

IN THE COURT OF APPEALS OF IOWA

No. 2-425 / 11-0875
Filed July 11, 2012

CHRISTOPHER JAMES DRIESON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee

Appeal from the Iowa District Court for Sioux County, Jeffrey A. Neary,
Judge.

Christopher James Driesen appeals the denial of his application for
postconviction relief. **AFFIRMED.**

Eric K. Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish,
Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General and Coleman McAllister, County Attorney, for appellee.

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

MULLINS, J.

Christopher James Driesen appeals the denial of his application for postconviction relief. He argues his trial counsel was ineffective by failing to make him aware his guilty plea would result in a sentence of incarceration that could not be deferred or suspended, and such knowledge would have changed his decision to plead guilty. Because we find Driesen does not meet his burden of showing prejudice, we affirm.

I. Background Facts and Proceedings

On July 27, 2007, Driesen, age twenty-three, was charged with two counts of third-degree sexual abuse, alleging he performed sex acts with girls ages thirteen and fifteen, in violation of Iowa Code sections 709.4(2)(b) and (c)(4) (2007), respectively. A violation of section 709.4(2)(b) is a forcible felony as defined by section 702.11(1), while a violation of section 709(2)(c)(4) is specifically excepted from the definition of a forcible felony by section 702.11(2)(c). Driesen was also charged with two counts of supplying alcohol to minors, in violation of Iowa Code section 123.47(4).

On March 10, 2008, Driesen signed a written plea agreement stating he would receive a concurrent ten-year sentence for each count of third-degree sexual abuse. For each count, the agreement specifically provided, “This sentence shall not be suspended or deferred.” In exchange for his plea, the two counts of supplying alcohol to minors were dismissed by the State. The minutes of evidence show that Driesen had confessed to all four crimes after being duly read his *Miranda* rights. His confession was corroborated by statements from

both of his victims and a third person who witnessed Driesen having sexual intercourse with both victims. Upon entering his plea, Driesen was immediately taken into custody. He claims to have received a letter from his attorney a few days later wherein his counsel apologized for not realizing one of the charges was a forcible felony. Driesen did not, however, file a motion in arrest of judgment, and cannot now produce that letter.

Under Iowa Code section 907.3, a person convicted of a forcible felony is not eligible for a deferred judgment or a deferred or suspended sentence. Nonetheless, at Driesen's sentencing on March 24, 2008, his attorney presented several witnesses to testify that justice in Driesen's case would best be served by a sentence of probation with treatment rather than incarceration. Driesen's attorney admitted that the court might not have any discretion to give Driesen probation, but still asked the court to "give Mr. Driesen whatever consideration the Court can give him." Driesen was sentenced to two concurrent sentences for terms not to exceed ten years. At the sentencing hearing, the court specifically noted that it had no discretion to suspend or defer Driesen's sentence. In November of 2008, Driesen filed a motion to reconsider his sentence, seeking a suspended sentence, which was denied by the court on the grounds that one of the offenses was a forcible felony.

In August of 2009, Driesen filed an application for postconviction relief arguing that his counsel was ineffective in failing to properly advise him of the consequences of his guilty plea. A trial was held on February 8, 2011. Driesen testified at the trial that his trial counsel led him to believe that he would not have

to serve prison time if he pled guilty, and presented his parents as witnesses to his understanding at the time of the plea. Driesen's trial attorney died prior to the postconviction relief hearing, and therefore was unavailable to testify as to his actions. Relying primarily on the record of irregularities at sentencing, the court concluded Driesen's counsel was constitutionally ineffective. However, the court further ruled that Driesen could not show prejudice resulted due to "overwhelming evidence of guilt." Driesen appeals.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). To establish a claim of ineffective assistance of counsel, a defendant must show by the preponderance of the evidence (1) their attorney failed to perform an essential duty, and (2) prejudice resulted. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Failing to prove either prong is fatal to the case. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

III. Analysis

Since the issue of prejudice is dispositive of this case, we decline to address counsel's failure to perform an essential duty. "The defendant establishes prejudice 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 v. Washington*, 466 U.S. 668, 694 (1984)). "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 Driesen must show there is a reasonable probability that without counsel's error he would not have pled guilty. See *State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002). A defendant's conclusory claim that they were ready to insist on going to trial is not enough to show prejudice. *Id.* Instead, we look for objective evidence of that desire, based on either a defense waived or a weakness in the case against the defendant. *United States v. Gordon*, 156 F.3d 376, 380-81 (2nd Cir. 1998); see also *State v. Marlenee*, No. 04-1755, 2006 WL 1229993 at *3 (Iowa Ct. App. Apr. 26, 2006); *State v. Becker*, No. 04-1869, 2005 WL 2217074 at *2 (Iowa Ct. App. Sept. 14, 2005); *State v. Tate*, No. 04-1690, 2005 WL 1398269 at *3 (Iowa Ct. App. June 15, 2005). The court may weigh the evidence against him and his chance of succeeding at trial in order to determine whether he was prejudiced. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Driesen asserts that had he known his plea would result in a sentence of incarceration, he would not have pled guilty. However, the objective evidence indicates that Driesen still had substantial incentive for a guilty plea even if he had been fully informed of the consequences. It is undisputed that Driesen was age twenty-three at the time of the events, and the female victims were ages thirteen and fifteen. Driesen did not allege that he was married to either victim. The only question is whether a sex act occurred. The evidence against Driesen on this issue included an admissible confession and corroborating accounts from both victims and an eyewitness. See *Irving*, 533 N.W.2d at 541 (holding an admissible confession with corroborating evidence was enough to demonstrate

defendant was not prejudiced by pleading guilty because an innocent verdict at trial was unlikely). Driesen's plea deal dismissed two serious misdemeanors and called for his sentences to be served concurrently. Had he proceeded to trial, he would have faced the possibility of consecutive ten-year sentences and two additional serious misdemeanor charges, each punishable by imprisonment not to exceed one year, plus a fine. Iowa Code §§ 901.8, 903.1(b). A finding of guilt at trial could not have imposed any lesser sentence than Driesen actually received in his plea deal.

Driesen bears the burden to establish by a preponderance of the evidence that he would have insisted on going to trial had he been aware of the consequences of his plea. His conclusory claim that he would have insisted on a trial is self-serving and not sufficient on its own to bear the burden to show prejudice. The objective evidence indicates that Driesen would still have had sufficient incentive to plead guilty after considering his sentence was not within the discretion of the trial court to suspend or defer, and that the evidence of guilt was overwhelming, making his chance of succeeding at trial very unlikely. Driesen has not demonstrated the prejudice necessary for an ineffective assistance of counsel claim.

AFFIRMED.