

IN THE COURT OF APPEALS OF IOWA

No. 8-670 / 98-0715

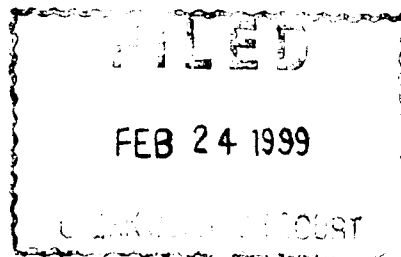
WILLIAM NEWELL GRAHAM,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Clinton County, Charles H. Pelton,
Judge.

Appellant appeals from the district court order denying his application for
postconviction relief. **AFFIRMED.**

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.
Zimmer, J., takes no part.

SACKETT, C.J.

Applicant-appellant William Graham appeals the district court decision denying his request for postconviction relief. Graham claims he received ineffective assistance of counsel. We affirm on appeal.

In March 1996, Graham was charged by trial information with operating while intoxicated, third offense, in violation of Iowa Code sections 321J.2(1)(a) and (2)(c). In May 1996, the trial information was amended to charge him as a habitual offender. On May 17, 1996, Graham pled guilty to operating while intoxicated, third offense. He sought immediate sentencing. The court sentenced him as a habitual offender and ordered him to serve a prison term not to exceed fifteen years.

Because Graham was convicted of operating while intoxicated, his parole on a previous conviction was automatically revoked. An administrative parole judge ordered him to serve a prison term not to exceed five years on the previous charge.

In September 1996, Graham filed a motion in district court seeking to have his sentences run concurrently. He attached a copy of a letter dated August 2, 1996, from his attorney, Mervin Woodin. The letter stated in part:

I talked with Mr. Jindrich who was your parole officer as he is as knowledgeable as anyone I know on paroles. He says that your parole revocation time will run concurrent with the habitual offender OWI sentence which is in accord with my thinking.

At a hearing on the motion, Woodin stated he believed the sentences would run concurrently as a matter of law.

The district court determined under section 908.10¹ the sentence for operating while intoxicated, third offense, should be served consecutively with the term imposed for the parole violation, unless concurrent terms were ordered. The district court recognized Graham had been unsuccessfully treated for alcohol abuse a number of times. A charge of operating while intoxicated, third offense, resulted from Graham's involvement in an automobile accident. Graham's blood alcohol level at the time was determined to be 0.488. The district court determined Graham's sentences should be served consecutively. Graham did not appeal.

In November 1997, Graham filed this application for postconviction relief claiming Woodin, the attorney representing him when he pled guilty to operating while intoxicated, third offense, was not effective because he advised Graham his sentences would run concurrently, not consecutively. The district court found Graham failed to show Woodin was not effective and denied the application for postconviction relief.

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, an applicant must show (1) the attorney failed to

¹ The applicable portion of Iowa Code section 908.10, which deals with conviction of a felony while on parole, provides:

The new sentence of imprisonment for conviction of a felony shall be served consecutively with the term imposed for the parole violation, unless a concurrent term of imprisonment is ordered by the court.

Iowa Code § 908.10.

perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996).

The State claims Graham failed to preserve error because he did not file a direct appeal. Although we question whether error was preserved in this case, we proceed to address the case on the merits.

Graham contends Woodin breached an essential duty in giving him erroneous advice. Defense counsel does not have a duty to inform a defendant about the collateral consequences of a guilty plea. *Stevens v. State*, 513 N.W.2d 727, 728 (Iowa 1994). If an attorney does mislead a defendant about the collateral consequence of a guilty plea, then the attorney has breached an essential duty. *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983).

To be entitled to postconviction relief, Graham must also show prejudice. He needs to prove the subject of the misinformation was of substantial importance to him and that he considered it in deciding to plead guilty. *Saadiq v. State*, 387 N.W.2d 315, 324 (Iowa 1986). He must show he relied to his detriment on his attorney's advice. *See Mott v. State*, 407 N.W.2d 581, 584 (Iowa 1987).

At the postconviction hearing, Graham testified on cross-examination:

Q. Mr. Graham, I'm trying to figure out what you're complaining about. Are you complaining that you pled guilty at all, or are you complaining merely that you did not plead guilty soon enough?

A. I was willing to plead guilty two days after I was arrested, and I kept asking Mr. Woodin to plead me guilty.

Q. So you're not complaining about the fact that you pled guilty? A. No, no.

Graham's theory at the postconviction hearing was that his attorney should have assisted him to enter a guilty plea sooner, before the State decided to charge him as a habitual offender.

Graham has failed to show he was prejudiced by his attorney's performance. The evidence at the postconviction hearing showed Graham wanted to plead guilty. The evidence does not show Graham was induced to plead guilty because Woodin gave erroneous advice. We find Graham has failed to show he was prejudiced. We affirm the decision of the district court denying his application for postconviction relief.

AFFIRMED.