IN THE COURT OF APPEALS OF IOWA

No. 1999-43 (9-198) / 98-1116
Filed April 30, 1999

CARL D. BRIGHT,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

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

Carl Bright appeals from the dismissal of his application for postconviction relief. **AFFIRMED.**

Anna Wirt O'Flaherty of the O'Flaherty Law Firm, Swisher, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

SACKETT, C.J.

Applicant-appellant Carl D. Bright appeals the district court's denial of his application for postconviction relief. Bright contends the attorney representing him on direct appeal was not effective when he failed to raise three evidentiary issues raised in the district court and preserved for appellate review. We affirm.

Bright was convicted in 1994 of three counts of attempted murder. Bright appealed contending (1) his speedy trial rights were violated; (2) the district court erred in allowing the State to question him about information gleaned from a wiretap; and (3) there was not substantial evidence supporting his conviction. His convictions were affirmed by this court in an unpublished opinion. *State v. Bright,* No. 94-1305 (Iowa App. Feb. 2, 1996).

In this proceeding, Bright specifically contends his appellate counsel should have challenged on appeal the district court allowing admission of evidence surrounding the issuance and execution of search warrants at three locations. Bright contends the admitted evidence was hearsay, was not relevant, and was prejudicial. Bright also argues his appellate attorney should have appealed the district court's decision admitting photographs of guns found in his home.

Postconviction relief proceedings are actions at law and are reviewed on error. *State v. Blum,* 560 N.W.2d 7, 9 (Iowa 1997). In a postconviction proceeding where the applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review. *Jones v. State,* 479

N.W.2d 265, 271 (Iowa 1991). Because Bright contends his appellate attorney was not effective, we review de novo. *Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1995).

The grounds alleged in this appeal were not raised in his direct appeal. Iowa Code section 822.8 (1997) provides postconviction relief may not be granted on assignments not asserted in prior applications for relief in the absence of a showing of good cause. This means postconviction relief is not a means for again litigating claims that were or should have been properly presented on direct appeal. *Earnest v. State,* 508 N.W.2d 630, 632 (Iowa 1993); *Washington v. Scurr,* 304 N.W.2d 231, 235 (Iowa 1981). Consequently, a claim not properly raised on direct appeal may not be litigated in postconviction unless there is a showing of a sufficient reason for not properly raising it in the direct appeal and the applicant can show actual prejudice resulting from the failure. *Jones,* 479 N.W.2d at 271; *Polly v. State,* 355 N.W.2d 849, 856 (Iowa 1984). A showing an appellant attorney was not effective may be a sufficient reason to allow the issue to be raised for the first time in a proceeding for postconviction relief. *Jones,* 479 N.W.2d at 271; *Collins v. State,* 477 N.W.2d 374, 376 (Iowa 1991).

To prove his appellate counsel was not effective, Bright must show two things. First, he must show the attorney failed in an essential duty. *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997). That is, the attorney's conduct fell outside the range of normal competency and was so deficient as to not constitute functioning as "counsel." *Kane v. State,* 436 N.W.2d 624, 627 (Iowa 1989). In making this

assessment, we need to look at the entire record and totality of the circumstances to determine if counsel's performance was within the normal range of competency. *Meier v. State,* 337 N.W.2d 204, 206 (Iowa 1983). Improvident appellate strategy, miscalculated tactics, or mistakes in judgment do not necessarily prove an attorney did not render effective assistance. *Jones,* 479 N.W.2d at 272. Bright must overcome a strong presumption his appellate attorney was effective, and he bears the burden of proving by the preponderance of the evidence the attorney was not effective. *See Strickland v. Washington,* 466 U.S. 668, 689-90, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984); *Jones,* 479 N.W.2d at 272.

Additionally, Bright has to prove the deficient performance was so prejudicial as to deprive him of a fair trial. *Jones,* 479 N.W.2d at 271. To prove prejudice, Bright "must show there is a 'reasonable probability' that, but for appellate attorney's unprofessional errors, the result of the proceeding would have been different." *Bugely,* 562 N.W.2d at 178. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome" of Bright's appeal. *State v. Kraus,* 397 N.W.2d 671, 673 (Iowa 1986).

The ultimate concern of this court is that the appeal is fundamentally fair. *See Strickland,* 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; *see also Jasper v. State,* 477 N.W.2d 852, 855-56 (Iowa 1991). The fact Bright's attorney was not successful in arguing his appeal does not mean he was not effective. *See Jasper,* 477 N.W.2d at 857; *Kane,* 436 N.W.2d at 629.

A search warrant issued for premises occupied by Bright and another person. Officers executing the warrant, whose clothing identified them as police officers, entered the home using a battering ram. They used something called "flash bangs" as a distractive device. Bright fired a semi-automatic weapon eight times. He was hit by four bullets from police officers' guns. Bright sought to defend alleging he thought the officers invading his home were friends of a man he felt was coming to beat him up.

In this proceeding, Bright first claims his appellate counsel should have raised a challenge to evidence concerning three other search warrants issued on the night in question. Bright's trial counsel contended the evidence was not relevant and prejudicial. The trial court overruled the objection reasoning it showed the police activities the night of the search. Bright's brief contends the evidence was prejudicial but fails to offer an adequate explanation of any prejudice.

Bright next objects to responses made by a police officer as being hearsay and prejudicial. The challenged answers were:

> A. Drugs, guns, ammunition. They also told us that we would encounter possibly at least two adults, one being --
>
> A. One of the persons being a Pamela Dodson, the owner of the residence, and one being possibly Carl Bright. We were further advised that upon entry to the house we may come upon gunfire.

Bright next contends photographs of guns seized in the search should not have been admitted.

The district court found appellate counsel made a professional call as to the issues to raise on appeal. The district court specifically found:

> Appellate counsel wisely chose not to dilute the significant appellate issues with these relatively minor (and unmeritorious) claims.
>
> It is absurd to claim Bright's appellate counsel was ineffective. To the contrary, counsel presented the most serious and meritorious issues, and was successful to a certain extent insofar as the speedy indictment issue was concerned. It would have been folly to present the minor issues that Bright now asserts in his petition.

The State contends none of the claims should stand because appellate counsel chose the best claims and those that held the best chances for resolution in Bright's favor. As such, the State advances the district court correctly found appellate counsel had used reasonable strategy. We agree. *See Osborn v. State,* 573 N.W.2d 917, 924 (Iowa 1998) (Carter, J., specially concurring). A reasonable tactical decision by appellate counsel may include even waiving meritorious issues on appeal. *Stringer v. State,* 522 N.W.2d 797, 799 (Iowa 1994). We also find Bright has failed to show the required prejudice to succeed on the issues.

We affirm.

AFFIRMED.

No. 98-1116. [1999-43 (9-198)] BRIGHT v. STATE

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Vogel and Mahan, JJ. Opinion by Sackett, C.J. (6 pages $2.40)

Carl D. Bright appeals the district court's denial of his application for postconviction relief. Bright contends the attorney representing him on direct appeal was not effective when he failed to raise three evidentiary issues raised in the district court and preserved for appellate review. We affirm. Bright was convicted in 1994 of three counts of attempted murder. Bright appealed contending (1) his speedy trial rights were violated; (2) the district court erred in allowing the State to question him about information gleaned from a wiretap; and (3) there was not substantial evidence supporting his conviction. His convictions were affirmed by this court in an unpublished opinion. In this proceeding, Bright specifically contends his appellate counsel should have challenged on appeal the district court allowing admission of evidence surrounding the issuance and execution of search warrants at three locations and his appellate attorney should have appealed the district court's decision admitting photographs of guns found in his home. The district court found appellate counsel made a professional call as to the issues to raise on appeal. The State contends none of the claims should stand because appellate counsel chose the best claims and those that held the best chances for resolution in Bright's favor and used reasonable strategy. We agree.