

IN THE COURT OF APPEALS OF IOWA

No. 9-091 / 98-0331
Filed March 31, 1999

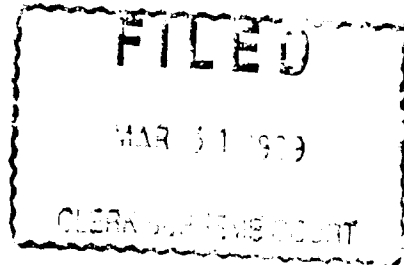
KENNETH FLANDERS,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Petitioner appeals the denial of his postconviction relief action. **AFFIRMED.**

Thomas J. McCann, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for
appellee.

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

SACKETT, C.J.

Petitioner-appellant Kenneth Flanders appeals following the district court's denial of his claim for postconviction relief. Flanders was convicted after a jury trial of first-degree kidnapping in violation of Iowa Code sections 710.1(3) and 710.2 (1993), second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(1), and first-degree robbery in violation of Iowa Code sections 711.1 and 711.2. We affirm.

Flanders was accused of robbing the Altoona Pub in Altoona and abducting at gunpoint and sexually abusing a female employee of the bar. Flanders' conviction was affirmed by this court in *State v. Flanders*, 546 N.W.2d 221 (Iowa App. 1996).

In the first trial, the female employee testified the bar was empty when Flanders approached her at gunpoint and forced her to perform oral sex. She further testified Flanders attempted sexual intercourse with her but could not achieve an erection. She said he took her in his truck to a secluded area and sexually assaulted her and urinated in her mouth and on her body. She said he left her tied and taped to a road barricade. She freed herself and sought help at a truck stop. The employee positively identified Flanders as the person who robbed and assaulted her. Flanders' attorney did not cross-examine the employee. Flanders' attorney did not introduce into evidence (1) the rape kit used to test the employee, (2) evidence as to what was found on her clothing, and (3) the absence of fingerprint evidence linking defendant to the crime scenes.

The district court, in dismissing Flanders' petition for postconviction relief, found the decisions of Flanders' trial attorney were reasonable strategic tactical decisions. The district court further found Flanders did not prove he was prejudiced by any decisions made by his attorney during trial. The district court also found Flanders had failed to prove his appellate attorney was not effective.

On appeal, Flanders contends the requested relief should have been granted because he was denied effective assistance when his trial attorney (1) did not cross-examine the victim, (2) did not introduce the rape kit, (3) did not introduce evidence he claims shows there was no urine on the victim, (4) failed to question a juror, and (5) did not present evidence showing the absence of his fingerprints. He further contends his trial attorney was not effective in advancing a defense of diminished responsibility and intoxication rather than contending Flanders was innocent.

Flanders alleges his appellate counsel was not effective as he did not adequately address on appeal Flanders' claim certain evidence should have been suppressed.

Flanders also advances the district court erred when it denied his request to be present at the postconviction proceedings.

We ordinarily review postconviction relief proceedings for errors at law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When a postconviction applicant asserts a violation of constitutional safeguards, however, we make our own evaluation

based on the totality of the circumstances. *Id.* This is akin to a de novo review. *Id.* Since the claim in this case is based on ineffective assistance of counsel, we review de novo.

To prevail on a claim of ineffective assistance of counsel, the applicant must show by a preponderance of the evidence counsel failed to perform an essential duty and prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). In evaluating the performance of counsel, we begin with a presumption that counsel acted competently. *See id.* at 131.

Flanders' trial attorney had advised Flanders to admit allegations against him but to claim a defense of diminished responsibility and intoxication. The attorney had Flanders examined by a clinical psychologist and actively pressured a defense of lack of mental capacity to form a specific intent. Our review causes us to determine the choice of defenses was reasonable and Flanders' trial attorney was not ineffective in adopting it.

Flanders contends his trial attorney should have cross-examined the female employee. The trial attorney at the postconviction hearing testified he did not feel he could "rattle" her in cross-examination. He also testified the employee was crying on the witness stand and he felt he would antagonize the jury if he cross-examined her. There was other evidence corroborating the employee's version of the events. Flanders does not advance what specifically his trial attorney would have

accomplished in a cross-examination. Flanders has failed to show the necessary prejudice to succeed on this issue.

The evidence Flanders contends his trial attorney should have admitted into evidence would not have bolstered Flanders' intoxication defense. Again, we find Flanders has not shown these decisions prejudiced him.

Flanders also contends his trial attorney should have questioned a juror about an alleged statement the juror made that if the instructions had included an option to find second-degree kidnapping rather than first-degree, he would have found Flanders guilty of the lesser charge.

A jury's verdict can be impeached in the rare circumstance where the verdict was not correctly recorded or external matters were improperly brought into the jury's deliberations. *See Weatherwax v. Koontz*, 545 N.W.2d 522, 524 (Iowa 1996). The fact a juror may have said he would have found Flanders guilty of second-degree kidnapping rather than first-degree kidnapping is not an event such as could be used to impeach the jury's verdict. Rather, it is such a statement as inheres in the verdict. *See State v. Johnson*, 445 N.W.2d 337, 341 (Iowa 1989). We do not find Flanders' trial attorney ineffective for failing to question the juror.

Flanders also contends his appellate counsel was not effective. Flanders contends his appellate counsel should have done a better job of addressing his argument evidence seized from his pick-up truck should have been suppressed.

Flanders fails to direct us to the specific evidence he challenges, and certain of his references to the record are not correct. Flanders had abandoned his truck and left the scene on foot. The officers found any of the questioned evidence by first seeing it in plain view through the windows of the pick-up truck. Consequently, there was no basis to suppress the evidence. *See State v. Cain*, 400 N.W.2d 582, 585 (Iowa 1987). An attorney is not ineffective when he or she fails to file a motion that would not be successful. We affirm the district court on this issue.

Flanders contends he should have been allowed to personally appear at the postconviction hearing. A postconviction trial is a civil trial. *See Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996). An inmate does not have a constitutional right to be present at a civil trial. *Myers v. Emke*, 476 N.W.2d 84, 85 (Iowa 1991). The question of whether Flanders should appear was a discretionary call of the trial court. *Webb*, 555 N.W.2d at 826; *see also* Iowa Code § 822.7 (1997);¹ *Hahn v. State*, 306 N.W.2d

¹ Iowa Code section 822.7 provides, as follows:

The application shall be heard in, and before any judge of the court in which the conviction or sentence took place. However, if the applicant is seeking relief under section 822.2, subsection 6, the application shall be heard in, and before any judge of the court of the county in which the applicant is being confined. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties. The court may receive proof of affidavits, depositions, oral testimony, or other evidence, and *may* order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

Iowa Code § 822.7 (emphasis added).

764, 767 (Iowa 1981); *Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982).

The district court allowed Flanders the opportunity to testify by telephone and to confer privately with his attorney. There is no proof Flanders' attendance was necessary. Flanders has failed to show how his presence was necessary. Absent such proof, there is no basis for this claim. *See Sallis*, 325 N.W.2d at 123-24. We affirm on this issue.

AFFIRMED.