IN THE COURT OF APPEALS OF IOWA

No. 7-263 / 96-0374

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DEREK E. DOOLIN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

On appeal from the denial of his application for postconviction relief, the appellant contends his guilty plea and sentence should be vacated due to the ineffective assistance of his trial counsel. **AFFIRMED.**

Jeffrey L. Stein of the Stein Law Office, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Debra J. Tharp of Trout & Tharp, Marshalltown, Special Prosecutor, and James DeTaeye, County Attorney.

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

HABHAB, C.J.

This is an appeal by Derek Doolin claiming the district court should have granted his application for postconviction relief. Doolin asserts he received ineffective assistance of counsel at his guilty plea proceedings. We affirm on appeal in this memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On December 13, 1993, the State charged Doolin with burglary in the third degree and with being a habitual offender. Doolin was represented by public defender James DeTaeye. On January 31, 1994, Doolin entered a guilty plea to the charge of burglary in the third degree.[1] In exchange, the State dismissed the habitual offender charge. At one point the guilty plea proceedings were stopped to allow Doolin to consult with his attorney. When proceedings resumed, Doolin agreed to enter a plea of guilty.

Doolin filed a motion in arrest of judgment claiming he did not adequately understand the legal or penal consequences of his plea. While the motion was pending, the district court granted Doolin's request for the withdrawal of DeTaeye, and Doolin's present counsel was appointed to represent him. The district court denied the motion in arrest of judgment.

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[1] Before entering his plea of guilty, Doolin admitted that on November 2, 1993, he entered a private residence in Marshalltown through a closed front door, without permission to do so, with the intent to commit a theft, and once inside, did commit a theft by taking a television. The record is abundantly clear Doolin's plea of guilty was freely and voluntarily made and that he was duly advised of his constitutional rights and the effect of entering a plea of guilty.

Doolin was sentenced to a term of imprisonment not to exceed five years. This sentence was made consecutive to a sentence Doolin had been ordered to serve in a previous case. The supreme court dismissed Doolin's direct appeal under Iowa Rule of Appellate Procedure 104.

On February 24, 1995, Doolin filed an application for postconviction relief, claiming he received ineffective assistance from DeTaeye. The district court concluded Doolin's allegations were without merit. The application for postconviction relief was denied. Doolin now appeals.

I. To establish a claim of ineffective assistance, Doolin must show (1) his attorney failed to perform an essential duty, and (2) prejudice resulted. *See Caldwell v. State,* 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and Doolin has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jones v. State,* 479 N.W.2d 265, 272 (Iowa 1991).

II. Doolin contends the district court should have granted his application for postconviction relief because the State did not rebut his allegations of ineffective assistance. We believe the State was able to adequately rebut Doolin's contentions. Although the State did not present any witnesses, it did cross-examine the two witnesses in the case, Doolin and DeTaeye, and presented two exhibits. We also note the court was at liberty to believe or disbelieve the testimony of witnesses. *See State v. Trammell,* 458 N.W.2d 862, 863 (Iowa App. 1990).

000112

III. Doolin claims DeTaeye failed to prepare a proper defense. He asserts his attorney failed to (1) investigate the case; (2) file a motion to suppress; (3) challenge a photographic lineup; and (4) contact potential witnesses. We determine Doolin's allegations have no merit. First, a professional investigator employed by the public defender's office investigated the case. Second, Doolin fails to allege what evidence might have been suppressed or the grounds for the suppression. DeTaeye considered a motion to suppress, and testified he saw no basis in the police reports to file such a motion. Third, Doolin does not allege what was deficient about the photographic lineup. Finally, he does not show what additional evidence the potential witnesses would have given which would have significantly aided his defense.

IV. Doolin contends DeTaeye led him to believe his sentence in this case would run concurrently with his sentence for a previous offense. He also claims he felt intimidated by DeTaeye and felt coerced into giving a guilty plea. We conclude Doolin voluntarily entered his plea of guilty. DeTaeye testified he never told his clients they were getting a concurrent sentence. Furthermore, in the plea proceedings, the district court specifically told Doolin the plea agreement did not contain any guaranty concerning a sentence. The record also shows Doolin was able to take a break during the plea proceedings in order to allow him to further consider whether he wanted to enter a guilty plea.

We affirm the decision of the district court denying Doolin's application for postconviction relief.

AFFIRMED.