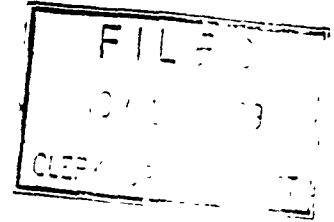


IN THE COURT OF APPEALS OF IOWA

No. 1999-125 (9-341) / 98-1292
Filed November 10, 1999



SANDRA WOODWORTH, n/k/a
SANDRA ABRAMS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin Hibbs, Judge.

Applicant appeals the denial of her postconviction relief action. **AFFIRMED.**

Barbara A. Schwartz, Iowa City, and Alex Mongiat, Student Legal Intern, Iowa City, and Eric Tundal, Student Legal Intern, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

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MAHAN, J.

Sandra (Woodworth) Abrams appeals the denial of her postconviction relief action. She contends she is entitled to postconviction relief on the grounds she received ineffective assistance of counsel because an attorney, other than defense counsel, misstated immigration law regarding whether the plea would render her deportable. She also contends her plea of guilty was not a knowing, intelligent, and voluntary waiver of her rights because she misunderstood the immigration consequences of the plea. We affirm.

Abrams is a British citizen living in the United States as a conditional lawful permanent resident. She acquired this status as a result of her marriage to Scott Woodworth, an American citizen, in January of 1995. The couple hired James Pearson, an immigration law attorney, to file the necessary paperwork.

The marriage quickly deteriorated. After one argument, Abrams pled guilty to a simple assault-domestic charge and received a deferred judgment in mid-1995. In August of 1996, Abrams was charged with domestic abuse assault while displaying a dangerous weapon following an argument during which she threatened Scott with a kitchen knife. Attorney Kelly Steele was appointed to represent Abrams on this aggravated misdemeanor charge. As a result of Steele's plea negotiations with the assistant county attorney, Abrams was offered the opportunity to plead to a lesser offense which was a serious misdemeanor. Abrams was concerned about how a conviction would affect her immigration status. However, Steele did not handle

immigration matters. He did not advise her on immigration law, but did recommend she consult an immigration attorney.

On September 30, 1996. The Illegal Immigration Reform and Immigrant Responsibility Act was enacted. This law affected the types of criminal offenses for which immigrants could be deported. Specifically, it made any conviction for domestic assault, no matter how minor, grounds for deportation. This provision became effective on the date of passage.

In November 1996, Abrams called Pearson regarding the potential for the proposed plea to affect her immigration status. Pearson testified he told Abrams although he is an immigration attorney, he does not work in criminal immigration or deportation matters. He offered to research the issue and get back to her, however, Abrams said she "needed to know right now" because she had a hearing that afternoon. Pearson told Abrams conviction of a simple misdemeanor would not be grounds for deportation.¹ Abrams asked if she could plead guilty to the charge. Pearson replied, "Only if it's a simple misdemeanor." He told her two or three times to make sure the charge was only a simple misdemeanor. Pearson believed this to be a correct statement of the law, but cautioned Abrams he needed to fully research the law. Pearson was not retained at this time and was not paid for his advice.

Abrams accepted the plea bargain, entered a written guilty plea to this serious misdemeanor, and was granted a deferred judgment. Thereafter, it was determined

¹ It is clear this advice, as it applied to a simple misdemeanor, was erroneous.

Abrams was ineligible for a deferred judgment because she had previously received a deferred judgment for domestic assault. She was permitted to either withdraw her plea or reaffirm it. Abrams reaffirmed the plea and was sentenced to forty-eight hours in the county jail, fined \$250, and ordered to receive an alcohol evaluation and attend batterer's education.

Abrams later learned her guilty plea to the serious misdemeanor had rendered her deportable, and she filed an application for postconviction relief. She had no complaints about defense attorney Steele's representation of her. Rather, she argued she had received ineffective assistance of counsel from immigration attorney Pearson and his misstatement of immigration law rendered her guilty plea involuntary. Pearson's account of the conversation between himself and Abrams was accepted as credible by the district court. The court found Pearson's advice was partially incorrect because Abrams could not safely plead to any domestic assault charge, regardless of how minor it is. However, Pearson was correct Abrams could not safely plead to any crime greater than a simple misdemeanor. Thus, the district court determined, Abrams was not prejudiced because she disregarded the correct portion of Pearson's advice. The district court also found Abrams' plea was voluntary, knowing, and intelligent. Abrams' application for postconviction relief was denied.

Abrams appeals.

I. STANDARD OF REVIEW. When reviewing claims of ineffective assistance of counsel, we make an evaluation based on the totality of the

circumstances. This is equivalent to a de novo review. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). When reviewing claims a guilty plea was involuntary, our review is the same. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997).

II. INEFFECTIVE ASSISTANCE OF COUNSEL. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Abrams' conviction based on her failure to prove prejudice without deciding whether her counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceedings. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*,

397 N.W.2d 671, 673 (Iowa 1986)). This same test applies when the proceedings end in a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985).

A. COLLATERAL VERSUS DIRECT CONSEQUENCES. It is clear defense attorney Steele had no duty to inform Abrams about the immigration consequences of her plea. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987). Those consequences are collateral and not direct. *Id.* Thus, failure on the part of a defense attorney to advise a defendant of collateral consequences involved in a plea cannot provide a basis for a claim of ineffective assistance of counsel. *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986). However, defense counsel must avoid affirmatively misleading a defendant by misadvice even if it involves a collateral matter. *Stevens v. State*, 513 N.W.2d 727, 728 (Iowa 1994); *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). Abrams claims Pearson affirmatively misled her on a collateral consequence, and her postconviction action should have been granted. We must, therefore, address the status of Abrams' claim as it pertains to Pearson.

B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AGAINST PEARSON. Abrams contends she should be granted relief because she received ineffective assistance of counsel from an attorney who did not represent her in the criminal case. We disagree.

Steele was Abrams' court-appointed defense counsel. He did not answer Abrams' questions about the immigration consequences of her plea. Abrams

telephoned Pearson, read the plea agreement, and spoke to him for approximately ten minutes. He indicated he did not practice in this area of immigration law but offered to research the issue for her. Abrams declined the research offer and demanded an immediate answer because she had apparently called Pearson shortly before the hearing in which she signed the written plea agreement. Abrams was not billed and did not pay for Pearson's advice. Steele and Pearson never spoke to each other about the immigration issue, and Pearson never saw the criminal file.

Abrams indicated she considered Pearson to be her defense counsel on the immigration issues. Abrams contends Steele delegated a duty to Pearson. Even if Steele had assumed a duty in this regard, Abrams failed to argue or provide authority for her contention Steele had delegated the duty to Pearson under the facts of this case. Alternatively, Abrams contends she independently established an attorney-client relationship with Pearson as defense counsel. Again, Abrams failed to argue or provide authority for her contention she had established an attorney-client relationship with Pearson as defense counsel under the facts of this case.

Strickland defines the ineffective assistance of counsel claim as a claim brought by a defendant based upon the performance of counsel. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, L. Ed. 2d at 693. Our supreme court has indicated *Strickland* applies specifically to the performance of defense counsel. *Bugely*, 562 N.W.2d at 178 ("A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty or (2) prejudice results.") (emphasis added).

All of the cases cited by Abrams involved ineffective assistance of counsel claims against defense counsel. Neither the State nor Abrams was able to cite any authority a claim of ineffective assistance of counsel against an attorney other than defense counsel is cognizable. Therefore, we find there is strong support for the conclusion Abrams' claim against Pearson is not a constitutionally cognizable claim. However, we stop short of so holding. We recognize a long-standing principle courts are obliged "to avoid constitutional questions when the merits of a case may be fairly decided without addressing them." *State v. Stradt*, 556 N.W.2d 149, 150 (Iowa 1996); *State v. Trucke*, 410 N.W.2d 242, 243 (Iowa 1987); *Moorman Mfg. Co. v. Bain*, 254 N.W.2d 737, 749 (Iowa 1977) *aff'd* 437 U.S. 267, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978). The merits of the instant case may be fairly decided on the prejudice issue.

C. PREJUDICE. Pearson informed Abrams he did not work in the criminal area of immigration law. Pearson also offered to do research on this specific issue in question. Pearson informed Abrams two or three times she should not plead guilty to anything other than a simple misdemeanor. Finally, Abrams did not retain Pearson as her defense attorney, and Pearson did not request nor was he paid for his spur-of-the-moment legal advice.

We note in reviewing claims of ineffective assistance of counsel, a defendant's conduct should be examined in addition to that of counsel. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). A defendant cannot prevail on such a claim when his or her conduct frustrated the performance of counsel. *Id.* We find the facts of this case

clearly show Abrams refused Pearson's offer to fully research the issue. She clearly frustrated Pearson's ability to complete the necessary research to render an informed opinion. She cannot be allowed to prevail on her claim Pearson failed to perform the specific duty which he offered to perform.

Pearson's advice was correct as to serious and aggravated misdemeanors, either one is a deportable offense. He also warned Abrams at least two or three times to make sure she was pleading to a simple misdemeanor. Abrams' attorney went over the plea agreement with Abrams and was convinced she understood it. Nevertheless, Abrams then plead to a serious misdemeanor. Abrams was not prejudiced by Pearson's misstatement of the law, she disregarded it. Thus, Pearson's advice with regard to simple misdemeanors, while incorrect, did not cause Abrams' prejudice. It is clear she disregarded Pearson's correct advice not to plead guilty to a serious misdemeanor. Therefore, we reject Abrams' contention she suffered prejudice as a result of Pearson's performance.

III. KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER.

Abrams contends her guilty plea was not a knowing, intelligent, and voluntary waiver of her constitutional right to demand a trial. We disagree.

It is undisputed Abrams was fully informed and understood the plea agreement and its direct consequences. Abrams received effective assistance of counsel from Steele and, as discussed above, she has no ineffective assistance of counsel claim

regarding Pearson. In addition, she was correctly informed by Pearson a guilty plea to a serious misdemeanor would render her deportable.

Abrams' contentions are based on the same issues already discussed in the ineffective assistance of counsel claim against Pearson portion of this decision. For all of the reasons set out in that discussion, we find her argument to be without merit. We have carefully reviewed her plea of guilty and conclude she entered a knowing, intelligent, and voluntary waiver of her constitutional right to demand a trial.

For all of the reasons set out above, we affirm the decision of the district court.

AFFIRMED.