

**IN THE COURT OF APPEALS OF IOWA**

No. 8-601 / 07-1144  
Filed October 1, 2008

**JASMIR MUJKIC,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his guilty pleas to third-degree sexual abuse and assault while displaying a dangerous weapon. **AFFIRMED.**

Michael M. Pedersen, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Potterfield, J., and Schechtman, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

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

Jasmir Mujkic is a native of Bosnia who resided in Waterloo. In January 2002, Mujkic was charged with assault while using or displaying a dangerous weapon, an aggravated misdemeanor, and sexual abuse in the third degree, a class C felony, separate incidents.

On May 2, 2002, Mujkic, then eighteen, though still a high-school junior, pled guilty to both charges. An interpreter was provided for the plea proceedings. The district court failed to advise Mujkic of several of the rights waived by entering a guilty plea. See Iowa R. Crim. P. 2.8(2)(b). Mujkic requested to be sentenced immediately after the acceptance of his pleas. He was advised that an immediate sentence would not allow him to file a motion in arrest of judgment to challenge any legal defects in the entry and acceptance of his pleas. See Iowa R. Crim. P. 2.24(3)(b).<sup>1</sup> Pursuant to the plea bargain that generated his pleas, he was given suspended ten and two-year concurrent sentences, suspended fines, and placed on supervised probation, with mandated sex offender treatment at a residential facility.

After the imposition of the sentences, and a bench conference off the record, the court informed Mujkic:

A conviction here in these cases could result in your deportation.

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They [Immigration and Naturalization Services] may use a conviction and start procedures to deport you. Knowing that, does that change your mind about whether you want to plead guilty and be sentenced?

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<sup>1</sup> The motion must be made not later than forty-five days after the plea, "but in any case not later than five days before the date set for pronouncing judgment."

Through the interpreter, Mujkic replied, “keep the plea as it is.” He did not file a direct appeal of the guilty plea and sentencing proceedings, though advised of his rights to appeal, including his right to appellate counsel.

Three months later, In August 2002, Mujkic filed a petition for postconviction relief, alleging that he received ineffective assistance of counsel as (1) no effort was made to transfer the charges to juvenile court,<sup>2</sup> and (2) there was no compliance with the Vienna Convention, as he was a citizen of Bosnia. These charges were augmented by his counsel at the postconviction hearing to include defense counsel’s failure to file a motion in arrest of judgment challenging numerous deficiencies in the pleas, subjecting them to be set aside as not knowingly and voluntarily given. Arguments were received, but no direct evidence was taken. Postconviction counsel stated Mujkic was in the custody of Immigration and Naturalization Services (INS) at Hastings, Nebraska, and was facing deportation to Bosnia due to his convictions.

The district court ruled that Mujkic was not adequately advised of his rights,<sup>3</sup> and the guilty pleas should be set aside. The State appealed. The Iowa Court of Appeals determined the district court should have held an evidentiary hearing prior to ruling on its merits. *Mujkic v. State*, No. 02-2077 (Iowa Ct. App.

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<sup>2</sup> The allegations giving rise to the charge of third-degree sexual abuse took place in November 2001, when Mujkic was seventeen years old. He was eighteen years old, however, in January 2002, when the incident which led to the assault charge occurred.

<sup>3</sup> These omissions included his right (1) against self-incrimination, (2) to a jury trial, (3) to a speedy and public trial, (4) to the presumption of innocence, (5) to confront and cross-examine witnesses called by the State, and (6) to present witnesses on his own behalf with subpoena powers to obtain their attendance. See Iowa R. Cr. P. 2.8(2)(b).

Aug. 27, 2003). The decision of the district court was reversed and remanded for an evidentiary hearing. *Id.*

After several continuances, hearings on the remand were held in 2007. Mujkic testified that if his rights had been adequately explained to him he would not have pled guilty. But on cross-examination he admitted he pled guilty because he wanted to receive probation. Mujkic's plea counsel stated that he thoroughly reviewed with Mujkic, through a seasoned interpreter, all the rights he would be giving up by pleading guilty, and that he could be deported based on those guilty pleas, particularly the felony.

The district court determined Mujkic was not a credible witness.<sup>4</sup> The court found Mujkic had failed to establish prejudice due to counsel's failure to challenge the defective plea colloquy. The court noted, "The petitioner was solely interested in avoiding going to prison and was very satisfied with the plea offer in the case." The district court denied Mujkic's request for postconviction relief. Mujkic now appeals.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). Although our review is de novo, weight will be given to the trial court's findings, as in other de novo appeals, because that court had an opportunity to assess the credibility of the witnesses. *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed

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<sup>4</sup> The same judge heard the first and second postconviction proceedings. A different judge had accepted the challenged pleas of guilty.

to perform an essential duty, and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). The test for the first element is whether the attorney's performance was outside the range of normal competency. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The test for the second element is whether there is "a reasonable probability that but for his trial counsel's unprofessional errors, the resulting conviction and sentence would have been different." *Id.* (citing *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990)). A reasonable probability is "one sufficient to undermine confidence in the outcome." *Id.* If sufficient prejudice is not shown, there is little need to focus alone on whether counsel breached an essential duty. *Id.*

Since a central issue is whether there was adequate compliance with the requirement that the defendant be informed of certain rights (as opposed to the requirement of an in-person colloquy for a felony), it has been consistently held that all that is required is substantial, not strict, compliance with rule 2.8(2)(b), even for a felony. *State v. Myers*, 653 N.W.2d 574, 577-78 (Iowa 2002). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

### **III. Merits**

Generally, a challenge to a guilty plea must be raised by a motion in arrest of judgment. See Iowa R. Crim. P. 2.24(3)(a) ("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.""). An applicant's failure to file a motion in arrest of judgment is not a bar, however, if the failure is due to ineffective assistance of counsel. *State v. Bearnse*, 748 N.W.2d 211, 218 (Iowa 2008). We consider Mujkic's challenges to the plea proceedings under the theory of ineffective assistance of counsel.

In the present case, the State recognizes that the plea and sentencing court did not sufficiently comply with the requirements of Iowa Rule of Criminal Procedure 2.8(2)(b). Since plea counsel did not raise this issue, involving several significant deficiencies, the first prong of the test is established, that is, a breach of duty.

Establishing a breach of duty alone, however, does not establish a claim of ineffective assistance of counsel. *Myers*, 653 N.W.2d at 578. The second prong is more difficult for a postconviction applicant to prove. "In order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)); see also *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). In this regard, conclusory claims of prejudice are not sufficient. *Myers*, 653 N.W.2d at 579.

On our de novo review, we agree with the trial court that Mujkic was not credible. He conversed with the investigating officer in English, until he recognized that he was being accused of a sexual act. At that juncture, he turned into one who could speak and understand very little English. Then the

following day, he recanted his admissions made the previous day, with the purported assistance of a Bosnian friend, as an interpreter. A review of the tape of that recantation, by another disinterested Bosnian interpreter, overwhelmingly reflected that the recantation was scripted to convince the investigators of his almost total ignorance of English and to denigrate the confessions made by him. From that point forward, Mujkic used his English deficiencies to his benefit when that would help impede the prosecution. His understanding of English was substantially better than he professed. These facts do not serve to excuse counsel. But they do provide substantial evidence that Mujkic was prepared to plead guilty and would not have done anything different whether advised of all his rights, or not advised, as he wanted what the plea bargain afforded him, particularly probation/suspension. Trial was not an option to him. Contrary to his testimony, Mujkic took his chances on whether INS would pursue deportation. He did not file any direct appeal, but resorted to postconviction proceedings only when it became clear that he was targeted for deportation.

After our review of the record, we agree with the findings of the trial court, including:

The Court had an ample opportunity to observe the petitioner's testimony over a substantial period of time. Throughout the proceedings he was evasive in answering questions and repeatedly stated he could not remember signing statements with police officers . . . . Even when an interpreter is used, the petitioner claims not to understand them or that they didn't understand what he was saying to the interpreter. There was also the matter of an interpreter who viewed the petitioner and his friend's interview at the police department which reflects that they were being evasive and untruthful . . . after discussing how to answer questions in Bosnian. . . . The Court finds that, based upon his demeanor, his claimed lack of memory as to events and to the inconsistent

statements and denial of statements made to the police that the petitioner is not a credible witness. . . . He [counsel] fully advised the petitioner of his rights and the prospects if it went to trial.

We do not, by this resolution, imply our acquiescence in guilty pleas to felonies which fail to substantially comply with our rules.<sup>5</sup> But neither do we accept postconviction challenges wherein the outcome would not have been altered with compliance. We are somewhat comforted, in this situation, with the findings that Mujkic, notwithstanding the omissions, was aware of each of his rights, as a plea defendant, through conferences with counsel in his native language, as well as his second language.

We conclude Mujkic has failed to show he was prejudiced by counsel's breach of duty. There was not a reasonable probability, that but for that breach, he would not have pleaded guilty and insisted on a trial. Mujkic has shown only a conclusory claim he was prejudiced by counsel's conduct. This is not sufficient. *See id.* We affirm the decision of the district court denying this claim for postconviction relief.

**AFFIRMED.**

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<sup>5</sup> In *State v. Hook*, 623 N.W.2d 865, 871 (Iowa 2001), abrogated on other grounds by *State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002), our supreme court held that the right procedure for a guilty plea to a felony is "a full, oral colloquy." The case of *State v. Meron*, 675 N.W.2d 537, 542 (Iowa 2004), commented that non-compliance with the oral requirements of rule 2.8(2)(b), "normally constitutes reversible error." These were direct appeals, not postconviction proceedings, wherein there arises the need to show prejudice.