

IN THE COURT OF APPEALS OF IOWA

No. 6-985 / 06-0245
Filed January 31, 2007

SHAWN P. GANT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Fayette County, Kellyann M. Lekar,
Judge.

Shawn P. Gant appeals from the district court's dismissal of his application
for postconviction relief. **AFFIRMED.**

James T. Peters, Independence, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, W. Wayne Saur, County Attorney, and, Nathan Lein, Assistant County
Attorney, for appellee State.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Shawn Gant appeals from the district court's ruling dismissing his application for postconviction relief. We affirm.

Gant was initially charged with first-degree arson, a class "B" felony, and first-degree criminal mischief, a class "C" felony, in connection with a fire in an apartment house. Pursuant to a plea agreement, Gant pled guilty to reckless use of fire, a serious misdemeanor. Following his sentencing on December 13, 2004, Gant filed a direct appeal to the Iowa Supreme Court. His appeal was dismissed as frivolous.

While his direct appeal was still pending, Gant filed a pro se application for postconviction relief raising a single claim of newly discovered evidence. The State moved to dismiss the application, arguing that only claims fundamental to Gant's guilty plea were available to the applicant.

Hearing was held on Gant's postconviction relief application on November 21, 2005.¹ Gant did not appear personally; however, he was represented by attorney Jeremiah White. The record reveals White spoke with Gant on November 21 before the hearing took place. At the hearing White informed the court he did not think it was necessary for Gant to testify. White offered the deposition testimony of Gant's brother as evidence in support of his client's claim of newly discovered evidence. The deposition was admitted without objection by the State. White then asked for an opportunity to amend Gant's postconviction application to add a new claim that Gant's guilty plea was not knowing and voluntary. The new claim was based on Gant's contention that

¹ The order setting hearing is not part of the record on appeal.

he did not understand his guilty plea in this case could result in the “complete revocation” of his probation in another arson case which had been prosecuted against him in a different county. White suggested Gant’s claim regarding his plea generated an issue of ineffective assistance of trial counsel. The court did not rule on White’s oral request to amend the postconviction application, and the matter was submitted.

In an order entered January 23, 2006, the postconviction court dismissed Gant’s application for postconviction relief. The court concluded Gant’s newly-discovered-evidence claim did not survive his guilty plea. The court also noted Gant’s claims that his guilty plea was not knowing and voluntary and his trial counsel was ineffective were not part of his application for postconviction relief, which had not been amended prior to hearing. Because those grounds were not properly pleaded, the court did not consider them.

On appeal, Gant does not challenge the postconviction court’s conclusion that his claim of newly discovered evidence did not survive his guilty plea. Instead, he contends the postconviction court erred in dismissing his application for postconviction relief without providing him with an evidentiary hearing. The State argues Gant failed to preserve any claim of procedural error regarding the manner in which his hearing was conducted. Upon review of the record, we agree that error was not preserved. Gant raised no procedural objections of any kind in the postconviction court regarding the sufficiency of his hearing.² Issues not raised before the district court, including constitutional issues, cannot be

² Even if Gant had preserved his procedural complaints, the record suggests the postconviction court provided Gant’s attorney with the opportunity to present any evidence he considered appropriate.

raised for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). Accordingly, we reject this assignment of error.

In his second assignment of error, Gant asks us to find his postconviction counsel ineffective for failing to submit a timely amended application for postconviction relief. Gant asserts his application should have been amended to raise a claim of ineffective assistance of trial counsel based on his assertion that he (Gant) did not enter a knowing and voluntary guilty plea.

We review ineffective assistance of counsel claims de novo. *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998). Gant has the burden to establish by a preponderance of evidence that his counsel was ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). To prove ineffective assistance of counsel, Gant must show counsel failed to perform an essential duty, and prejudice resulted from counsel's error. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish the first prong of the test, Gant "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the second prong, Gant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Id.* If Gant is unable to prove either the duty or the prejudice prong, his ineffective assistance claim will fail. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003).

When a defendant claims ineffective assistance of counsel in connection with a guilty plea, he or she may establish the occurrence of prejudice by showing a reasonable probability that, but for counsel's errors, he or she would

not have pled guilty and would have insisted on going to trial. *Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995).

According to Gant's brief on appeal, his claim of ineffective assistance stems from postconviction counsel's awareness of and failure to timely act on Gant's belief his guilty plea was involuntary. Postconviction counsel informed the court that Gant claimed he did not understand there would be a complete revocation of a prison sentence imposed upon him in another county on account of his guilty plea in this case.³ We are unconvinced Gant's belated and unsupported assertion that he did not understand the effect of his guilty plea gave rise to a meritorious claim of ineffective assistance of trial counsel which his postconviction counsel should have pursued. In addition, Gant has not asserted, much less shown, that but for a possible failure of duty on the part of his trial counsel, he would not have pleaded guilty to a serious misdemeanor and would have insisted on going to trial on class "B" and class "C" felony offenses.

We affirm the district court's dismissal of Gant's application for postconviction relief.

AFFIRMED.

³ The record indicates Gant spoke with his attorney about the probation revocation issue on the day the hearing was held.