

IN THE COURT OF APPEALS OF IOWA

No. 8-968 / 07-1354
Filed December 31, 2008

GARY BOWERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cedar County, Mary E. Howes,
Judge.

Applicant appeals from the district court's order granting the State's
motion for summary disposition of the applicant's post-conviction relief claims.

AFFIRMED.

Mary Lynn Wolfe, Clinton, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, and Sterling L. Benz, County Attorney, for appellee.

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

SACKETT, C.J.

Applicant, Gary Bowers, appeals from the district court order granting the State's motion for summary disposition of Bowers's postconviction relief claims pursuant to Iowa Code section 822.6 (2005).

Bowers was convicted of four counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (2001). His convictions were affirmed in *State v. Bowers*, 661 N.W.2d 536 (Iowa 2003). Bowers filed an application for postconviction relief on May 26, 2006. He asserted he received ineffective assistance of counsel when his trial attorney (1) failed to make a sufficient record of the trial court's rejection of a proposed plea agreement, and (2) failed to counteroffer a plea agreement or consider applicable law during plea negotiations. The State filed a motion for summary disposition under Iowa Code section 822.6 and, following a hearing, it was granted by the district court on July 23, 2007.

Bowers does not challenge the district court's conclusions on appeal. Rather, Bowers asserts a new claim of ineffective assistance of counsel. He contends his trial attorney was ineffective for failing to make a reasonable investigation into the victim's criminal history. He also argues his appellate and postconviction attorneys were ineffective in failing to raise this issue in earlier proceedings.

ERROR PRESERVATION & STANDARD OF REVIEW. An applicant need not raise ineffective assistance of counsel claims on direct appeal to preserve them. Iowa Code § 814.7. Yet, an applicant must assert all grounds for relief in his original or amended application for postconviction relief unless there is a sufficient reason to explain why it was not asserted previously. *Id.* § 822.8. Ineffective postconviction counsel may constitute a sufficient reason. See *Collins v. State*, 588 N.W.2d 399, 402-03 (Iowa 1998). We review constitutional claims, such as those concerning ineffective assistance of counsel, de novo. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we evaluate counsel's conduct considering the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

ANALYSIS. To establish his claim of ineffective assistance of counsel, Bowers must prove “(1) the failure by counsel to perform an essential duty and (2) resulting prejudice.” *State v. Bentley*, 757 N.W.2d 257, 263 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Both elements are essential to the claim and we can affirm based on the failure to prove prejudice without analyzing whether the attorney failed to perform an essential duty. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). “Prejudice exists where ‘there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006) (quoting *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005)). “A

reasonable probability is one that is sufficient to undermine confidence in the outcome.” *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (citation omitted).

Bowers contends his trial attorney was ineffective in failing to conduct a reasonable investigation into the victim’s criminal background. He argues that the victim may have had a juvenile adjudication on a theft charge and this evidence could have been used to challenge the victim’s credibility. He reasons the outcome of the trial would likely have been different if the victim’s credibility was attacked because the victim was the State’s main witness. However, Bowers provides no documentation showing the victim in fact had been adjudicated as a juvenile for committing theft.

We conclude Bowers has failed to prove he was prejudiced by his trial attorney’s failure to investigate the victim’s background. Bowers must provide some evidence showing that the victim had actually committed theft with proof of a conviction or adjudication. See Iowa R. Evid. 5.609 (stating that evidence of a conviction or adjudication may be admissible); *State v. Bauer*, 324 N.W.2d 320, 323 (Iowa 1982) (stating that evidence of an arrest is not admissible for impeachment). A claimant must show actual prejudice. *Kirchner v. State*, 756 N.W.2d 202, 205 (Iowa 2008) (citing *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696). “It is not enough for the [claimant] to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697. Bowers has not provided any evidence that undermines confidence in the outcome and therefore there is no reasonable probability that the outcome would have been

different had counsel further investigated the victim's criminal history. Bowers has not proved he suffered prejudice from his trial attorney's conduct. Furthermore, he cannot show prejudice because our review of the record shows overwhelming evidence of his guilt. See *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006) (finding claim of ineffective assistance of counsel failed when no prejudice could be established as a matter of law given the overwhelming evidence of defendant's guilt). We affirm the district court's dismissal of Bowers's application for postconviction relief.

AFFIRMED.