IN THE COURT OF APPEALS OF IOWA

No. 0-738 / 09-1949
Filed November 24, 2010

CODY A. ANDERSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Hamilton County, Timothy J. Finn, Judge.

Applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel Regenold and Thomas J. Gaul, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Chambers, County Attorney, and Jon Beaty, Special Hamilton County Prosecutor, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

DOYLE, J.

Cody Anderson appeals the district court's denial of his application for postconviction relief. He claims his guilty plea to third-degree sexual abuse should be set aside because his attorney was ineffective in failing to file a motion to suppress statements he made to a police officer while hospitalized. We conclude otherwise and affirm the judgment of the district court.

I. Background Facts and Proceedings.

In October 2007, police were called to investigate a series of fires and burglaries in Webster City, Iowa. Several days after the last fire occurred, a witness contacted the police department. She informed them Cody Anderson had set the fires and burglarized the businesses. He was at a hospital being treated for burn injuries.

A police officer went to the hospital to speak with Anderson on October 31. Anderson was sitting in a chair next to his bed watching television when the officer walked into his room. The officer introduced himself and asked Anderson if they could talk. Anderson said okay. The officer asked him about the fires and burglaries. Anderson admitted he set the fires and stole items from the businesses. Toward the end of the conversation, Anderson told the officer about a sexual relationship he had with his cousin when his cousin was thirteen years old.

Anderson was charged by trial information with one count of second-degree burglary, two counts of third-degree burglary, two counts of second-degree arson, and two counts of first-degree criminal mischief. In a separate trial information, he was charged with third-degree sexual abuse. The minutes of

testimony attached to that trial information indicated the victim, the victim's mother, and two police officers would testify at trial regarding the details of the sexual abuse.

In February 2008, pursuant to a plea agreement with the State, Anderson pleaded guilty to three counts of third-degree burglary, one count of second-degree arson, and one count of third-degree sexual abuse. He was sentenced to a total term of imprisonment not to exceed fifteen years. Anderson did not file a motion in arrest of judgment challenging his guilty plea. Nor did he file a direct appeal from his convictions and sentences.

Instead, in March 2009, Anderson filed a pro se application for postconviction relief, alleging his trial counsel was ineffective for failing to file a motion to suppress the statements he made at the hospital. Anderson reiterated that claim, among others, in a subsequently amended application.

At the hearing on the application, Anderson testified he had surgery the day before the officer's visit and was on morphine and "a bunch of other drugs" while talking to the officer. Anderson testified the officer "started questioning me about [the fires]; and then I just started talking to him. I don't remember details or anything like that though." He stated "after going over it and having a clear mind to think about what I was doing at the time . . . I really don't believe I was operating under my own free will." Anderson reasoned, "It just don't make any sense to me . . . why I would just start confessing to crimes; and then even confess to another crime that had . . . nothing to do with it or whatever."

Anderson's trial counsel testified he did not believe there were any grounds to file a motion to suppress in Anderson's case. He explained, "From

reading the interview, Cody seemed eager to tell his story. It wasn't something that was drug out of him . . . . He just seemed to want to tell a story." He also testified it did not appear Anderson was in custody when the statements were made thus eliminating the need for a *Miranda* warning.

Following the hearing, the district court entered a ruling denying Anderson's postconviction relief application. The court confined its ruling to the only issue Anderson presented evidence on at the hearing—whether trial counsel was ineffective for failing to file a motion to suppress Anderson's confession to sexual abuse. The court rejected that claim, finding in relevant part that Anderson had failed to establish the prejudice prong of the analysis.

Anderson appeals.[1]

II. Scope and Standards of Review.

The standard of review on appeal from the denial of postconviction relief is for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). To the extent Anderson's claims involve constitutional rights, our review is de novo. *Id.*

III. Discussion.

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant is required to show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d

[1] At the outset, we observe Anderson's brief acknowledges "the issues raised at the postconviction hearing centered on the Applicant's trial counsel failure to file a motion to suppress statements Applicant made to the police concerning the sexual abuse charge." We will likewise confine our analysis to that charge.

674, 693 (1984). The claim may be resolved on either ground. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We elect to address the prejudice ground.

In order to establish prejudice in the context of a guilty plea, Anderson must prove a reasonable probability that, but for counsel's alleged errors, he "'would not have pled guilty and would have insisted on going to trial.'" *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (quoting *State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006)). Anderson has not made that showing.

At the hearing on his application, Anderson testified he talked to his attorney twice about filing a motion to suppress. The first time, Anderson stated his attorney told him "it would have nothing—that there's no point of filing it or whatever." The second time, Anderson testified his attorney agreed to file a motion to suppress. About a week later, according to Anderson, his attorney presented him with the State's plea bargain. When asked why he decided to accept the plea bargain instead of pursuing the motion to suppress, Anderson testified his attorney told him

> that I would be facing one hundred fifteen years;[2] and I was completely flabbergasted. One hundred fifteen years, this is my first time, first time to ever commit anything or whatever; and I didn't know anything about earned time, good time, parole, or anything.
>
> Then he [Anderson's attorney] says, "Well, if try to get a plea bargain for ten years, would you take that?" Still to me that was quite extensive . . . .
>
> Then later they gave fifteen years; and I said, "Well, I guess fifteen years is better than one hundred fifteen years," so I just went and took it.

[2] The State notes that by its calculations, Anderson actually faced seventy years in prison if convicted of all charges. The sexual abuse charge comprised ten of those seventy years. *See* Iowa Code §§ 709.4(4), 902.9(4). The remaining sixty years were due to the multiple burglary, arson, and criminal mischief charges. As stated earlier, the only conviction Anderson is challenging on appeal is the conviction for third-degree sexual abuse.

Clearly, counsel's advice regarding the motion to suppress was not a factor in Anderson's decision to accept the State's plea bargain, as Anderson believed his attorney had already filed the motion when he elected to plead guilty. *Cf. id.* at 644 (examining defendant's claim that trial counsel's ineffectiveness in failing to file a motion to suppress vitiated the knowing and voluntary character of his guilty plea). Anderson was instead concerned about the lengthy potential imprisonment he faced if convicted, which he was able to avoid by accepting the favorable plea bargain. *See, e.g.*, *State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009) (finding no prejudice where defendant accepted favorable plea agreement that avoided mandatory minimum and lifetime supervision); *cf. Kirchner v. State*, 756 N.W.2d 202, 206 (Iowa 2008) ("Kirchner offered no evidence to support his self-serving statement that he would have accepted the plea deal had he known the great likelihood of his conviction of first-degree kidnapping.").

Furthermore, even if Anderson's statements to the police had been suppressed, it is not likely he would have succeeded at trial as the State had other evidence on the sexual-abuse charge. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985) ("In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial."); *Carroll*, 767 N.W.2d at 641 (stating to establish prejudice outside guilty plea context, a claimant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different). The minutes of testimony show the Iowa Department of Human Services contacted the police department on October 11, 2007, regarding a possible sexual assault involving Anderson and his cousin, C.A. A police officer spoke to C.A. and his mother on October 30. The mother provided the officer with a written statement about the sexual abuse that same day. Anderson's confession did not occur until the following day.

We accordingly reject Anderson's argument that "the State had no information about the sexual abuse charges until they interviewed the applicant at the hospital." Because much of the evidence supporting the sexual abuse charge was discovered before Anderson's incriminating statements were made, his attempt to invoke the "fruit of the poisonous tree" doctrine fails. *See, e.g.*, *State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001) (stating the fruit of the poisonous tree doctrine bars evidence found in subsequent searches only when the evidence was found by virtue of the first illegality). That evidence would have been admissible at trial regardless of whether Anderson's confession was suppressed.

We also find no merit to the remaining claims raised by Anderson in his pro se brief. His argument that the judge presiding at the postconviction relief hearing should have recused himself because he accepted Anderson's guilty plea in the underlying proceedings was raised for the first time on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) ("[W]e will not consider a substantive or procedural issue for the first time on appeal . . . ."). Moreover, Anderson has not shown any actual prejudice resulted from the judge failing to recuse himself. *See State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997)

("A party must show actual prejudice before a recusal is necessary."). Finally, the claims raised in Anderson's pro se reply brief regarding the adequacy of the guilty plea colloquy must also fail, as those claims were neither presented to nor ruled upon by the court in the postconviction proceedings. *See DeVoss*, 648 N.W.2d at 63. In fact, at the hearing on Anderson's application, his counsel stated, "[T]his isn't a challenge to your plea of guilty and sentencing. . . . And there's no indication that those pleas were defective or . . . taken in any illegal manner."

For the foregoing reasons, we affirm the judgment of the district court denying Anderson's application for postconviction relief.

AFFIRMED.