

**IN THE COURT OF APPEALS OF IOWA**

No. 0-779 / 09-1422  
Filed February 9, 2011

**MAYO KAKAL,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Appeal from the denial of postconviction relief. **AFFIRMED.**

Jesse A. Macro Jr. and Tammi M. Blackstone of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

**SACKETT, C.J.**

Mayo Kakal appeals from the district court's denial of his application for postconviction relief. He contends the court erred (1) in denying his request for an interpreter for the postconviction proceeding and (2) in finding he received effective assistance of trial counsel. We affirm.

**I. Background and Proceedings.**

Kakal, born in 1980, grew up in Sudan and graduated from high school there. He moved to California in 2000 and Iowa in 2001. In 2006 he was convicted of willful injury and harassment in the second degree. His convictions were upheld on direct appeal. *State v. Kakal*, No. 06-1262 (Iowa Ct. App. July 12, 2007). We preserved his ineffective assistance claim for possible postconviction proceedings. *Id.*

He filed an application for postconviction relief in 2007 and an amended application in January of 2009 after counsel was appointed for him. In February of 2009 he applied for a court-appointed interpreter. In response to the application for an interpreter, the court issued an order that raised several issues and directed counsel to prepare an amended application for appointment of interpreter. At the April hearing on the amended application, Kakal had an interpreter. Kakal testified at the hearing and was also questioned by the court. The court found that he understood English "adequately so as to not require the appointment of an interpreter under Iowa Code § 622A.2. (2009)." The court noted Kakal understood the questions posed by counsel and the court and was able to express his answers in English. The court further found, "Although it is

difficult to say that Kakal's understanding of the English language is perfect, it certainly appears adequate to this Court for purposes of meaningfully participating in the court proceeding." The court denied the request for an interpreter in the postconviction proceedings and the judge recused himself from further involvement in the proceedings because the issue of the necessity of an interpreter at the criminal trial was an issue raised in the postconviction relief application.

The application for postconviction relief claimed trial counsel rendered ineffective assistance in five areas: (1) in not obtaining an interpreter for Kakal, (2) in not obtaining an interpreter for the State's complaining witness, (3) in not objecting to a hearsay remark during the testimony of the complaining witness, (4) in not objecting to the use of leading questions on direct examination of the complaining witness, and (5) in not adequately investigating previous injuries suffered by the complaining witness in a car accident. Following a June hearing on the application for postconviction relief, the court issued its ruling in August, denying relief on all the claims raised. Kakal appealed.

## **II. Scope of Review.**

"Generally, an appeal from a denial of an application for postconviction relief is reviewed for correction of errors at law." *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). "However, when the applicant alleges constitutional error, review is de novo 'in light of the totality of the circumstances and the record upon which the postconviction court's rulings was made.'" *Id.* (quoting *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994)).

### III. Merits.

On appeal, Kakal limits his claims to those involving his assertion interpreters were necessary in the criminal trial and in the postconviction proceedings. The claims concerning the need for interpreters at his criminal trial are raised as ineffective-assistance claims.

***Ineffective Assistance.*** “To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure.” *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). “The claim fails if the defendant is unable to prove either element of this test.” *Id.* at 266. To establish prejudice, the defendant must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

***Interpreter for the defendant.*** Kakal first claims his trial counsel was ineffective in not obtaining an interpreter for him “for the preparation of his defense and for his criminal trial.” Iowa Code section 622A.2 provides: “Every person who cannot speak or understand the English language and who is a party to any legal proceeding or a witness therein, shall be entitled to an interpreter to assist such person throughout the proceeding.” The corresponding court rule concerning interpreters was not in effect at the time of Kakal’s trial in June of 2006. See Iowa Ct. Rule 47.2 (derived from rule 14.2, which was effective on October 1, 2006). Kakal argues his English at the time of trial was very limited

and he did not have the requisite level of understanding to assist in his own defense or to understand the questions and testimony at trial. Citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 903, 43 L. Ed. 2d 103, 112-13 (1975), which deals with a defendant's lack of understanding of the proceedings based on a mental condition, Kakal asserts the same legal framework should apply. *Drope* is inapposite.

Although Kakal correctly argues a defendant is entitled to an adequate translation of legal proceedings so he can participate in his defense, see *Thongvanh v. State*, 494 N.W.2d 679, 681-82 (Iowa 1993),<sup>1</sup> there first must be a need for a translator. The postconviction court considered the transcript of the criminal trial, the sworn deposition of trial counsel, and Kakal's testimony. Although Kakal asserts his English was limited enough at the time of trial that he needed an interpreter, the trial transcript and the attorney's deposition testimony belie that assertion. The trial transcript does not reveal any indication Kakal did not understand the proceedings or the questions asked when he testified. He did not request an interpreter. His attorney stated he would have sought an interpreter if Kakal had requested one or if he thought Kakal did not understand, but he believed Kakal understood him and the testimony at trial. The postconviction court implicitly found the evidence from Kakal's attorney and the trial transcript more credible than Kakal's assertion he needed an interpreter at trial to be able to understand and to assist in his own defense.

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<sup>1</sup> The issue in *Thongvanh* was the adequacy of the translation made by the translator, not the need for a translator.

Kakal does not indicate how the result of the trial likely would have been different if an interpreter had assisted him at trial. The transcript shows he understood the questions and was able to respond appropriately in English. The court reporter did not ask for clarification or indicate an inability to understand. Defense counsel, the prosecutor, and the court all appear to have had no difficulty understanding Kakal. Both Kakal and the complaining witness appeared to communicate their versions of events adequately. The testimony of the treating physician clearly described the wounds sustained by the complaining witness and contradicted Kakal's version of the events. We conclude Kakal has not demonstrated prejudice and affirm on this claim.

*Interpreter for the State's witness.* This claim differs slightly in that Kakal does not assert an interpreter was necessary because the complaining witness did not understand, but rather because it would have helped Kakal and the jury understand the witness's testimony. The only authority he cites for a duty of defense counsel to request a translator is a court rule that was not in effect at the time of the trial. See Iowa Ct. R. 47.2. Even if that rule had been in effect, it does not impose a duty on attorneys.<sup>2</sup> He testified, "I believe that you didn't understand even what he's saying because nobody really was understanding. It

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<sup>2</sup> The current rule provides:

Whenever the court learns the services of an interpreter are reasonably necessary to ensure complete and accurate communication with a witness or party, court staff shall select a competent interpreter applying the criteria set forth in these rules. The court shall enter an order appointing the interpreter and setting the level of compensation for the interpreter. When a party needs an interpreter and the court expects the proceedings to be complex or lengthy, the court shall appoint more than one interpreter.

Iowa Ct. R. 47.2.

was difficult to understand, even me, the victim who testified.” The trial transcript reveals the complaining witness tended toward rambling answers unless asked simple yes-or-no questions. Yet there is no indication anyone had any difficulty understanding the witness—except for Kakal’s testimony at the postconviction hearing. Nothing in the trial transcript supports Kakal’s claim a translator was necessary so that the State’s complaining witness could be understood.

Kakal makes no claim he was prejudiced and does not indicate how there is any reasonable probability the result of the trial would have been different if there had been a translator for the State’s witness. We affirm on this claim.

***Translator for Postconviction Proceedings.*** Kakal contends the court committed legal error in denying his request for a translator for the postconviction proceedings. At the hearing on his request, Kakal testified through an interpreter on direct examination. No interpreter was used for cross-examination or when the court questioned him directly. No one expressed any difficulty understanding Kakal. He did not indicate he did not understand questions or what was said. His responses to questions show he clearly understood the question. He admitted his English had improved since the criminal trial and that he had spoken primarily English in the three years since his criminal trial. After reviewing the transcript of the criminal trial and considering the testimony at the hearing on the request for a translator, the court determined Kakal did not need a translator.

Iowa Code section 622A.2 requires a translator for witnesses and parties to legal proceedings “who cannot speak or understand the English language.” The court here determined Kakal could speak and understand English. Iowa

Court Rule 47.2 provides for an interpreter “[w]henver the court learns the services of an interpreter are reasonably necessary to ensure complete and accurate communication with a witness or party.” Based on the evidence from the trial transcript and the interaction with Kakal during the hearing, the court determined the services of an interpreter were not reasonably necessary. We agree and affirm on this claim.

**AFFIRMED.**