IN THE COURT OF APPEALS OF IOWA

No. 3-237 / 92-816

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FILED
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CLERK SUPREME COURT

PAUL A. EMLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Paul A. Emler appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Gary D. McKenrick of Gomez, May, McKenrick & Kelley, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Bridget Chambers, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J. 000216

Paul Emler pleaded guilty to second-degree theft in violation of Iowa Code sections 714.1 and 714.2(2) (1989). He was sentenced to a term of imprisonment not to exceed five years. The supreme court dismissed Emler's direct appeal but reserved his ineffective assistance claims for a possible postconviction relief action. See Iowa R. App. P. 104.

Emler filed an application for postconviction relief and later amended the application. At his postconviction relief hearing, Emler alleged he pleaded guilty to avoid being charged as an habitual offender. See Iowa Code sections 902.8 and 902.9 (1989). He claimed the district court misinformed him of the potential sentence for being adjudicated an habitual offender. The district court had stated the sentence was up to ten years, while the actual sentence is up to fifteen years with a three year minimum. Moreover, he claimed the district court failed to inform him he was not subject to the habitual offender statutes because judgment had been entered upon his two previous felony convictions on the same date. See State v. Hollins, 360 N.W.2d 216, 217-18 (Iowa 1981). He thus maintained his original counsel rendered ineffective assistance in failing to discover and inform him the habitual offender statutes did not apply.

The district court denied Emler's application for postconviction relief, ruling that the only evidence

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available to defense counsel at the time of the plea proceeding indicated the State could probably have proven Emler was an habitual offender.

Emler now appeals.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

The reviewing court may look at either prong of the test to dispose of an ineffective assistance of counsel claim. State v. Nebinger, 412 N.W.2d 180, 192 (Iowa App. 1987). If the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. White v. State, 380 N.W.2d 1, 3 (Iowa App. 1985).

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To establish prejudice, the defendant must show a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L.Ed. 2d 203, 210 (1985). In this case, the record does not support Emler's claim. The record supports a conclusion that Emler made his decision to plead guilty prior to any mention of the possibility that the State might file an habitual offender allegation. In addition, the decision to plead guilty was made prior to the time that the trial court misstated the effect of a finding that Emler was an habitual offender. Emler's decision to plead guilty was, in part, based on his desire to move his case along. In addition, it is apparent that Emler was fully aware of the likely outcome should he decide to go to trial on the case. Based on the evidence, we conclude it was likely Emler would have pleaded guilty regardless of the other circumstances he now claims impacted his decision. Thus, we find no prejudice. We affirm the decision of the district court.

AFFIRMED.