IN THE COURT OF APPEALS OF IOWA

No. 0-052 / 05-1074
Filed April 8, 2010

RAYMOND DITTMER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Raymond Dittmer appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Jean Curtis, Guttenberg, and John Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On January 14, 2000, the State filed a trial information charging Raymond Dittmer with: (1) conspiracy to manufacture more than five grams of methamphetamine; (2) manufacturing more than five grams of methamphetamine as a second offender; (3) possession of lithium as a second and habitual offender; (4) possession of ephedrine and/or pseudoephedrine as a second and habitual offender; (5) possession of ether as a second and habitual offender; (6) receipt for unlawful purpose of precursor drugs as a habitual offender; and (7) fifth-degree theft. Dittmer pleaded not guilty to the charges on February 1, 2000.

On the morning of trial, January 9, 2001, Dittmer entered an *Alford* plea pursuant to a plea agreement in which he pleaded guilty to charges one through six as listed above.[1] On January 30, 2001, he filed a motion in arrest of judgment, claiming his *Alford* pleas were not knowingly, voluntarily, and intelligently given because of a mental illness. On March 9, 2001, the district court denied the motion, and entered judgment of guilty for all crimes to which Dittmer entered a guilty plea.

Dittmer appealed, contending his pleas were not entered knowingly and voluntarily, and this court affirmed the district court. Dittmer filed an application for postconviction relief alleging his trial counsel was ineffective for advising him

[1] In *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970), the Supreme Court found a defendant may "consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

that he could revoke his *Alford* plea for any reason as long as he did so within the proper time frame. The district court dismissed Dittmer's application, finding Dittmer's testimony lacked credibility and that the testimony of Dittmer's trial counsel was credible. Dittmer now appeals, arguing the district court erred in finding his trial counsel did not misinform him and that he was not denied his right to a jury trial.

II. Standard of Review

We review Dittmer's claim of ineffective assistance of counsel de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). Although we review constitutional issues de novo, we give weight to the trial court's findings on credibility of witnesses. *Id.*

III. Ineffective Assistance

Dittmer alleges his trial counsel was ineffective for advising him that he could withdraw his *Alford* plea within forty-five days after the plea and that he did not need any particular reason to do so. In order to prove that his counsel was ineffective, Dittmer must show that: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id*. To establish the first prong of the test, Dittmer must show that his counsel did not act as a "reasonably competent practitioner" would have. *See State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). There is a strong presumption that counsel performed competently. *Id*. To satisfy the second prong, prejudice, Dittmer must show that but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial. *See Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995).

On our de novo review, we find Dittmer cannot prevail on his claim of ineffective assistance. During a comprehensive plea colloquy, the district court informed Dittmer that he could challenge a defective or inadequate plea by filing a motion in arrest of judgment within forty-five days. Through his counsel, Dittmer filed a motion in arrest of judgment alleging that his guilty pleas were involuntary because of a mental illness.

At the hearing on the motion in arrest of judgment, Dittmer testified that he had changed his mind, wanted to withdraw his plea, and understood that he could do so as long as it was within the prescribed time period. When asked what led him to that understanding, Dittmer testified that he heard this from someone with whom he played cards who had informed Dittmer he was going to "pull his plea agreement." Dittmer also wrote a letter to the district court judge filed three days after his hearing on the motion in arrest of judgment. In his letter, Dittmer stated that he understood he could revoke his plea for no reason in particular and that he "found that out playing cards with other people in similar situations." The letter continued, "I am claiming that I was misinformed and it was my own stupidity of listening to people in [jail] and assuming they knew how the system worked." Dittmer did not allege at that time that he had been misinformed by trial counsel. Rather, Dittmer received this misinformation from someone other than his counsel.

Further, defense counsel testified at the postconviction hearing that his practice was to tell clients who were considering pleading guilty that "it's virtually impossible to take [a guilty plea] back, so you can't change your mind down the line." Counsel also testified he would "absolutely not" tell a client they could

withdraw their plea "on a whim." Dittmer testified at the postconviction hearing that he never actually intended to enter a guilty plea, but was instead trying to delay the trial. Dittmer stated, "I mean, I guess I didn't ask [counsel], maybe, enough questions about [withdrawing the guilty plea.]" We give weight to the district court's credibility findings. The record does not support the claim that counsel misadvised Dittmer regarding withdrawal of his *Alford* plea.

Dittmer also argues on appeal that he did not voluntarily and intelligently waive his right to a jury trial. To the extent this argument is different from his claim that he was misadvised by counsel regarding the ability to withdraw an *Alford* plea, it was not presented to the district court. Because the district court did not decide this issue, we decline to rule on it on appeal. *See State v. Moorehead*, 699 N.W.2d 667, 675 (Iowa 2005).

AFFIRMED.