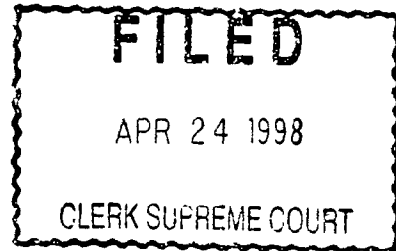


IN THE COURT OF APPEALS OF IOWA

No. 8-069 / 96-2237
Filed April 24, 1998



LOREN HUSS,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson,
Judge.

Loren Huss appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John Sarcone, County Attorney, and Steven M. Foritano, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Loren Huss appeals from the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

Huss was charged with first-degree murder for killing Marilyn Sheets in May 1996. Because mental health experts opined Huss was insane, it was agreed Huss's case would be submitted to the district court on stipulated evidence in anticipation of a finding of not guilty by reason of insanity. However, the district court failed to reach a verdict because the stipulated evidence was deemed insufficient to determine Huss's sanity at the time the offense was committed.

Following the district court's failure to reach a verdict, counsel for the State and the defendant withdrew. The court appointed new counsel to represent Huss and the attorney general assumed prosecution of Huss's case. A jury subsequently convicted Huss of first-degree murder rejecting his insanity defense.

On direct appeal, Huss argued further prosecution following the district court's failure to reach a verdict was precluded by the double jeopardy clause of the Fifth Amendment. The Iowa Supreme Court rejected Huss's double jeopardy claim and affirmed Huss's conviction. Huss did not raise any other issues on direct appeal.

Huss has petitioned for postconviction relief alleging several theories of ineffective assistance of counsel. He also reasserted the double jeopardy claim raised

on direct appeal of his first-degree murder conviction. The district court denied Huss's claim for postconviction relief.

In this appeal, Huss contends he was denied effective assistance of trial, appellate, and postconviction counsel. He also seeks appellate review of admission of prior bad acts evidence at his murder trial and renews the double jeopardy claims made on direct appeal. Lastly, Huss contends the district court erred in denying his request for new postconviction counsel.

II. Standard of Review.

We review postconviction proceedings for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction petitioner asserts a constitutional violation—such as ineffective assistance of counsel—we evaluate the totality of the circumstances. This is the equivalent of de novo review. *Id.*

III. Ineffective Assistance of Trial and Appellate Counsel.

To prevail on an ineffective assistance of counsel claim, the claimant must show: (1) counsel failed to perform an essential duty; and (2) the claimant was prejudiced by counsel's failure. The claimant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

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

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674, 498 (1984). We measure the competency of appellate counsel by the same standards applied to determine trial counsel's competency. *Hinkle v. State*, 290 N.W.2d at 31.

Huss claims trial counsel was ineffective because counsel failed to present evidence of mental illness suffered by members of Huss's family. He also cites counsel's failure to request a jury instruction limiting the use of prior crimes evidence admitted at trial.

As noted earlier, ineffective assistance of counsel was not an issue Huss raised on direct appeal. To obtain postconviction review of an issue not raised on direct appeal, Huss must show by a preponderance of the evidence: (1) sufficient cause exists for not raising the issue on appeal; and (2) he suffered actual prejudice as a result of the alleged error. *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984).

Huss cites ineffective assistance of appellate counsel as cause for not raising ineffective assistance of trial counsel on direct appeal. Appellate counsel is not required to urge every conceivable, nonfrivolous complaint on appeal to be effective. *See Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). In this context, the effectiveness of trial counsel may be determinative of appellate counsel's effectiveness. *Luke v. State*, 465 N.W.2d 898, 904 (Iowa App. 1990). Our de novo review of the record indicates Huss has failed to meet his burden and prove either trial or appellate counsel was ineffective. Trial counsel testified Huss's family medical history was not offered because it was included as part of the expert testimony on

Huss's mental state. Counsel also testified he questioned the admissibility of such evidence. Such considerations implicate counsel's tactical judgment and trial strategy. It is well settled that improvident trial strategy or mistakes in judgment do not necessarily amount to ineffective assistance of trial counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Trial counsel was unable to recall his reason for not requesting a limiting instruction on the jury's use of prior crimes evidence. Counsel does not have a duty to urge every possible instruction to display competency, even if the instruction was appropriate. *Brewer v. State*, 444 N.W.2d 77, 85 (Iowa 1989). Even if we were to find counsel's failure to request a limiting instruction was a breach of duty, the record does not reveal the resulting prejudice required to justify the relief requested. The central issue at trial was Huss's sanity. There is not a reasonable probability the jury's resolution of this issue would have been different but for the absence of a limiting instruction on the permissible use of prior crimes evidence. Because we find Huss had no viable claims of ineffective assistance of trial counsel, there is no merit to Huss's claim appellate counsel was ineffective for failing to assert such a claim on direct appeal.

IV. Postconviction Counsel.

Huss's dissatisfaction with postconviction counsel concerns failure to address the cumulative effect of prior counsel's professional errors and appellate counsel's failure to challenge the admission of prior crimes evidence during Huss's murder trial.

We reject Huss's cumulative error argument because the record indicates postconviction counsel litigated this issue at the postconviction hearing.

The record also indicates evidence that Huss committed two prior crimes was admitted during his murder trial over Huss's objections. These offenses included an assault and the rape of a seventeen-year-old girl. This evidence was admitted because the district court determined it was relevant to Huss's ability to form the required specific intent to commit first-degree murder. We find it sufficient to note Huss's failure to establish the prejudice necessary to prevail on this claim. The admission of prior crimes evidence implicates the considerable discretion of the trial court. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994). Based on our review of the record, we are unable to say admission of this evidence was an abuse of discretion. Accordingly, there is no probability of a different result even if postconviction counsel raised this issue.

Moreover, when the instructions given the jury at the murder trial are considered as a whole, there is no reasonable probability of a different result if a limiting instruction was given. We also affirm on this issue.

V. Request for Different Postconviction Counsel.

The postconviction court, finding counsel represented Huss effectively in these proceedings, denied Huss's request for different postconviction counsel.

We review a district court's ruling on a request for substitute counsel for an abuse of discretion. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). To show an

abuse of discretion, one must show the court exercised its discretion on clearly untenable grounds or to an extent clearly unreasonable. *State v. Cheatheam*, 569 N.W.2d 820, 821 (Iowa 1997).

The applicant whose request for substitute counsel was denied must ordinarily demonstrate prejudice, unless he was denied counsel or counsel has a conflict of interest. *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995).

Huss was not completely denied counsel, and he does not assert counsel had a conflict of interest; therefore, he must establish prejudice. We have found counsel gave Huss effective assistance. Upon reviewing the record, we find Huss fails to show he was prejudiced by the denial. Accordingly, we find the court did not abuse its discretion. We affirm the postconviction court on this issue.

VI. Double Jeopardy.

Huss's double jeopardy claims were raised and resolved on direct appeal. As the State correctly notes, Huss is barred from relitigating this claim in postconviction proceedings. *See Armento v. Baughman*, 290 N.W.2d 11, 12 (Iowa 1980).

VII. Summary.

We have carefully considered the remainder of all of Huss's postconviction claims and find them to be without merit. The judgment of the district court is affirmed in its entirety.

AFFIRMED.