

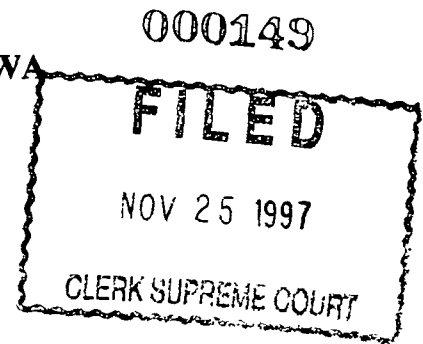
IN THE COURT OF APPEALS OF IOWA

No. 7-547 / 96-1434

CLIFFORD GOODEN,
Appellant,

vs.

STATE OF IOWA,
Appellee.



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

Defendant appeals the denial of his application for postconviction relief.

AFFIRMED.

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Defendant appeals the denial of his application for postconviction relief, contending the district court erred by failing to find prejudice from his claim of ineffective assistance of counsel. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

In 1991, the defendant was charged by trial information with the offense of delivery of a simulated substance, a class C felony, in violation of Iowa Code section 204.401(1)(c) (1991)(now Iowa Code § 124.401(1)(c)). In discussing the charge with Steven Berger, his attorney, the defendant claims he asked if there was any way to get the charge reduced to a misdemeanor. Berger, who concededly was unaware of the offense of delivery of an imitation controlled substance under section 204A.4 (now Iowa Code § 124A.4), an aggravated misdemeanor, apparently answered in the negative. The defendant subsequently entered an open plea to the felony charge. The court placed him on probation for two years, which was revoked in September, 1993, leading to the defendant's incarceration.

The defendant filed a pro se application for postconviction relief on February 22, 1995, on the grounds his counsel was ineffective by not informing him of section 204A.4, or arguing its applicability during the plea proceedings. He asserts he did not find out about this statute until 1994, and accordingly attributes his failure to file a direct appeal to his counsel's ineffectiveness. The defendant argues he would not

have pled guilty to the felony charge had he known about section 204A.4, and would have demanded a trial to try to force the State to make a better plea offer.

The district court denied the application on the grounds, given the strength of the evidence, the defendant did not demonstrate a reasonable probability a better plea agreement would have been offered to the defendant, or that a jury would have found him not guilty on the charge under section 204.401(1)(c), thus he failed to establish any prejudice on his ineffective assistance claim. The court noted, since a prosecutor has discretion to choose which of two potential charges to bring, it is difficult, if not impossible, to present proof that the county attorney could have been persuaded to bring the other charge.

The defendant appeals, contending the district court erred by finding he had failed to demonstrate prejudice. He argues the prosecutor wanted jail time and would have been willing to amend the charge to the misdemeanor in order to get it, rather than risk the sentencing court placing the defendant on probation, which was likely under the circumstances, and which did in fact happen. The defendant argues he had a reasonable chance of making this deal, and lost the opportunity because of his own counsel's ignorance of section 204A.4.

The State contends dismissal of the appeal is appropriate under Iowa Code section 822.8 (1995) on the grounds error was not preserved. Alternatively, the State defends the district court's finding that the defendant failed to demonstrate prejudice.

A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To demonstrate prejudice a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant states he would have demanded a trial instead of pleading guilty, claiming this would have caused the prosecution to offer a better plea. There is no reasonable probability the result would have been different or he could have negotiated a better plea agreement. The defendant has failed to demonstrate prejudice. We affirm the postconviction relief court.

AFFIRMED.