently, and involuntarily.

On February 9, 2006, a postconviction relief trial was held. At the trial, Sisk denied he had committed a burglary and stated he had been pressured into accepting the plea agreement. The trial court found no evidence that Sisk had an interest in proceeding to trial “and exposing himself to mandatory prison sentences with a mandatory minimum when he could enter an *Alford* plea to reduced charges in exchange for a suspended sentence, probation, and an immediate release from custody . . . .” The testimony of Sisk’s trial attorney, that he was prepared and ready for trial, was “completely reliable.” The trial court found that Sisk was

so intent on his release and so confident he could successfully complete two to five years of probation that he voluntarily chose to ignore his attorney’s concern for the length of time he would serve if his probation were revoked . . . .

The trial court found no evidence that Sisk’s attorney was ineffective or that Sisk’s plea was unknowing or involuntary and therefore denied Sisk’s application for postconviction relief. Sisk appeals.

## **II. Merits**

A claim of ineffective assistance of counsel requires a *de novo* review because the claim is derived from the Sixth Amendment of the United States Constitution. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1)

counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). When “there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different,” prejudice results. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

The determination of whether a conflict exists between counsel and client is a mixed question of fact and law. *State v. Powell*, 684 N.W.2d 235, 238 (Iowa 2004). “Whether the facts show an actual conflict of interest or a serious potential for conflict is a matter for trial court discretion.” *Id.* (citing *Pippins v. State*, 661 N.W.2d 544, 548 (Iowa 2003)). An abuse of discretion exists “only when . . . the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Id.*

#### **A. Conflict of Interest**

The question before us is whether the trial court abused its discretion when it denied Sisk's request for substitute counsel after he claimed his attorney had a conflict of interest. When the trial court knows, or should know, that a conflict exists, it has a duty to inquire into the propriety of defense counsel's representation. *State v. Watson*, 620 N.W.2d 233, 238 (Iowa 2000). “If an actual conflict existed and the trial court knew or should have known of the conflict, yet failed to make inquiry, reversal is required.” *Id.*; see also *Mickens v. Taylor*, 535 U.S. 162, 166-76, 122 S. Ct. 1237, 1240-46, 152 L. Ed. 2d 291, 300-07 (2002).

A conflict of interest exists when an attorney is placed in a situation inherently conducive to divided loyalties. *Pippins*, 661 N.W.2d at 548; *Watson*,

620 N.W.2d at 239. An actual conflict results when interests “diverge with respect to a material fact or legal issue or to a course of action.” *Pippins*, 661 N.W.2d at 548-49 (citation omitted). In this case, no such conflict existed.

Sisk asserts that he “was not granted a meaningful hearing regarding his claim of a conflict of interest.”<sup>2</sup> Sisk’s brief to this court does not suggest any possible divergence of interest, and we have found none in the record. See *id.* at 548. At best, Sisk complained that he and his trial counsel were not compatible. Incompatibility is insufficient to support a claim of ineffective counsel due to a conflict of interest. The Sixth Amendment right to the assistance of counsel does not “guarantee a ‘meaningful relationship between an accused and his counsel.’” *State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004) (citations omitted).

Additionally, even if we were to find a conflict, there was no prejudice. Sisk has presented no evidence that, but for his trial counsel’s unprofessional errors, the results would have been different. See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Sisk’s goal was to get out of custody. Sisk received probation and stated, “I can do probation and I’m not worried about that.” Sisk got exactly what he wanted – to avoid serving a prison sentence. He got a good deal and simply did not follow through with his end of the bargain.

---

<sup>2</sup> Prior to trial, Sisk twice requested substitute counsel and was twice denied by order of the district court. The December 11, 2003 court order stated that Sisk “presented insufficient reason to grant his request for new counsel. Although the defendant and [trial counsel] disagree on how the facts will be perceived by a jury, this disagreement is insufficient grounds for new counsel.” The January 4, 2004 court order stated that Sisk “seems to think he has the right to dismiss his own court-appointed counsel and have successor counsel of his choice appointed to represent him. [Sisk] is mistaken.”

## **B. Failure to Investigate**

Sisk also contends that he was denied effective assistance of trial counsel in connection with his plea because he pled guilty without knowing that the State could not produce its key witness. He contends his trial counsel failed to determine whether Wise was available to testify on the day of trial.

It is not enough for Sisk simply to testify that he would not have accepted a plea offer if counsel's advice had been different. See *Hill v. Lockhart*, 474 U.S. 52, 59-60, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985). In the context of guilty pleas, a defendant may establish prejudice by showing a reasonable probability that, but for his trial counsel's errors, he would have insisted on going to trial rather than pleading guilty. *Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995).

Sisk has not shown a reasonable probability that, but for his trial counsel's alleged failure of duty, Sisk would not have pled guilty. It is clear that upon receiving an offer of probation, Sisk's acceptance of the plea was probable. It is not objectively or subjectively reasonable that he would have rejected this offer. Sisk suffered no prejudice due to his trial counsel's alleged failure to determine whether Wise was available to testify on the day of trial.

## **C. Allowing Plea Without Factual Basis**

Sisk further contends that he received ineffective assistance of counsel because his counsel failed to raise the issue that, because he had Wright's

permission to come back to her house, there was no factual basis for his plea to the burglary charge.<sup>3</sup> A burglary is committed when

[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired . . . .

Iowa Code § 713.1. Sisk may have been allowed to return, but even in the recanted facts, he did not have permission to enter without knocking or permission. See e.g. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Additionally, a “victim need not expressly revoke his or her consent to the defendant's presence; it is sufficient that the victim's actions give the defendant reason to know that such consent has been withdrawn.” *State v. Walker*, 600 N.W.2d 606, 609 (Iowa 1999). A factual basis existed for Sisk’s plea to the charge of burglary. Sisk suffered no prejudice due to his trial counsel’s failure to raise the issue.

### **III. Conclusion**

Sisk has presented insufficient evidence to support his claim of ineffective counsel due to a conflict of interest. Sisk suffered no prejudice due to his trial counsel's alleged conflict of interest, alleged failure to determine whether Wise was available to testify on the day of trial, or failure to raise the issue that there was no factual basis for his plea to the burglary charge. We agree with the trial

---

<sup>3</sup> Initially Wright had stated that Sisk did not have permission to be in her home; she later recanted to some extent, stating that Sisk had told her that he would be coming back and that was all right with her. Both the defendant and counsel were aware of this as was the judge as the county attorney specifically amended what Wright would say at the time of the guilty plea. In her recanted testimony, Wright was prepared to testify that if she had known that Sisk was coming back to assault or take money from his girlfriend, she would not have permitted him in the residence.

court that there was no evidence that Sisk's attorney was ineffective or that Sisk's plea was unknowing or involuntary. We therefore affirm the trial court's denial of Sisk's application for postconviction relief.

**AFFIRMED.**