

IN THE COURT OF APPEALS OF IOWA

No. 6-075 / 95-139

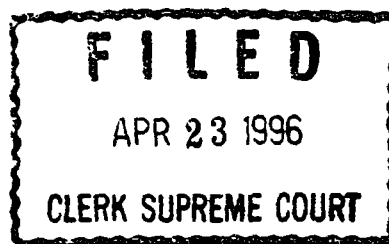
JEFFREY ALLEN MASSICK,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Warren County, James W. Brown,
Judge.

Massick challenges the order denying his application for postconviction relief.

AFFIRMED.

Richard B. Clogg of Elgin, Clogg & Patin, Indianola, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, Kevin Parker, County Attorney, and Douglas Hammerand, Assistant County
Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

HABHAB, J.

Jeffrey Allen Massick was convicted, following a jury trial, of fourth-offense operating while intoxicated (OWI) in violation of Iowa Code section 321J.2 (1991). The primary question to be resolved by the jury was whether Massick was actually intoxicated during the accident, as there was evidence indicating he drank beer afterwards.

During trial the court admitted into evidence, without objection, Exhibit 1, which is the implied consent form. This form indicated Massick failed a preliminary breath test (PBT). During deliberations, the jury sent a written request for information on alcohol's effects on the body. After discussions with counsel, the court decided to deny the request. While the jury was called to receive the court's response, it gave a second question to the court asking for an explanation about the results of the PBT. The court responded to this second question indicating the results of the PBT were not admissible as evidence and were to aid the officers in determining whether to allow an intoxilyzer test. The trial court did not discuss the question with counsel prior to giving the answer to the second question, but did ask if there were any objections to his response. No objections were raised. The jury subsequently found Massick guilty as charged.

The matter proceeded through sentencing; however, the court failed to order a substance abuse evaluation as required by Iowa Code sections 321J.2(2)(c) and 321J.3(1) (1991). On appeal, the supreme court affirmed Massick's conviction. *State*

v. Massick, 511 N.W.2d 384 (Iowa 1994). As part of the supreme court's opinion, issues of ineffective assistance of counsel were preserved for possible postconviction relief proceedings.

Massick filed an application for postconviction relief claiming he received ineffective assistance of counsel when his trial counsel failed to object to the admission of Exhibit 1, failed to object to the court's answer to the jury's second question during deliberations, and failed to object to alleged prosecutorial misconduct. Massick also contended the district court erred in failing to order a substance abuse evaluation prior to sentencing. The district court denied Massick's application for postconviction relief.

Massick appeals.

I. *Ineffective Assistance of Counsel.* Massick asserts the following three claims of ineffective assistance of counsel: (1) counsel failed to object to Exhibit 1 which showed evidence of a preliminary breath test; (2) counsel failed to object to the trial court's response to the second inquiry by the jury about an explanation of the results of the preliminary breath test; and (3) counsel failed to move for a mistrial because of the prosecutor's statements during selection of the jury.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the

circumstances. This is the equivalent of de novo review. *Id.*

To prevail on a claim of ineffective assistance of counsel, the applicant must show: (1) counsel's performance fell outside the normal range of competency, and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, defendant must show that counsel's failure worked to defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Massick's claims regarding the failure to object to Exhibit 1 and the failure to object to the trial court's response to the jury's question both fail for the same reason. Massick's counsel testified one of his strategies at trial was to convince the jury Massick's intoxication took place after the accident. Massick's counsel made a strategic decision not to object to Exhibit 1 since the PBT was taken after the accident and provided no evidence regarding intoxication at the time of the accident.¹ This

¹ Massick's counsel testified the results of the PBT were not only irrelevant to Massick's intoxication at the time of the accident, but they supported Massick's contention he did not consume alcohol until after the accident.

testimony also supports Massick's counsel's failure to object to the trial court's response to the jury question.

Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *McKettrick*, 480 N.W.2d at 55. Simply because a chosen trial strategy does not achieve the desired result does not mean counsel's performance fell outside the normal range of competence. *See State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982). Consequently, we find Massick's counsel did not fail to perform an essential duty. Since Massick has failed to meet the first prong of the ineffective assistance of counsel test, both of these claims must fail.

Massick's final claim of ineffective assistance of counsel concerns his counsel's failure to move for a mistrial because of the prosecutor's statements during selection of the jury. This particular claim was not preserved for postconviction proceedings by our supreme court on direct appeal. Issues not properly raised and preserved in prior proceedings may not serve as a basis for postconviction relief unless there is sufficient reason for not raising it previously. *See Iowa Code* § 822.8 (1993).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is a sufficient reason for not raising it previously.

Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981) (citation omitted).

To be entitled to postconviction review of alleged errors not properly preserved below, the applicant must establish by a preponderance of the evidence: (1) sufficient cause for failure to properly preserve the claims, and (2) actual prejudice resulting from the alleged errors. *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984). Massick provides no argument for why this issue was not raised in the direct appeal or how it can be properly raised at this time. Consequently, error has not been properly preserved for this issue and we decline to consider it.

II. Sentencing. Massick contends the district court erred in failing to order a substance abuse evaluation prior to sentencing as required by Iowa Code section 321J.3 (1991). *State v. Moyer*, 382 N.W.2d 133, 136 (Iowa 1986). In *Moyer*, after stating the sentencing court's duty to order a substance abuse evaluation was mandatory, our supreme court stated, "The sentencing court ordered no evaluation and had not received equivalent information before imposing sentence." *Id.*

The decision in *Moyer* was analyzed in a later case by our court in *State v. Ludley*, 465 N.W.2d 912 (Iowa App. 1990). We found the situation presented in *Ludley* was **different** from that in *Moyer*.

Unlike the situation in *Moyer*, the sentencing court here had received equivalent information before imposing sentence. A presentence substance abuse evaluation was ordered as a condition of Ludley's release and he did obtain a substance abuse evaluation. The results and recommendations from that evaluation were included in the presentence investigation (PSI) report. The PSI report was made available to the court and counsel. At the sentencing hearing, when asked about his sentencing recommendation, Ludley's counsel referred to the evaluation conclusion that Ludley did not need in-patient treatment.

The presentence investigator relied upon this conclusion in recommending that Ludley receive a prison term not to exceed two years. The sentencing court obviously gave consideration to Ludley's substance abuse problems

Ludley, 465 N.W.2d at 914. We found substantial compliance with the mandate of section 321J.3. *Id.* Our supreme court has also found there are limited exceptions to the rule stated in *Moyer*. *State v. Weber*, __ N.W.2d __, __ (Iowa 1996)(per curiam).

In this case, the sentencing court had information regarding Massick's substance abuse in the presentence investigation (PSI) report. The PSI included information on Massick's prior alcohol-related offenses, including all of Massick's prior OWIs and over a dozen arrests for public intoxication. The PSI discussed Massick's drinking habits, his past treatments for substance abuse, and an admission by Massick made to the presentence investigator that he believed he was an alcoholic. The PSI recommended incarceration in an OWI facility. The sentencing court followed this recommendation.

We find the sentencing court had what should be considered equivalent information in the PSI for its consideration. Accordingly, we conclude there was substantial compliance with section 321J.3. We affirm the district court's denial of postconviction relief.

AFFIRMED.