

IN THE COURT OF APPEALS OF IOWA

No. 9-062 / 97-1080
Filed March 31, 1999

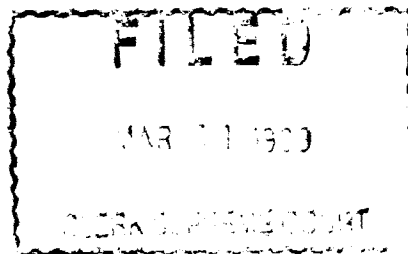
TAIT OTIS PURK,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Tama County, Kristin L. Hibbs, Judge.

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

Tait Otis Purk, Anamosa, pro se.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Brent D. Heeren, County Attorney, and Richard R. Vandermeij, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Applicant-appellant Tait Otis Purk appeals after the district court dismissed his application for postconviction relief. Purk contends his petition should have been granted because (1) his trial attorney did not afford him effective representation in that he examined him about prior criminal acts and precluded Purk from calling certain witnesses; (2) he was subject to double jeopardy in that the State had initially sought forfeiture of the truck he allegedly used in the theft and the search warrant should have been challenged; (3) there was not substantial evidence supporting his conviction; and (4) a spoliation instruction should have been given. We affirm.

Some firewood identified as allegedly being stolen was found at Purk's home. The State first sought to forfeit the firewood and Purk's 1975 red truck. A Tama County magistrate determined the State failed to prove the elements necessary for a forfeiture and ordered the property returned to Purk. The State appealed the decision. The magistrate's decision was considered by the district court and, after a finding by the district court the State's forfeiture was premature, the district court ordered the truck and firewood should not be returned at that time.

Purk was then charged with third-degree burglary in violation of Iowa Code section 713.1 and with being an habitual offender under section 713.6A (1993). He was tried and convicted, and was sentenced to an indeterminate fifteen-year prison term.

Purk appealed. His appeal was subsequently dismissed after the attorney representing him on the appeal filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104. This application for postconviction relief followed.

Purk initially was represented by an attorney during the postconviction proceedings. However, during the course of the examination of his trial attorney, Purk discharged the attorney appointed for the postconviction proceeding and represented himself.

It is conceded Purk's trial attorney questioned Purk about his prior criminal record. Purk's trial attorney testified he did so because he believed it would be to Purk's advantage for the jury to know he had been convicted of other offenses and had spent time in prison. The trial attorney reasoned this was a trial tactic intended to make the jury sympathetic and less likely to convict Purk for stealing a bit of firewood if they thought he would go to prison for doing so.

The district court did not find Purk's trial attorney ineffective. The district court further found Purk had elected to testify in his own defense, thereby allowing himself to be impeached by his prior convictions.

To show his trial attorney was not effective, Purk must show (1) the attorney failed to perform an essential duty, and (2) he was prejudiced by the error. *See State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996); *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). A failed trial tactic does not ordinarily provide a basis for a claim of relief. *See State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984).

Purk contends his trial attorney's reason for examining him about his prior criminal convictions was not a valid reason. We need not address this claim and do not do so. As did the trial court, we find Purk's decision to testify opened up the issue of his prior criminal record; consequently, he cannot show he was prejudiced by his trial attorney's action. We affirm the trial court on this issue.

Purk also contends his trial attorney failed to allow him to call certain witnesses. Purk has not shown how these witnesses, if called, would have changed the result of the trial. Consequently, he has failed to show the required prejudice on this issue to succeed on an ineffective assistance of counsel claim.

Purk also asserts his trial attorney should have objected to the State's closing argument. The district court found the argument proper and found Purk's trial attorney had no reason to object.

We agree with the district court the State's closing argument urging the jury not to find Purk guilty of trespass as a compromise verdict was a valid argument and, consequently, Purk's trial attorney was not ineffective for failing to object. A defense attorney is not found to be ineffective because he or she does not make an objection where there is no basis for the objection.

Purk makes a further claim about the assistant county attorney's attempt in closing argument to ring a societal alarm. Any statement made by the assistant county attorney was not sufficiently inflammatory to deny Purk a fair trial. *See State v. Conner*, 241 N.W.2d 447, 456 (Iowa 1976).

Purk's next argument is that forfeiture procedures brought to forfeit the truck preclude his conviction on criminal charges. Purk's claim is advanced as both an issue preclusion and a double jeopardy claim. He contends the forfeiture action brought by the State and adversely decided against it by a magistrate prevents the prosecution of these criminal charges. He advances, among other things, in filing the forfeiture action, the State prejudiced him because it became privy to his line of defense.

The district court denied Purk's claim finding the issues of forfeiture and the elements of burglary were not the same; the decision was appealed and reversed; and it was a decision of a magistrate court, and a decision of a magistrate court is not given preclusive effect.

The grounds for collateral estoppel or res judicata were not met in that the initial decision of the magistrate was reversed. *See State v. Herkleman*, 251 N.W.2d 214, 215 (Iowa 1977). Likewise, this is not a case of double jeopardy. Iowa's forfeiture statute has been declared neither criminal nor punishment for double jeopardy purposes. *See State v. Predka*, 555 N.W.2d 202, 213 (Iowa 1996).

We have considered Purk's other claims and find them to be without merit.

AFFIRMED.