

**IN THE COURT OF APPEALS OF IOWA**

No. 1-708 / 11-0126  
Filed October 5, 2011

**LASHUN GRAY,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Lashun Gray appeals from the denial of his application for postconviction relief. **AFFIRMED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James J. Katcher, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

**DOYLE, J.**

Lashun Gray appeals the district court's denial of his application for postconviction relief stemming from his convictions of arson, interstate flight to avoid prosecution, and operating a motor vehicle without the owner's consent. Gray contends his first trial counsel was ineffective in failing to investigate a potential alibi witness and in failing to file a notice of intent to raise an alibi defense. Gray also claims his second trial counsel was ineffective in failing to request a continuance when filing an untimely notice of intent to raise an alibi defense. Gray argues this prejudiced him, first because the potential alibi witness did not testify, and second because Gray himself had to take the stand and raise his alibi claim, exposing himself to impeachment with evidence of his prior felony convictions.

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to prevail on an ineffective-assistance-of-counsel claim, an applicant must 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 674, 693 (1984). In order to show prejudice, Gray must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The claim may be resolved on either ground. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Gray's application for postconviction relief suggests an alibi witness would testify she was with Gray at her residence at the time of the arson. In denying the application, the district court concluded:

[Gray] also asserts that [his trial attorneys] failed to meet the standards expected of defense counsel in that [his first] counsel failed to timely give notice of the use of Laika Burt as a defense [alibi] witness. [Gray] asserts Ms. Burt would have testified that he was with her on the night of September 17, and thus, she knows of personal knowledge that he could not have committed the crimes asserted against him. [Gray's second] trial counsel . . . testified he spoke to Ms. Burt and her testimony would have been substantially at odds with [Gray's] testimony. [Gray] did not call Ms. Burt during this postconviction relief application. The only proof that Ms. Burt would testify as [Gray] alleges is [Gray's] statements. [Gray] also asserted that Ms. Burt supplied an affidavit to [Gray's second trial counsel] of what she would testify to. [Defense counsel] testified he received no affidavit from Ms. Burt. . . . Without actual testimony from Ms. Burt as to what she would have testified to, the court finds that [Gray's] claim is unavailing.

On appeal, Gray reasserts his claim his trial attorneys were ineffective and Burt would have testified she was with Gray at her residence at the time of the arson. However, Gray failed to present any evidence as to how Burt would have testified. Gray's bald assertion Burt's testimony would have been beneficial is pure speculation. See *Stewart v. Nix*, 31 F.3d 741, 744 (8th Cir. 1994) ("To prove prejudice from a trial attorney's failure to investigate potential witnesses, a petitioner must show that the uncalled witnesses would have testified at trial and that their testimony would have probably changed the outcome of the trial."). We will not engage in speculation. See *State v. Douglas*, 485 N.W.2d 619, 625 (Iowa 1992) ("A reviewing court cannot predicate error on speculation."). Gray has failed to meet his burden to show he was prejudiced.

We therefore affirm the district court's denial of Gray's application for postconviction relief.

**AFFIRMED.**