

IN THE COURT OF APPEALS OF IOWA

No. 7-784 / 07-0566
Filed November 29, 2007

GARY KIRCHNER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Ida County, James D. Scott, Judge.

Applicant appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Kristal L. Phillips, County Attorney, for appellee State.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Gary Kirchner appeals following the district court's denial of his application for postconviction relief. He claims the district court erred in finding that his trial counsel provided adequate advice regarding the State's plea offer before his first trial. He also claims the district court applied an incorrect standard of law in finding he would not have accepted the plea offer. We affirm the judgment of the district court.

In late 1996 Kirchner was charged with two counts of first-degree burglary, criminal mischief, domestic abuse assault, and first-degree kidnapping. The charges were based on allegations he transported his estranged wife, Melanie Kirchner, to several remote areas, beat her with a tire iron, and otherwise physically and sexually abused her. The first-degree kidnapping charge exposed Kirchner to the possibility of life in prison. See Iowa Code §§ 710.2, 902.1 (1995).

On June 2, 1997, the State sent a letter to Kirchner's counsel, Gregory Jones, offering to allow Kirchner to plead guilty to second-degree kidnapping, second-degree burglary, and third-degree sexual assault and to recommend a twenty-five year concurrent sentence. The county attorney prefaced the letter by stating, "My prior experience with Mr. Kirchner suggests that he will not reasonably consider any plea proposal short of a dismissal." Jones forwarded the letter to Kirchner, who was out on bail, and asked Kirchner to meet him at the county courthouse on June 13 to discuss the plea offer. Kirchner did not show up for the meeting. Jones "stopped at Mr. Kirchner's house to see if [he] could locate him in person and [he] wasn't able to find anybody at home." He also sent

an investigator from his office to try to find Kirchner. The investigator eventually located Kirchner on June 20 and communicated the plea offer to him. Kirchner told the investigator, “[F]uck that anyway, I am not taking any plea offer.”

Jones discussed the plea offer with Kirchner before trial and encouraged him to consider it “[a]lthough Mr. Kirchner had made it clear to [him] that he wasn’t going to accept a plea offer.” Kirchner’s family also urged him to accept the State’s offer, but he refused, stating, “No. I’m not guilty. I’m not doing it.”

Kirchner ultimately rejected the plea offer, and the case proceeded to trial on October 29, 1997. After the trial began, Kirchner was found incompetent to stand trial due to “methamphetamine use at or around the time of the trial,” and a mistrial was declared. Kirchner regained his competency about one month later, and his case was rescheduled for trial commencing in January 1998. Shortly before trial, the State informally told Jones it would “be willing to accept a plea to just about anything,” even a Class D felony with a five-year sentence, “as long as Mr. Kirchner would agree to go to prison.” Jones advised Kirchner of the State’s offer, and he responded that “he didn’t do anything, and he wasn’t going to plead to anything he didn’t do.”

After Kirchner again rejected a plea agreement, the case proceeded to trial and the jury returned a guilty verdict on all counts. Kirchner was sentenced to a mandatory life imprisonment term on the first-degree kidnapping charge with all other sentences to run concurrently. He appealed, challenging the sufficiency of the evidence, and the district court’s denial of his request for different court-appointed counsel. He also raised a variety of ineffective assistance of counsel claims, which we preserved for possible postconviction relief proceedings. We

rejected Kirchner's other claims and affirmed his conviction. *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

Kirchner subsequently filed an application for postconviction relief, claiming in part that his trial counsel provided ineffective assistance because he "failed to explain the benefits of the plea agreement made before the first trial began and the risks of going to trial." The district court denied the application for postconviction relief finding, "Jones clearly informed Kirchner of the strengths and weaknesses of the State's case." The court further found Kirchner "failed to show that but for trial counsel's alleged misadvice he would have accepted the State's plea agreement."

Kirchner appeals. His appeal asserts ineffective assistance of counsel only with respect to the twenty-five-year plea offer made prior to his first trial. He makes no claim of ineffective assistance regarding the five-year plea offer made prior to his second trial.

Postconviction proceedings are generally reviewed for correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises issues of constitutional dimension, such as ineffective assistance of counsel, our review is de novo. *Id.* We give weight to the district court's findings concerning witness credibility. *Id.*

The United States Supreme Court has long held that the standards promulgated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), apply to ineffective assistance claims arising out of the plea bargaining process. *Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001); see also *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). Kirchner has

the burden to establish by a preponderance of evidence that his counsel was ineffective. *Ledezma*, 626 N.W.2d at 145. To prove ineffective assistance of counsel, Kirchner must show his counsel failed to perform an essential duty and prejudice resulted. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. If Kirchner 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).

Upon our de novo review of the record in this case, we find it unnecessary to address Kirchner's claim that his trial counsel offered deficient advice as to the State's plea offer before his first trial. We reach this conclusion because Kirchner has failed to demonstrate prejudice.

The prejudice inquiry in plea bargain cases focuses on whether counsel's ineffective performance affected the outcome of the plea process. *Wanatee*, 259 F.3d at 703. A defendant who rejects a plea offer due to improper advice from counsel may show prejudice under *Strickland* even though he ultimately received a fair trial. *Id.* To show prejudice under such circumstances, the defendant "must show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence." *Id.* at 704. "[T]he inquiry into what [the defendant] would have done under different circumstances is necessarily subjective." *Id.*; accord *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). We therefore reject Kirchner's claim that the district court incorrectly applied a subjective standard in determining whether he established prejudice.

Like the district court, we find that Kirchner did not establish he would have accepted the State's plea offer before his first trial but for counsel's allegedly deficient advice. Kirchner maintained his innocence throughout these proceedings and categorically rejected the State's plea offers because "he wasn't going to plead to anything that he didn't do." We also find it significant that the State informally offered Kirchner a significantly more favorable plea bargain before his second trial, which he rejected and is not challenging on appeal. We agree with the district court's finding "that irrespective of any alleged deficiencies in trial counsel's performance Kirchner refused to enter a plea of guilty to any crime that would result in a prison term because he believed that he was innocent of the charges." *See, e.g., Engelen*, 68 F.2d at 241 (finding defendant failed to prove he would have pled guilty if properly advised because he continually asserted he was innocent).

Because we conclude Kirchner did not establish he was prejudiced by his counsel's allegedly inadequate advice regarding the State's plea offer before his first trial, we affirm the district court's decision denying Kirchner's application for postconviction relief.

AFFIRMED.