

IN THE COURT OF APPEALS OF IOWA

No. 3-257 / 12-1126
Filed April 10, 2013

RANDY JOE HERRMANN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Randy Herrmann appeals from the district court's dismissal of his
application for postconviction relief. **AFFIRMED.**

Thomas P. Graves of Graves Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Michael Bennett, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant
County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Bower, J., takes
no part.

DOYLE, J.

Randy Herrmann appeals from the district court's dismissal of his application for postconviction relief. He contends his *Alford*¹ plea was not voluntary and knowing and that his trial counsel was ineffective in failing to perfect a direct appeal. Upon our de novo review, we affirm.

We normally review postconviction relief 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 believe this case can be resolved on the prejudice prong.

After his first trial ended in a mistrial, Herrmann entered an *Alford* plea to charges of possession of methamphetamine with intent to deliver while in the immediate possession or control of a firearm, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.401(1)(e) (2005), a class "C" enhanced felony, and trafficking in stolen weapons, in violation of section 724.16A, a class "D" felony. His counsel (plea counsel) was allowed to withdraw after Herrmann expressed a desire to take back the plea. Substitute counsel (sentencing counsel) was appointed, and he prepared a motion in arrest of judgment and application to

¹ An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001).

withdraw guilty plea, but he advised Herrmann against filing it.² The motion was not filed.³ Herrmann was sentenced to twenty years on the possession conviction and five years on the trafficking conviction, with the sentences to be served concurrently. No mandatory minimum sentence was imposed, and fines were suspended. Herrmann then informed his sentencing counsel he wished to appeal, but no appeal was filed.

Herrmann filed, pro se, a pre-printed application for postconviction relief with various grounds checked off on the application form as the basis upon which the application was filed. Postconviction relief counsel was appointed. A hearing on Herrmann's application was held in the district court. In its order dismissing the application, the court indicated Herrmann "maintains that his [sentencing counsel] was ineffective because he did not perfect an appeal."

Herrmann's sentencing counsel testified that after Herrmann asked him to file an appeal, he talked to Herrmann's girlfriend and asked her to speak with Herrmann about the "wisdom" of filing an appeal. Sentencing counsel did not believe there were grounds for an appeal and thought it was not in Herrmann's best interests to pursue an appeal because to do so would jeopardize the plea agreement. The girlfriend reported back to sentencing counsel the next day and said Herrmann did not want to appeal, so counsel did not file one. The

² As a part of the plea agreement, the State made certain concessions and agreed to refrain from referring the matter to federal authorities. Herrmann could have faced more imprisonment time under federal charges than under the state charges. Herrmann's counsel was told by the State that if the motion were filed, the State would not guarantee it would refrain from referring the matter to the federal authorities.

³ Sentencing counsel testified he recommended to Herrmann "that it was probably in his best interest that we not file [the combined motion in arrest of judgment and application to withdraw guilty plea] and [Herrmann] agreed with that recommendation."

postconviction court concluded Herrmann's sentencing counsel breached an essential duty in not conferring directly with Herrmann to confirm his decision regarding the appeal. However, the court further concluded that "even though [sentencing counsel] should have confirmed [Herrmann's] decision directly with [Herrmann]," Herrmann suffered no prejudice because "[a] review of the entire record demonstrates that [Herrmann] had no valid grounds to appeal." Specifically, the court found Herrmann's plea was voluntarily, knowingly, and intelligently entered, and the plea had a factual basis. The court also found Herrmann's decision not to file a motion in arrest of judgment was voluntarily, knowingly, and intelligently made. The court then dismissed Herrmann's application for postconviction relief.

Herrmann now appeals. He contends error was preserved because "[t]his is a post-conviction relief action." However, this statement of issue preservation is deficient as it makes no reference to the places in the record where the issue was raised or decided. See Iowa R. App. P. 6.903(2)(g)(1). Additionally, Herrmann asserts, as a discrete issue, his plea was not voluntary and knowing, in that he did not understand the meaning of an *Alford* plea. As a stand-alone issue, error was also not preserved. "A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal." See Iowa R. Crim. P. 2.24(3); see also *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006). Here, Herrmann did not file a motion in arrest of judgment challenging the adequacy of his plea. "[A]ny claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is

shown for not previously raising the claim, and actual prejudice resulted from the claim of error.” *Everett*, 789 N.W.2d at 156. A claim of ineffective assistance of counsel provides an exception to this traditional error preservation rule. Iowa Code § 814.7; *Everett*, 789 N.W.2d at 156. So, it is only through a claim of ineffective assistance of counsel that the issue of the voluntariness and knowingness of the plea could be preserved for our review.

Herrmann asserts, as he did before the postconviction court, that sentencing counsel was ineffective in failing to perfect an appeal after Herrmann directed him to do so. We disagree.

To be sure, the postconviction relief court concluded sentencing counsel breached an essential duty by not conferring directly with Herrmann to confirm his decision regarding an appeal. But we, like the postconviction relief court, conclude Herrmann suffered no prejudice, as there were no legitimate grounds upon which to appeal the plea. After a de novo review of the record, we agree with the findings of the postconviction court:

[Herrmann] confirmed that he was able to understand the [plea] proceedings and confirmed that there were no threats or promises made to him to get him to plead guilty, other than the terms of the plea agreement. In addition, at the postconviction-relief trial, [Herrmann] testified that “no one was forcing me to plead guilty.” No threats were made. [Herrmann] testified that he pled guilty because of the negotiated plea. A review of the transcript of plea proceedings shows that [Herrmann] understood the rights he was giving up in entering the plea and did give up those rights.

The postconviction court concluded that “[a] review of the entire record demonstrates that [Herrmann] had no valid grounds to appeal. His plea was knowingly and intelligently entered. His plea was voluntary.” We agree with the postconviction court’s assessment. “To establish prejudice, a defendant must

show the probability of a different result is sufficient to undermine confidence in the outcome.” *Everett*, 789 N.W.2d at 159. (citations and internal quotation marks omitted). Herrmann has not made that showing here. With no valid grounds to appeal, Herrmann was not prejudiced by his counsel’s failure to perfect an appeal. Having failed to prove the prejudice prong, Herrmann’s claim misses the mark, and we therefore affirm the court’s dismissal of Herrmann’s application for postconviction relief.

AFFIRMED.