

IN THE COURT OF APPEALS OF IOWA

No. 6-519 / 95-1388

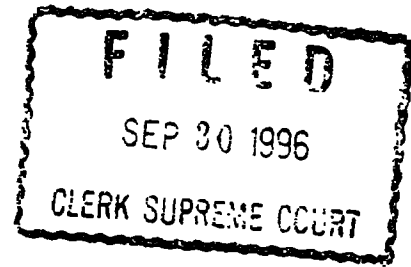
JERRY L. ALLBEE II,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Scott County, James R. Havercamp,
Judge.

Jerry Allbee II appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Matthew D. Hatch of Wells, Gallagher, Roeder & Millage, Bettendorf, for
appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, William E. Davis, County Attorney, and Joseph Grubisich, Assistant County
Attorney, for appellee.

Considered by Habhab, P.J., Huitink, and Vogel, JJ.

PER CURIAM

This is an appeal by an applicant claiming the district court should have granted his request for postconviction relief because he received ineffective assistance at his criminal trial. We affirm by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On October 3, 1992, Jerry Allbee was involved in two accidents. When later tested, he was found to have a blood alcohol level of .267. He first rear-ended a vehicle on Devil's Glen Road in Bettendorf. Allbee left the scene of the accident, but the other driver was able to obtain his license plate number.

Shortly thereafter, Allbee was involved in a collision with a van at the intersection of Wells Ferry Road and Forest Grove Road. One of the passengers in the van died as a result of the collision and another passenger was seriously injured. Stephen Belk, the driver of the van, testified he had been driving southbound on Wells Ferry Road, and that Allbee had been eastbound on Forest Grove Road. He stated Allbee ran a stop sign and struck the van. Police officers who investigated the scene found the physical evidence supported Belk's testimony. Allbee testified he had been driving northbound on Wells Ferry Road, and Belk was driving southbound, when Belk suddenly made a left turn in front of him, which caused the collision.

A jury found Allbee guilty of homicide by vehicle, in violation of Iowa Code section 707.6A(1); serious injury by vehicle, in violation of section 707.6A(3); and leaving the scene of an accident, in violation of section 321.262. Allbee's direct

appeal was dismissed by the supreme court, pursuant to Iowa Rule of Appellate Procedure 104. Allbee filed an application for postconviction relief, claiming he received ineffective assistance of trial counsel. The district court denied his request for relief. Allbee now appeals.

Allbee contends his trial counsel was ineffective because he failed to investigate whether the location of Allbee's injuries supported his theory of how the accident occurred. Allbee claims that because his injuries were on the left side, this disproves the State's theory that he drove into the side of the van.

We note Allbee presented no medical evidence at the postconviction hearing to support his contentions concerning the nature of his injuries. Allbee presented only his own testimony that he believed his injuries would have been different under the State's theory of the case. Furthermore, the location of Allbee's injuries could not be conclusive on how the accident occurred. Representation by counsel is presumed competent, and an applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). We conclude Allbee has failed to show he received ineffective assistance of counsel due to counsel's failure to further investigate the nature of Allbee's injuries.

We affirm the decision of the district court. Costs of this appeal are assessed to Allbee.

AFFIRMED.