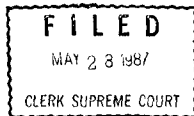


IN THE COURT OF APPEALS OF IOWA



WALTER L. HALL,

)

Petitioner-Appellant,

)

Filed May 28, 1987

115

vs

)

STATE OF IOWA,

)

7-58
86-269

Respondent-Appellee.

)

Appeal from the Iowa District Court for Scott County (71028), Max R. Werling, Judge.

The petitioner appeals from the trial court's denial of his application for postconviction relief. **AFFIRMED.**

Bobbi M. Alpers, Davenport, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bradley V. Black, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., and Danielson and Hayden, JJ.

HAYDEN, J.

The petitioner was accused of first-degree arson. A jury found the petitioner guilty as charged, and the trial court sentenced him to an indeterminate prison term not to exceed twenty-five years. The supreme court dismissed petitioner's direct appeal as frivolous pursuant to Iowa Rule of Appellate Procedure 104. On November 22, 1985, the petitioner filed an application for postconviction relief as a "Notice of Claims," alleging his trial counsel was ineffective for failing to call certain impeachment and alibi witnesses and failing to challenge the admissibility of a Miller beer bottle cap seized from his vehicle. Following an evidentiary hearing, the postconviction court denied the petitioner's application.

Jacquelyn Johnson testified at the petitioner's trial her house was fire-bombed on September 5, 1983. She stated she saw the petitioner throw the first firebomb that hit her house. Earlier that day, Mrs. Johnson had taken petitioner's unattended, three-year-old nephew into her house and called the police to report the lack of attention being given to the child. The petitioner and Carolyn Roark later approached her to inquire about the child and to discover why she had phoned the police. Jacquelyn's husband Donald also testified he had seen the petitioner throw a firebomb at his house.

Firefighters smelled gasoline in the Johnsons' home, and burning glass fragments from Miller beer bottles were found in their yard. Subsequent laboratory tests revealed the beer bottles had contained gasoline.

Officer William Thomas stopped the petitioner's vehicle after Mrs. Johnson named him as one of the firebombers. While talking to the petitioner, Officer Thomas saw a Miller beer bottle cap in the car's ashtray and seized it. The petitioner then consented to a warrantless search of his vehicle. The officer noted petitioner's hands smelled of soap and his shoes of gasoline.

The petitioner testified he was not involved in firebombing the Johnson home. He maintained he was purchasing beer at a convenience store when the incident occurred and the officer stopped him on his return to Carolyn Roark's house.

The petitioner contends he was denied effective assistance by his trial counsel's failure to call Mrs. Johnson's Hispanic neighbors and Brenda Hill as witnesses at trial. He maintains Johnson's neighbors could have helped demonstrate she had a propensity for feuding with neighbors that could have made her many enemies. He asserts Ms. Hill would have denied making certain statements to Mrs. Johnson, thus helping to undermine Johnson's credibility. The petitioner further argues the trial counsel rendered ineffective assistance in failing to locate and call a female convenience store worker as an alibi witness at trial. He maintains trial counsel should not have given up looking for this person after discovering a male worker was scheduled to work that evening. Petitioner finally urges trial counsel was ineffective for failing to move to suppress the Miller's beer cap seized from his car. He insists counsel should have attempted to prevent the cap from being admitted under the plain view exception.

Generally, postconviction proceedings under Iowa Code Chapter 663A are law actions, triable to the court, and ordinarily are reviewed on error only. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). However, when, as here, there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo-type review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

A person claiming his counsel was ineffective must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen

v State, 308 N.W.2d 11, 14 (Iowa 1981). It is incumbent upon one asserting the claim to establish it by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). There is a presumption that counsel is competent which must be overcome by the person claiming ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The ultimate test is whether under the entire record and all the circumstances counsel's performance was within the normal range of competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In deciding the second prong of a claim of ineffective assistance of counsel, prejudice, the person claiming ineffectiveness must show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984), articulated the following standard for determining whether specified errors could have resulted in the required prejudice:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Under this standard, we need not determine whether counsel's performance was deficient before examining the prejudice component:

The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U S at 698, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700. Such standard is applicable to postconviction counsel as well. Gering v. State, 382 N.W.2d 151, 156 (Iowa 1986).

After a careful review of the record, we find petitioner's claim has no merit. Since both elements must be shown for petitioner to prevail, we consider only whether any prejudice resulted from petitioner's counsel's *alleged failures*. Petitioner failed his burden of showing a reasonable probability but for counsel's alleged errors, the outcome of the proceeding would have been different. The evidence in the record supporting petitioner's conviction is overwhelming. Through this postconviction relief appeal petitioner attempts to turn his claim of ineffective assistance of counsel into "a postmortem, microscopic dissection of each desperate effort of counsel to save a terminal case." Hinkle v. State, 290 N W 2d 28, 30 (Iowa 1980). We find petitioner's counsel performed well within the range of normal competency.

AFFIRMED.