

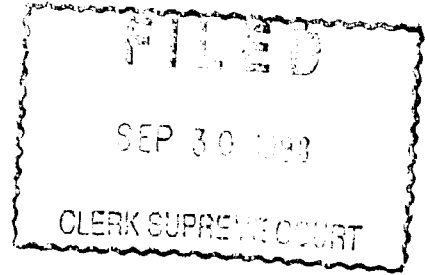
IN THE COURT OF APPEALS OF IOWA

No. 8-334 / 97-1060

TIMOTHY RHINER,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhower,
Judge.

Timothy Rhiner appeals the denial of his application for postconviction relief.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and James Bowers, Assistant County
Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ. Striet, J., takes no part.

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VOGEL, J.

This is an appeal by an applicant claiming he should receive postconviction relief because he received ineffective assistance of counsel at his probation revocation hearing. We affirm on appeal.

Timothy Rhiner was charged with possession of a controlled substance (methamphetamine) with intent to deliver, in violation of Iowa Code section 124.401(1)(c) (1993). In May 1994, Rhiner pled guilty to the charge. He was sentenced to a term of imprisonment not to exceed ten years. The sentence was suspended and Rhiner was placed on probation for two years.

Rhiner violated the terms of his probation and was sent to the Violator Facility Program at the Correctional Release Center in Newton. While at the program, Rhiner received disciplinary action for two incidents of possession of tobacco and one incident of making an obscene drawing. He was discharged from the program in December 1994.

In March 1995, Rhiner had a probation revocation hearing. He did not contest the incidents which led to his discharge from the Violator's Program. The district court revoked Rhiner's probation and reinstated his original sentence. Rhiner did not appeal.

Rhiner subsequently filed an application for postconviction relief, claiming he received ineffective assistance of counsel at his probation revocation hearing. He asserts his attorney improperly advised him to stipulate to violating his probation.

The district court found the decision to stipulate was made by Rhiner himself. The court dismissed the application for postconviction relief. Rhiner appealed.

I. Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996).

II. Rhiner contends his counsel at the probation revocation hearing, James Piazza, failed to properly investigate his claims he was innocent of the incidents which led to disciplinary action at the Violator's Program. He asserts Piazza breached an essential duty by advising him to admit to violating the program's rules.

At the postconviction hearing, Piazza testified Rhiner had never expressed a desire to challenge the disciplinary incidents at the Violator's Program. According to Piazza, Rhiner felt the rules at the Violator's Program were too strict, and he wanted to be transferred to another facility. Piazza testified Rhiner made the decision to admit to violating the rules. The transcript of the revocation hearing shows Rhiner was given an opportunity to exercise his right to elocution, but he made no statement expressing his innocence concerning the rules violations.

Based on the record in this case, we find Rhiner has failed to show he received ineffective assistance of counsel at his probation revocation hearing. The evidence

shows Rhiner made the decision not to challenge the disciplinary incidents which led to his discharge from the Violator's Program.

III. Rhiner asks us to preserve for a later postconviction action the issue of whether, at the time of his guilty plea, the district court failed to inform him a mandatory minimum sentence could be imposed in this case. Rhiner claims his postconviction counsel was ineffective for failing to raise this issue in the postconviction proceedings.

This issue has never been raised before the present appeal. We conclude this claim is barred by the three-year statute of limitations found in Iowa Code section 822.3. Rhiner was originally sentenced on May 18, 1994. He did not appeal. There is no reason this claim could not have been raised within the applicable time period. Therefore, we determine the issue should not be preserved for a later postconviction action.

We affirm the decision of the district court to dismiss Rhiner's postconviction action.

AFFIRMED.