IN THE COURT OF APPEALS OF IOWA

No. 7-638 / 06-1681
Filed October 12, 2007

JASON KLINGEMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, Stephen C. Clarke, Judge.

Jason Klingeman appeals from the district court's order denying his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, and Allan W. Vanderhart, County Attorney, for appellee State.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Jason Klingeman appeals following the denial of his application for postconviction relief. He raises two claims of ineffective assistance of counsel. We affirm the district court.

I. Background Facts and Proceedings.

At a plea agreement hearing on April 22, 2003, Klingeman entered an *Alford* guilty plea[1] to charges of first-degree burglary[2] and third-degree sexual abuse.[3] The plea agreement stated that the State would recommend sentences of twenty-five years and ten years, to be served concurrently with one another and with a probation revocation from his prior conviction of second-degree burglary in Winneshiek County, which had a ten-year sentence. Therefore, by accepting the plea agreement, Klingeman would be sentenced to twenty-five years in prison.

The court received Klingeman's permission to use the minutes of testimony to establish a factual basis, and also heard the prosecutor's recitation of the facts the State was prepared to prove. According to these sources, on March 18, 2003, Klingeman opened his neighbor's window and entered her apartment while she was asleep, got into bed with her, kissed her, and fondled her vagina. When the woman realized Klingeman was not her boyfriend she fled

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[1] An *Alford* plea allows a defendant to voluntarily and intelligently plead guilty even if he is unwilling or unable to admit his participation in the acts constituting the crime. *North Carolina v. Alford,* 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970).

[2] In violation of Iowa Code sections 713.1 and 713.3 (2003); class B forcible felony.

[3] In violation of sections 709.1(1) and 709.4(1); class C forcible felony.

the apartment and called the police. Klingeman was arrested in his apartment later that day.

At the plea hearing, Klingeman said he understood the agreement and had no questions. The court explained the maximum possible sentences for the two charges, but did not add that prison would be mandatory. Klingeman pled guilty pursuant to the agreement, and also admitted violating the terms of his Winneshiek County probation. Klingeman waived his rights and asked to be sentenced immediately. The district court imposed sentences of twenty-five years and ten years, to be served concurrently with one another and with all other sentences. The court stated its intention to enter an order revoking the Winneshiek County probation and imposing a sentence in that case that would be concurrent with the sentences in this case.

Klingeman did not file a direct appeal. However, Klingeman filed an application for postconviction relief on January 19, 2006. At the postconviction hearing, Klingeman claimed he did not know the charges were forcible felonies. He testified that his trial counsel did not tell him he was pleading guilty to forcible felonies, and that she told him he would probably serve two or three years and then be paroled. Klingeman's trial counsel, Julia Stoner, testified that she told Klingeman that he was charged with a forcible felony, that prison would be mandatory, and that probation would not be an option. Klingeman admitted that he knew he would go to prison as a result of the plea agreement, considered as a whole.

The postconviction court denied Klingeman's application, finding that his "testimony with respect to the actions of his trial counsel [is] not credible." The

court found that Klingeman knew he would go to prison as a result of his plea and knew his sentence would be twenty-five years. The court also found that Klingeman chose to take advantage of the plea agreement and to accept a sure twenty-five-year sentence, rather than risk a possible forty-five-year sentence.

Klingeman appeals. He contends his trial counsel was ineffective for waiving and failing to file a motion in arrest of judgment based on the court's failure to inform Klingeman of the mandatory minimum sentence of incarceration for the two forcible felony charges. He also contends his postconviction counsel was ineffective for failing to claim trial counsel ineffective for allowing a guilty plea to go forward on that basis.

II. Scope and Standards of Review.

Ordinarily, we review postconviction relief proceedings for errors of law. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). However, because Klingeman raises a constitutional issue, alleging the denial of his right to effective assistance of counsel, we conduct a de novo review. *Id.*

III. Discussion.

To establish ineffective assistance of counsel, Klingeman must prove (1) his attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish breach of duty, Klingeman must overcome the presumption that counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Klingeman may establish prejudice by showing a reasonable

probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Klingeman's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Klingeman contends his postconviction counsel was ineffective for waiving and failing to file a motion in arrest of judgment based on the court's failure to inform him of the mandatory minimum sentence of incarceration for the two forcible felony charges. However, none of the sentences in Klingeman's plea agreement involved a mandatory minimum sentence. Klingeman's burglary and sexual abuse charges were both forcible felonies, which carry mandatory imprisonment sentences. Thus, we interpret Klingeman's actual claim to be that he was denied effective assistance of counsel by his trial counsel's failure to challenge the plea proceedings on the basis that the court did not tell Klingeman that sentences of imprisonment would be mandatory. We find this claim to be without merit, however, because Klingeman is unable to establish prejudice.

In order to establish prejudice resulted from his counsel's ineffective assistance in connection with his guilty plea, Klingeman must show a reasonable probability that, but for his counsel's alleged error, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); *State v. Straw*, 709 N.W.2d 128, 137-38 (Iowa 2006). At his postconviction hearing, Klingeman admitted that he knew we would go to prison as a result of the plea agreement. We agree with the postconviction court that Klingeman chose to take advantage of the plea

agreement in order to accept a twenty-five-year sentence, rather than going to trial and risking receiving a forty-five-year term of incarceration.

Klingeman testified that if he chose not to accept the plea agreement and went to trial he would risk "that they would stack the sentences, run them consecutive or possibly charge me with a more serious crime." Although Klingeman also testified his trial attorney told him that he would likely serve two to three years in prison and then be paroled, we agree with the postconviction court that those statements lack credibility. The plea-taking court informed Klingeman of the maximum penalties for each charge and Klingeman stated that he understood the plea agreement, had no questions, and plead guilty pursuant to the agreement. Although nothing in the record indicates the court stated these charges carried mandatory imprisonment sentences, Klingeman's trial counsel informed Klingeman that he was charged with a forcible felony, prison would be mandatory, and probation would not be an option. Klingeman admitted during his postconviction hearing that he knew he was going to prison if he accepted the plea bargain, he knew the number of years he faced in prison for each charge, and he knew by accepting the plea bargain he would avoid serving a possible forty-five-year sentence. Because Klingeman cannot show he would have declined the plea bargain and would have risked going to trial had he known his imprisonment sentences were mandatory, we find that he has not established prejudice.[4]

[4] We note that Klingeman, in the alternative, argued that we should remand his case to the postconviction court to allow him the opportunity to present evidence on the issue of prejudice. However, we find the record is sufficient to establish prejudice would not have

Klingeman also claims his postconviction counsel was ineffective for failing to claim trial counsel ineffective for allowing a guilty plea to go forward. Because we find that no prejudice resulted from Klingeman's underlying claim involving his trial counsel, we conclude Klingeman was not denied effective assistance of counsel by postconviction counsel's failure to raise a meritless claim. *State v. Nitcher*, 720 N.W.2d 547, 555 (Iowa 2006).

IV. Conclusion.

We find Klingeman's claims of ineffective assistance of counsel without merit and affirm the decision of the postconviction court.

AFFIRMED.

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resulted because Klingeman chose to accept the plea bargain knowing he would be imprisoned, rather than going to trial and risk receiving a longer sentence.