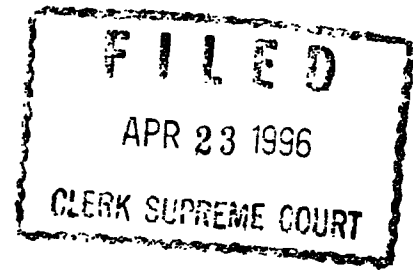


IN THE COURT OF APPEALS OF IOWA

No. 6-092 / 95-526



**WILLIE NELSON MILLER, JR.,**

Appellant,

000205

vs.

**STATE OF IOWA,**

Appellee.

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Appeal from the Iowa District Court for Linn County, L. Vern Robinson,  
Judge.

Willie Miller, Jr., appeals the district court's denial of his application for  
postconviction relief. **AFFIRMED.**

Timothy G. Goen, Cedar Rapids, and Edward J. Ennis, West Des Moines, for  
appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney  
General, Denver D. Dillard, County Attorney, and Harold Denton, Assistant County  
Attorney, for appellee.

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

**CADY, J.**

Willie Miller, Jr. appeals an order by the district court dismissing his application for postconviction relief. We affirm.

Miller was convicted of one count of delivery of crack cocaine. He was acquitted of a second count. The supreme court dismissed the appeal of his conviction as frivolous under Iowa Rule of Appellate Procedure 104.

Miller subsequently filed an application for postconviction relief based on ineffective assistance of counsel. Following a hearing, the district court dismissed the application. The court found Miller's trial counsel was not ineffective.

Miller appeals claiming his trial counsel was ineffective for two reasons. He argues trial counsel failed to file a timely motion to sever the two counts. He also asserts his trial counsel failed to conduct an adequate investigation. Miller further claims his appellate counsel was ineffective for failing to raise several issues and in filing a motion to dismiss under rule 104.

Miller's claims concern violations of a constitutional right. Accordingly, we evaluate all the circumstances in our de novo review. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

The burden of proving ineffective assistance of counsel rests with the defendant. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). Defendant must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Id.* at 131-32. Proof is by a preponderance of evidence. *Id.* To establish prejudice, a defendant

must demonstrate the outcome of the trial probably would have been different but for counsel's error. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

The first claim developed by Miller on appeal is his trial counsel was not only ineffective for failing to timely file a motion to sever, but failing to file a motion to enlarge in response to the trial court's denial of the motion and in failing to pursue an interlocutory appeal of the trial court's ruling. We find these claims without foundation.

A defendant must not only specifically explain the ways in which his or her counsel's performance was inadequate, but also identify how competent representation probably would have changed the outcome. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). In this case, the trial court denied the motion to sever without explaining its reasons. Thus, there is no indication the late filing of the motion prejudiced Miller. Moreover, there are no specific allegations explaining how a motion to enlarge or interlocutory appeal would have changed the outcome.

The second claim raised by Miller is his trial counsel was ineffective in failing to investigate and interview all potential witnesses. This claim also fails because there is no showing the investigation would probably have changed the outcome of the trial. Miller failed to identify any potential witnesses or provide any explanation of their relevance to his defense.

Finally, Miller claims ineffective assistance of appellate counsel. We find this claim was not properly preserved. Miller did not raise this claim in his application

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for postconviction relief, nor was it addressed by the district court. *See Jasper*, 477 N.W.2d at 855 n. 1 (Iowa 1991). Notwithstanding, assuming the claim was preserved, Miller has failed to show prejudice. The issues Miller now claims appellate counsel should have raised on direct appeal were all set forth in the rule 104 motion. Thus, they were considered by the supreme court in dismissing the appeal as frivolous.

We have considered all claims raised by Miller and conclude he has failed to show ineffective assistance of counsel.

**AFFIRMED.**