

IN THE COURT OF APPEALS OF IOWA

No. 9-330 / 98-0967

Filed July 23, 1999

DONALD W. WISE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

JUL 23 1999

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Applicant appeals from the district court's ruling denying his application for postconviction relief. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Richard Crawl, County Attorney, and Daniel J. McGinn, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Zimmer, J., and Habhab,* S.J.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

Applicant-appellant, Donald Wise, appeals the district court's ruling denying his application for postconviction relief. He contends the court erred when it ruled his trial counsel was not ineffective for failing to inform him of the consequences of his guilty plea. We affirm the district court.

Factual and procedural setting. In August 1994 Donald Wise received two concurrent five-year sentences. After reconsideration, the sentences were suspended and he was placed on probation for one year, effective November 1, 1994. In March 1995 Wise was charged with five new violations. In an effort to resolve the five pending criminal charges against him, Wise entered into a plea agreement. Under the plea agreement Wise would plead guilty to three class "D" felonies and the State would dismiss the remaining two charges. Wise's attorney told him, and he believed, the maximum prison sentence he could receive under the plea agreement was fifteen years. Wise's guilty pleas were accepted by the court in June 1995. Sentencing was set for July. Wise's probation was not mentioned during the plea negotiations or the plea hearing.

A week after the June plea hearing, the State filed an application to revoke Wise's probation. In late June Wise was charged with second-degree theft. Prior to the sentencing hearing, the State agreed to drop a new theft charge if Wise admitted the probation violation. Wise was informed by his counsel he could receive an additional five-year sentence if he admitted the violation, but counsel thought it unlikely the court would impose it consecutively. Counsel also informed Wise he

could request a continuance of the sentencing proceeding because of the new charge and plea agreement. Wise decided to admit the violation and proceed with sentencing. The court sentenced Wise to three consecutive five-year terms of imprisonment pursuant to his initial plea agreement. The court also imposed a consecutive five-year sentence for the probation violation. Wise filed a direct appeal, and the district court's decision was affirmed without published opinion. *See State v. Wise*, No. 95-1301 (Iowa November 4, 1996).

Postconviction proceeding. Wise filed an application for postconviction relief, alleging his guilty pleas were not knowingly and intelligently made because he was unaware his probation could be revoked and he could be ordered to serve an additional five-year sentence. Wise also alleged his trial counsel was ineffective for failing to object to the twenty-year sentence when the plea agreement was for a maximum of fifteen years. In denying his application, the district court found Wise may not have understood his exposure to more than a fifteen-year sentence at the time he pled guilty in June. It concluded, however, any misunderstanding was dispelled before the sentencing hearing, because Wise knew of the application to revoke probation, he was fully informed of the consequences of an admission he violated his probation, and he opted to proceed with sentencing.

Appellate claims. Wise contends he did not enter his guilty pleas intelligently because his attorney did not inform him his probation could be revoked as a result of the pleas, resulting in an additional five-year sentence. Wise requests the district

court's decision be reversed, or, in the alternative, that he receive specific performance for the plea bargain.

The State argues Wise waived his ineffective assistance of counsel claim because he failed to raise it on direct appeal, and he did not establish sufficient cause for failure to raise the issue on appeal.

Analysis. We review postconviction proceedings for errors of law. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997). Since postconviction claims of ineffective assistance of counsel involve constitutional issues, we review those claims de novo. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). To prevail on a claim counsel was ineffective, the appellant "must ultimately show that his attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

After the plea proceeding, Wise received notice of the application to revoke his probation. He did nothing. Before the sentencing hearing, Wise entered into a second plea agreement in which he would admit the probation violation. In return, the State would dismiss the *new* charge against him. In discussions with his attorney before the sentencing hearing Wise was informed he faced the possibility of an additional five-year sentence for the probation violation. He also had the opportunity to request the sentencing be continued because circumstances had changed since his guilty plea. He chose to proceed with the sentencing. He received three, consecutive,

five-year sentences under the initial plea agreement. He received the benefit of that bargain. He also received a five-year sentence under the second agreement. He received the benefit of that bargain. Even if the original plea agreement had included the probation violation, as Wise claims he “assumed” it did, he would have faced an additional five-year sentence and a fine of up to \$7,500 if convicted on the new second-degree theft charge. The result would have been the same. When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). The appellant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. See *Schertz*, 380 N.W.2d at 412; *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969). We find no reasonable probability the outcome would have been different. Wise suffered no prejudice.

The State claims Wise did not show sufficient reason for not raising his claim trial counsel was ineffective on direct appeal. Ineffective assistance of appellate counsel may be sufficient cause for failure to raise the issue on appeal, but Wise did not allege appellate counsel was ineffective. He does not raise that claim on appeal. However, the postconviction court addressed the merits of Wise's claim in the proceeding, even if he had no right to raise the claim. We, in our de novo review, reach the same conclusions as the district court and affirm.

AFFIRMED.