IN THE COURT OF APPEALS OF IOWA

No. 7-029 / 96-0362

000083

DAVID ROYCE DeSIMONE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

David DeSimone appeals a district court ruling denying his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol and Dennis D. Hendrickson, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Hugh Pries, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Streit, JJ.

PER CURIAM

David DeSimone appeals a district court ruling denying his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On July 31, 1992, David DeSimone was charged by trial information with first-degree theft in violation of Iowa Code sections 714.1(3) and 714.2(1) (1991). According to the trial information, DeSimone had obtained a checking account using the social security number, address, and driver's license of Homer Banks. DeSimone then wrote more than $5000 in checks, knowing there were insufficient funds in the account to cover the checks. The police ultimately traced the checks to DeSimone using a photographic line-up.

DeSimone entered a plea of guilty to a lesser-included offense of second-degree theft (goods or services received greater than $500 but less than $5000), but admitted for restitution purposes that he had written checks totaling $5841. The district court sentenced him to an indeterminate term of imprisonment not to exceed five years. DeSimone did not appeal the conviction.

In December 1994 DeSimone filed this application for postconviction relief. He contends his trial counsel was ineffective in failing to inform him that the penalties for theft had been amended effective July 1, 1992 and that the highest charge he could have been sentenced for under the amended statute was second-degree theft. He claims counsel's ineffectiveness is sufficient cause for having failed to raise this issue on direct appeal.

At the postconviction hearing, DeSimone's criminal trial counsel testified he was aware of the amendment to the theft statute at the time he represented DeSimone. However, counsel believed the amended statute would not apply to DeSimone because the acts were alleged to have occurred prior to the amendment's effective date. DeSimone testified he would not have pled guilty and would have proceeded to trial if he had known he could not receive a sentence of imprisonment in excess of five years. He additionally argued trial counsel was ineffective in failing to proceed with a live line-up in order to challenge identification testimony.

The district court denied the application for postconviction relief. The court noted that the case upon which DeSimone relies, *State v. Austin*, 503 N.W.2d 604, 607 (Iowa 1993), was a case of first impression decided after DeSimone was sentenced. In *Austin*, our supreme court ruled that a person entering a guilty plea to a charge of third-degree theft subsequent to July 1, 1992, could not be sentenced to a penalty for that offense when the alleged acts constituted only fourth-degree theft under the amended statute. The district court concluded that trial counsel need not have foreseen this decision. The court also noted that trial counsel's decision not to proceed with a live line-up was a reasonable tactical decision. DeSimone appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction applicant asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.* In order to prevail on such a claim, the applicant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989).

We conclude that DeSimone has failed to establish sufficient prejudice. Like the district court, we conclude trial counsel was not required to know that our supreme court would rule the amended provisions applied to offenses committed before the statute's effective date. *See Jasper v. State*, 477 N.W.2d 852, 858 (Iowa 1991) (counsel need not know what the law may become in the future in order to provide effective assistance of counsel). Even after *Austin* was decided, the supreme court was required to interpret the scope of that decision. *See State v. Chrisman*, 514 N.W.2d 57, 63 (Iowa 1994) (rejecting defendant's claim that the amended provision entitled him to a conviction of a class "D" felony rather than a class "C" felony; the defendant is entitled to benefit of more lenient sentence, but not a different characterization of the crime).

Moreover, DeSimone's case does not present the same circumstances as did *Austin.* There, the defendant's actions did not constitute the degree of theft under the amended statute to which he pled and, consequently, his sentence was void. DeSimone, however, pleaded guilty to second-degree theft and his actions as pled fulfill the elements of second-degree theft under the amended statute. He received the sentence which would have applied under the amended statute.

We affirm the denial of the application for postconviction relief.

AFFIRMED.