

IN THE COURT OF APPEALS OF IOWA

No. 2-464 / 91-381

FILED

NOV 30 1992

CLERK SUPREME COURT

THURMAN ROBERT MILLS, JR.,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Fayette County,
Joseph C. Keefe, Judge.

Thurman Mills appeals from a judgment of the district
court denying his application for postconviction relief.

AFFIRMED.

Robert J. Hearity of Hearity Law Firm, Oelwein, for
appellant.

Bonnie J. Campbell, Attorney General; Ann E. Brenden,
Assistant Attorney General; Mike Wallace, Assistant
Attorney General; and W. Wayne Saur, County Attorney, for
appellee.

Considered by Donielson, P.J., and Schlegel and Habhab,
JJ.

DONIELSON, P.J.

Thurman Mills appeals from a judgment of the district court denying his application for postconviction relief.

Thurman Mills was charged by trial information in May 1986, with eleven counts stemming from a robbery of a branch of the First National Bank of Oelwein. At the conclusion of the presentation of the evidence, Mills moved for a judgment of acquittal. Mills' motion was a renewal of his earlier motion to dismiss several counts as lesser-included offenses of other counts. The district court sustained Mills' motion in regards to one count of first-degree theft, two counts of first-degree robbery, one count of second-degree theft, three counts of assault while participating in a felony, and two counts of false imprisonment. The district court denied the judgment of acquittal on one count of first-degree robbery while using a dangerous weapon (Count I) and one count of first-degree theft in connection with a theft of car keys of a bank customer (Count V). The district court was silent as to its grounds in making these rulings.

Trial counsel did not move for dismissal of these two remaining counts under the double jeopardy doctrine. The jury was unable to arrive at a verdict regarding the two remaining counts and a hung jury was declared. The district court thereafter declared a mistrial.

The State subsequently proceeded to retry Mills based upon the same trial information. During a pretrial

hearing, the district court ruled the State was barred from reprosecuting on the counts previously dismissed by the district court in Mills' first trial. Mills was found guilty of the remaining two counts. Mills' conviction was affirmed on appeal by the court of appeals.

In August 1991, Mills filed for postconviction relief, alleging trial counsel's failure to raise the double jeopardy defense violated his right to effective assistance of counsel. The district court denied the application and Mills now appeals.

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.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

In proving the first prong of this test, Mills must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State .v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test Mills must show 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." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

Mills argues he received ineffective assistance of counsel by his trial counsel's failure to timely raise the issue of double jeopardy. Specifically, he argues the district court's ruling on his renewed motion to dismiss at the first trial barred reprosecution because the counts dismissed by the district court were lesser-included offenses of Count I and Count V. Mills contends once the lesser-included offenses were "adjudicated" (by the district court's dismissal), Count I and Count V were also adjudicated. Therefore, he argues to place him on trial for the greater charges, after an "acquittal" of the lesser-included offenses, is a violation of his right against double jeopardy.

In our review of Mills' ineffective assistance of counsel claim, we find it is more efficient in this situation to first consider the prejudice prong of the

test. See State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). We do not find Mills was prejudiced by defense counsel's failure to timely raise the issue of double jeopardy.

A defendant is deemed to be "acquitted," for the purposes of the double jeopardy bar, "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" United States v. Scott, 437 U.S. 82, 97, 98 S. Ct. 2187, 2197, 57 L. Ed. 2d 65, 78 (1978) (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 1354, 51 L. Ed. 2d 642, 651 (1977)). The determination of what constitutes an "acquittal" is not controlled by the form of the judge's action. Martin Linen Supply Co., 430 U.S. at 571, 97 S. Ct. at 1354, 51 L. Ed. 2d at 651.

We do not agree the district court's dismissal of the lesser-included offenses constituted either an adjudication or an acquittal of those charges. Rather, the court's ruling most likely was made in the "interest of justice," toward simplifying the jury charge. Any objection by trial counsel would have merely allowed the district court to clarify the reason for its ruling. Therefore, Mills has not demonstrated a reasonable probability that a timely objection by trial counsel would have resulted in anything

more than a new order stating the dismissal was purely in the interest of justice.

However, even if the district court based its ruling on the grounds urged by Mills, that the dismissed charges were lesser-included offenses of the remaining Count I and Count V, Mills still is not entitled to relief. The district court's ruling in no way addressed the question of the sufficiency of the evidence against Mills or represented a resolution of the factual elements of these lesser-included offenses. Therefore, the double jeopardy clause did not bar the continuation of this prosecution against him on the remaining charges.

We note the language of the district court:

[T]he Applicant cannot have it both ways. If the dismissed charges were truly lesser included, then the fact that the Trial Court believed that there was sufficient evidence to submit the case on two counts would also mean that the counts that were dismissed should have been submitted as lesser alternatives. On the other hand, if the dismissed charges were separate and independent of the two submitted charges, then they would not have barred the remaining two counts on the basis of double jeopardy.

As we find Mills was not prejudiced by his trial counsel's failure to timely raise the issue of double jeopardy, Mills has not established he received ineffective assistance of trial counsel. We find the district court properly denied his application for postconviction relief.

The costs of this appeal are taxed to Mills.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.