IN THE COURT OF APPEALS OF IOWA

No. 2-553 / 11-1855
Filed July 25, 2012

MICHAEL DUANE ASCHENBRENNER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson, Judge.

Michael Aschenbrenner appeals from the denial of his application for postconviction relief. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Rose Anne Mefford, County Attorney, and Tyler Eason, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Michael Aschenbrenner appeals from the district court ruling denying his application for postconviction relief following his guilty plea. He claims he received ineffective assistance of counsel because his trial attorney erroneously advised him regarding sex offense classifications. We affirm.

Aschenbrenner pleaded guilty to the crime of invasion of privacy—nudity in violation of Iowa Code section 709.21 (2009). He was given a one-year suspended jail sentence and a ten-year special sentence under section 903B.2, committing him to the custody of the Iowa Department of Corrections (Department). As a part of the suspended sentence, he was placed on probation for a year.

A conviction in violation of Iowa Code section 709.21 is generally a Tier II offense. *See* Iowa Code § 692A.102(1)(b)(7). However, if the offense is committed against a person under thirteen years of age, the offense is reclassified as a Tier III offense. *See id.* § 692A.102(5). Because the offense to which Aschenbrenner pleaded guilty was committed against a person under thirteen years of age, the Department, subsequent to the sentencing, classified Aschenbrenner as a Tier III sex offender.

Aschenbrenner filed an application for postconviction relief claiming his trial counsel provided him ineffective assistance. He alleged he was erroneously advised his sex offender classification would be Tier II, not Tier III. He asserted "[b]ecause of the restrictions on his ability to run his business, [he] would not have [pleaded] guilty had he known the consequences of his plea." By agreement of the parties, the case was submitted to the district court upon

Aschenbrenner's motion for summary judgment. Included in the summary judgment record was the parties' stipulation that Aschenbrenner's testimony would have been that "if the direct and collateral consequences . . . had been explained to him prior to the time of the plea, he would not have accepted the plea. He would have gone to trial."

The district court found Aschenbrenner's counsel rendered ineffective assistance in giving erroneous advice, but concluded Aschenbrenner failed to establish prejudice stemming from his trial counsel's ineffective assistance. The district court denied his application. Aschenbrenner now appeals.

We normally review postconviction proceedings for errors of law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights, such as effective assistance of counsel, we review the claim de novo. *Id*. To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id*. at 158. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id*. at 159.

We agree with the district court that Aschenbrenner did not prove the prejudice prong of his claim. While Aschenbrenner voices numerous complaints about the restrictions of his probation and how they have adversely affected his day-to-day life, he makes no suggestion his counsel misadvised him about these matters, nor could he under the record presented. Instead, it is his counsel's erroneous advice regarding Tier II and Tier III sex offender classifications that is the foundation of his claim of ineffective assistance of counsel. Aschenbrenner contends that had he been properly advised that he would be classified as a Tier

III offender rather than a Tier II offender that he would never have entered a guilty plea and would have insisted on going to trial.

The only difference between the Tier II and Tier III classifications is that Tier III requires more frequent appearances at the sheriff's office.[1] The district court found "[t]he harm of additional appearances at the sheriff's office is minimal considering the risks [Aschenbrenner] faced at trial." We agree. The minor difference in having to report to the sheriff's office four times a year as a Tier III offender, instead of twice a year as a Tier II offender, certainly would not adversely impact Aschenbrenner's ability to run his business, and he presents no evidence to the contrary. Other distinctions between the tiers as alleged by Aschenbrenner are hypothetical and not established by any evidence.

A defendant who enters into a plea agreement "must show there is a reasonable probability that, but for counsel's errors, he or she would not have [pleaded] guilty and would have insisted on going to trial" in order to satisfy the prejudice requirement. *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The only evidence supporting Aschenbrenner's prejudice claim is his self-serving statement that had he been properly advised, he would not have accepted the plea and would have insisted on going to trial.[2] Without more, this evidence is simply insufficient to establish prejudice. *See, e.g.*, *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir.

[1] A Tier II sex offender must report to the sheriff every six months. Iowa Code § 692A.108(1)(b). A Tier III sex offender must appear every three months. *Id*. § 692A.108(1)(c).

[2] The State stipulated that if Aschenbrenner testified, he would testify that had he been fully informed of the consequences of the plea, he would not have pleaded guilty. The State did not stipulate that such testimony was sufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

1997) (requiring objective corroborating evidence to establish prejudice from ineffective assistance that led to entering plea).

Aschenbrenner failed to prove the prejudice prong of his claim. Our review of the record convinces us that there was not a reasonable probability that, but for his counsel's errors, Aschenbrenner would not have pleaded guilty and would have insisted on going to trial. We therefore affirm the district court's denial of Aschenbrenner's application for postconviction relief. We affirm the district court on all remaining arguments raised by Aschenbrenner.

AFFIRMED.