

## IN THE COURT OF APPEALS OF IOWA

No. 2-469 / 91-1128

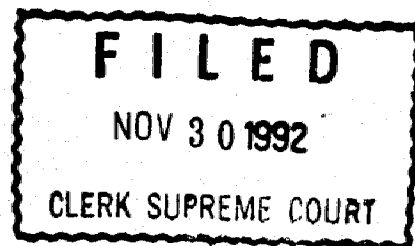
**MARTIN WELBORN,**

Applicant-Appellant,

vs.

**STATE OF IOWA,**

Respondent-Appellee.



---

Appeal from the Iowa District Court for Polk County,  
William H. Joy, Judge.

The applicant appeals from the district court's ruling denying his application for postconviction relief challenging his 1988 convictions for willful injury and tampering with a witness. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonbul, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson, Assistant Attorney General, John Sarcone, County Attorney, and Jamie Bowers, Assistant County Attorney, for appellee.

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

**SACKETT, J.**

Applicant-appellant Martin Welborn filed a petition for postconviction relief contending he received ineffective assistance of his trial and appellate counsel because his attorneys failed to raise and presume his contention that his trial should have been severed from the trial of his codefendant. The State contends error was not preserved on the issue and, if it were, appellant has failed to show how his attorneys were not effective and/or that he was prejudiced. We agree with the trial court that the record does not show Welborn's attorneys were not effective and Welborn failed to show, even if they were, that he was prejudiced by the failure to have his trial severed from the trial of his codefendant.

Welborn was convicted of assault with intent to inflict willful injury and witness tampering. Welborn's convictions were affirmed by his court. State v. Welborn, 443 N.W.2d 72 (Iowa App. 1989).

Ordinarily, our review of postconviction relief proceedings is for errors of law. See 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. See id. 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, 131-32 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

Appellant also claims he was denied effective representation of counsel. Established principles govern our review of appellant's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, [appellant] 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, appellant 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. With these principles in mind, we now turn to appellant's specific claims.

The trial court found Welborn's trial counsel's decision on the severance issue was a tactical decision. Our review of the record causes us to agree with this decision. The trial court also found Welborn has failed to show prejudice. We have reviewed the record and also agree with this decision. We, therefore, find it unnecessary to consider the State's challenge that Welborn has not preserved error on this issue.

**AFFIRMED.**