**IN THE COURT OF APPEALS OF IOWA**

No. 16-1701
Filed November 22, 2017

**DAVID ALLAN LAHMANN,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Bremer County, James M. Drew, Judge.

David Lahmann appeals the district court's denial of his application for postconviction relief following his 2011 conviction for assault with a dangerous weapon. **AFFIRMED.**

Clemens A. Erdahl and Elizabeth A. Araguas of Nidey Erdahl Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, and Kyle Hanson, Assistant Attorney General, for appellee State.

Considered by Vogel, P.J., McDonald, J., and Carr, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

**CARR, Senior Judge.**

David Lahmann appeals the district court's denial of his application for postconviction relief following his 2011 conviction for assault with a dangerous weapon, contending his trial counsel was ineffective in failing to advise him of collateral consequences of his guilty plea. Upon our review, we affirm the court's order denying Lahmann's application for postconviction relief.

## *I. Background Facts and Proceedings*

Lahmann shot two rescue flares in front of a crop-dusting plane as it flew over his property because he believed the plane was scaring his horses. The State charged Lahmann with intimidation with a dangerous weapon. Before trial, Lahmann was offered a plea agreement for a suspended sentence, which he rejected, and the case proceeded to trial.

When discussing the jury instructions with the court, Lahmann's attorney realized the charge of intimidation with a dangerous weapon was a forcible felony that would require incarceration upon conviction. At that point, to avoid incarceration, Lahmann agreed to plead guilty to the lesser charge of assault with a dangerous weapon.

Thereafter, Lahmann—through a new attorney—filed a motion in arrest of judgment, claiming he was not fully advised his plea would affect his gun rights. Following a hearing, the district court denied the motion. The district court imposed a suspended sentence with one to two years of probation. Lahmann's probation agreement prohibited him from possessing firearms.

Lahmann later applied for a permit to acquire pistols/revolvers. The Bremer County Sheriff denied the application based on Lahmann's conviction for assault with a dangerous weapon.

Lahmann filed an application for postconviction relief, raising a claim of ineffective assistance of counsel relating to counsel's failure to advise him of collateral consequences of his guilty plea, i.e., that he would lose his gun rights. Lahmann filed a motion for summary disposition, which the court denied. Following a hearing, the court denied the application. Lahmann now appeals.

## *II. Standard of Review*

We typically review the district court's ruling on an application for postconviction relief for correction of errors. *Nguyen v. State*, 878 N.W.2d 744, 750 (Iowa 2016). However, we conduct a de novo review of applications for postconviction relief raising constitutional infirmities, including claims of ineffective assistance of counsel. *Id*.

## *III. Discussion*

Lahmann claims his counsel "fail[ed] to research or properly advise as to the mandatory imprisonment consequence of a conviction on the original charge" (intimidation with a dangerous weapon), and counsel "fail[ed] to research or advise fully regarding to collateral consequences of the ultimate charge" he pled to (assault with a dangerous weapon). According to Lahmann, there is "a reasonable probability that an acceptable plea would have been reached prior to trial had counsel provided proper advice."

To prevail on a claim of ineffective assistance of counsel, Lahmann must show "(1) counsel failed to perform an essential duty; and (2) prejudice resulted."

*State v*. *Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984)). "If we conclude [Lahmann] has failed to establish either of these elements, we need not address the remaining element." *State v*. *Thorndike*, 860 N.W.2d 316, 320 (Iowa 2015); *State v*. *Clay*, 824 N.W.2d 488, 501 n.2 (Iowa 2012) ("The court always has the option to decide the claim on the prejudice prong of the *Strickland* test, without deciding whether the attorney performed deficiently.").

We elect to address Lahmann's claim on the prejudice prong. Prejudice is established "by showing 'there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v*. *Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Irving v*. *State*, 533 N.W.2d 538, 540-41 (Iowa 1995). In this context, Lahmann must show there is a reasonable probability that without counsel's error he would not have pled guilty.[1] *See State v*. *Myers*, 653 N.W.2d 574, 579 (Iowa 2002). The following facts are relevant to Lahmann's claim.

Prior to trial, Lahmann was offered a plea agreement for a suspended sentence. Lahmann told his counsel "he wasn't interested in any type of plea deal" because "he didn't believe he did anything wrong"—"[h]e thought he was justified in what he did." The case proceeded to trial, and the State presented evidence

[1] Lahmann suggests we use a less precise prejudice standard in analyzing his claim, citing *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) and *Missouri v. Frye*, 566 U.S. 134, 148 (2012). We decline to do so; the proper standard for Lahmann's contention is set forth in *Hill v*. *Lockhart*, 474 U.S. 52, 60 (1985). *See Kirchner v. State*, 756 N.W.2d 202, 205 (Iowa 2008) (rejecting proposed use of objective standard to measure prejudice and reaffirming use of subjective standard to measure prejudice set forth in *Hill*, 474 U.S. at 60).

that Lahmann shot two rescue flares in front of Ron Weeding's crop-dusting plane as it flew over Lahmann's property, and Lahmann believed he had a right to stop the plane from flying over his property because the airspace above his property was restricted and the plane was scaring his horses.

At the close of the evidence, counsel realized the charge Lahmann faced was a forcible felony that would require incarceration upon conviction. Considering "the way the evidence came out at trial" and his "impression of the jury's reaction to the pilot's testimony and everyone else's testimony," counsel believed it was "very likely" Lahmann was going to be convicted as charged. He told Lahmann this. Counsel acknowledged, "I would have liked to have known that it was a forcible felony so I could have explained that to Mr. Lahmann earlier, but . . . the choice still came down to does he go to trial or does he not go to trial." Lahmann adamantly rejected the suspended-sentence plea he was offered prior to trial because he believed he was innocent.

Lahmann "did not want to go to prison"; he had a "pristine history, and . . . prison would have been . . . traumatic for him." Counsel and Lahmann discussed prison as well as Lahmann's firearm rights. Counsel's primary focus in advising Lahmann in advance of his plea had been to avoid prison, and he recollected the "gun rights issue" did not come up "until trial." Counsel's impression was Lahmann wanted to avoid prison "regardless of his gun rights." Counsel told Lahmann he did not believe Lahmann's gun rights would be affected by his plea. Ultimately, Lahmann decided to plead guilty to the lesser charge, which would allow the court discretion to suspend his sentence.

During the plea colloquy, counsel broached the issue of Lahmann's gun rights:

> DEFENSE COUNSEL: Your Honor, one of the things that my client is asking me about is—Mr. Wadding [the prosecutor] and I had talked off the record about how this would affect the gun rights of my client. And it was my understanding and I believe Mr. Wadding's understanding that he would be able to own guns as a result of this although the Sheriff could certainly in his discretion prohibit my client from having the permit to carry. And that's not part of the agreement but I just wanted to make sure that I said that on the record.
>
> THE COURT: And, Mr. Lahmann, just so that you're clear, *the Court does not understand any part of this agreement to*, *um*, *either guarantee you a right to carry firearms or that it would automatically exclude you from carrying firearms*. *That the Court views this agreement as basicaIly silent on what will happen to your firearm rights*.
>
> *Do you understand that?*
>
> DEFENDANT: One minute.
>
> I think—*Yes*. *Yes*.
>
> THE COURT: So you understand that, um, your gun rights will be governed by whatever the existing law is.

(Emphasis added.)

On appeal, Lahmann persists counsel "would have been able to resolve the matter in a way that did not result in incarceration and that preserved [his] gun rights" if not for counsel's errors. But Lahmann presents no evidence of a more favorable plea offer, and we will not speculate as such. *See State v*. *Myers*, 653 N.W.2d 574, 579 (Iowa 2002) (holding "conclusory claims of prejudice" are not sufficient to satisfy the prejudice element). Under this record, Lahmann cannot show he would have rejected the proposed plea bargain and proceeded to jury arguments had he known his gun rights would be affected. *See Kirchner*, 756 N.W.2d at 205 (looking to whether the applicant "alleged 'special circumstances that might support the conclusion that he placed particular emphasis' on the erroneous advice" (quoting *Hill*, 474 U.S. at 60)).

In reaching this determination, we have also weighed the evidence against Lahmann and his chance of receiving a successful verdict. *See Drieson v*. *State*, No. 11-0875, 2012 WL 2819365, at *2 (Iowa Ct. App. July 11, 2012) ("The court may weigh the evidence against him and his chance of succeeding at trial in order to determine whether he was prejudiced." (citing *Hill*, 474 U.S. at 59)); *State v*. *Marlenee*, No. 04-1755, 2006 WL 1229993, at *3 (Iowa Ct. App. Apr. 26, 2006) ("Self-serving statements indicating a desire to await trial are alone insufficient to meet this prejudice standard. Rather we look for objective evidence of that desire consisting of some showing by Marlenee that he would have been better off to reject the plea offer and proceed to trial, based on either a defense waived or the vulnerability of the State's case against him." (citation omitted)).

As the district court determined on this issue:

> In this case, Mr. Lahmann's testimony is not sufficient to establish the prejudice necessary for an ineffective assistance of counsel claim. It appears more likely than not Mr. Lahmann would have been convicted of a forcible felony had the trial proceeded to verdict. Mr. Lahmann, like any other reasonable person, did not want to be imprisoned and did not want to become a convicted felon. Additionally, during the guilty plea colloquy it was made clear to Mr. Lahmann that his gun rights were not part of the plea agreement. Accordingly, the Court is unable to conclude that there is a "reasonable probability" that Mr. Lahmann would not have pled guilty had he known that his gun rights would have been affected.

In sum, Lahmann has not established the prejudice prong of his ineffective-assistance-of-counsel claim, and we affirm the court's denial of his application for postconviction relief.

**AFFIRMED.**