

IN THE COURT OF APPEALS OF IOWA

No. 3-091 / 10-2108
Filed March 27, 2013

LAFOYA GAINES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Defendant appeals the district court decision denying her application for postconviction relief from the revocation of probation on her two convictions for possession of a controlled substance. **AFFIRMED.**

Francis P. Hurley of Phil Watson, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert DiBlasi, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts & Proceedings.**

LaFoya Gaines was charged with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp after officers found plastic bags of crack cocaine in her purse. She pleaded guilty to possession of a controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(3) (2005). On August 18, 2005, Gaines was sentenced to a term of imprisonment not to exceed twenty-five years. The sentence was suspended, and she was placed on probation for a period of two years.

On December 31, 2005, Gaines was arrested and charged with possession with intent to deliver. Gaines stipulated that she had violated her probation. On May 9, 2006, the district court entered an order revoking her probation and imposing her original sentence for twenty-five years in prison. In addition, she pleaded guilty to the later charge of possession of a controlled substance with intent to deliver, in violation of section 124.401(1)(c)(3), and was sentenced to a term of imprisonment not to exceed ten years on that charge. The court ordered the sentences to run consecutively.

The district court entered an order on September 22, 2006, reconsidering Gaines's sentences. The court suspended Gaines's sentences and placed her on probation for a period of two years. A condition of that probation was placement at a residential facility. In March 2007 Gaines escaped from the women's residential facility, and she became a fugitive for two years.

In April 2009 Gaines was taken back into custody and charged with escape. New probation revocation proceedings were initiated. The transcript

from the probation revocation hearing shows Gaines entered into an agreement whereby she would stipulate she had violated her probation; her previous sentences would be reinstated, but would run concurrently; she would serve a mandatory minimum of one-third of that sentence; and the State would dismiss the escape charge. Gaines agreed on the record to accept this agreement. On April 30, 2009, the district court reinstated Gaines's previous sentences for twenty-five years and ten years, making them concurrent, and determined she would be required to serve a mandatory one-third of those sentences prior to being eligible for parole.

On December 7, 2009, Gaines filed an application for postconviction relief, claiming she received ineffective assistance of counsel during the 2009 probation revocation proceedings. Gaines testified at the postconviction hearing that her defense counsel advised her if she stipulated to violating her probation she would only serve eighteen to twenty-four months in prison. She also stated, "I just wanted to say yes, I did violate my probation." When asked, Gaines agreed there was no question she had violated her probation when she left the facility. In a deposition, defense counsel testified that he had advised Gaines she would have to serve a mandatory one-third of the twenty-five year sentence.

The district court entered a ruling on December 1, 2010, denying Gaines's application for postconviction relief. The court found defense counsel's testimony and description of his representation of Gaines to be more credible than her testimony. The court also noted that the parties' agreement was read into the record during the 2009 probation revocation hearing and Gaines affirmatively stated she would accept the agreement. At that hearing, the district court also

mentioned the mandatory minimum of one-third of the twenty-five year sentence would apply. The court concluded Gaines had failed to show she received ineffective assistance of counsel. Gaines now appeals the decision of the district court denying her application for postconviction relief.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). “In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy.” *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel’s breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

III. Merits.

Gaines contends the district court ruling was not supported by substantial evidence. Specifically, Gaines claims she received ineffective assistance at the 2009 probation revocation proceedings because her counsel failed to properly advise her of the consequences of stipulating that she had violated her probation.¹ She asserts defense counsel told her she would serve no more than

¹ On appeal, the State raises an issue of whether Gaines was entitled to the effective assistance of counsel at a probation revocation proceeding. This issue was not raised before the district court, and we conclude it has not been preserved for our

eighteen to twenty-four months in prison, and he did not explain to her the mandatory minimum requirement for her sentence. Gaines claims if she had been properly advised, she would have proceeded to a hearing on the issue of whether she had violated her probation.

We agree with the district court's conclusion that Gaines has failed to show she received ineffective assistance from defense counsel during the 2009 probation revocation proceedings. The district court specifically found Gaines's testimony on this issue was not credible. Defense counsel testified that he informed Gaines she would have to serve a mandatory one-third of the twenty-five-year sentence. Furthermore, the transcript from the probation revocation hearing shows the parties' agreement was read into the record, and when asked if she accepted the agreement, Gaines said, "Yes." Gaines has not shown counsel breached an essential duty.

In addition, Gaines has not shown she was prejudiced by stipulating during the 2009 probation revocation proceedings that she had violated her probation. At the postconviction hearing, Gaines stated she had violated her probation. Furthermore, Gaines escaped from the women's residential facility and was a fugitive for two years. It is clear even if Gaines had not stipulated she had violated her probation, the district court would have found her probation had been violated.

review. See *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding courts will not consider a substantive or procedural issue raised for the first time on appeal).

We conclude Gaines has failed to show the district court ruling was not supported by substantial evidence. We affirm the decision of the district court denying her request for postconviction relief.

AFFIRMED.