**IN THE COURT OF APPEALS OF IOWA**

No. 1-067 / 99-1779
Filed March 14, 2001

FILED
MAR 14 2001
CLERK SUPREME COURT

**RODNEY LAMAR JONES,**
Applicant-Appellant,

vs.

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Applicant appeals from the district court ruling granting the State summary judgment on his postconviction relief claim. **AFFIRMED.**

Robert J. Phelps of Phelps & Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

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

**MAHAN, J.**

Applicant appeals from the district court ruling granting the State summary judgment on his postconviction relief claim. He contends the court erred by summarily ruling for the State when there were genuine issues of fact whether his trial counsel was ineffective (1) in compelling him to plead guilty; (2) in failing to depose State witnesses; (3) in failing to investigate potential defense witnesses; and (4) by revealing potentially damaging information to the State. We affirm.

**Background Facts and Proceedings.** On June 5, 1996, the State filed a trial information charging Jones with first-degree robbery. The trial information alleged Jones robbed Joseph Meyer on or about March 1, 1996. Jones and the State entered into a plea agreement whereby Jones would plead guilty to first-degree theft and third-degree burglary,[1] and the State would dismiss the first-degree robbery charge.[2] The district court accepted Jones's guilty plea and explained to him the necessity of filing a motion in arrest of judgment to challenge the plea proceedings. Jones never filed the motion.

The district court sentenced Jones to an indeterminate ten-year term of imprisonment on the first-degree theft offense. The court suspended his sentence and placed Jones on probation. Jones did not appeal his convictions or sentence. Approximately one year later, the court found Jones violated the

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[1] The State had charged Jones with third-degree burglary in a separate case.

[2] The State filed an amended and substituted trial information that added the first-degree theft charge to the first-degree robbery charge.

terms of his probation. The court revoked Jones's probation and imposed the original ten-year sentence.

Subsequently, Jones filed an application for postconviction relief. In his initial pro se application, Jones claimed his trial counsel failed to depose the State's witnesses, "leaving the defendant unprepared for trial forcing defendant to take a plea." In addition, Jones claimed his trial counsel released privileged information to the prosecutor, which also forced him to plead guilty. In an amended application, filed by Jones's postconviction counsel, he explained his trial counsel failed to locate and interview witnesses who could verify his version of the facts. Jones also claimed his trial counsel disseminated the witnesses' names to the State without his permission. The State filed a motion for summary judgment, which Jones resisted. The district court granted the State's motion. Jones appeals.

**Standard of Review.** Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). When summary judgment is granted in a postconviction relief action, we examine the record to determine if a genuine issue of fact exists and whether the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); *Bugely*, 596 N.W.2d at 895. However, when there is an alleged denial of constitutional rights, our review is de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

**Preservation of Error.** In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show he preserved his claim for review by making it on direct appeal. *Collins v. State*,

477 N.W.2d 374, 376 (Iowa 1991). A claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence "sufficient reason" or "cause" for not having raised the issue at trial and on direct appeal. *Id.*

Jones did not file a motion in arrest of judgment. He did not appeal his sentence. He has not shown sufficient reason or cause for not raising the issue of ineffective assistance of counsel on direct appeal. Therefore, he has failed to preserve the issue for postconviction proceedings. We may affirm on this basis, even though it is not the one upon which the district court based its ruling. *See State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995) (appellate court may uphold district court's decision on any basis existing in the record, even though different from the one relied upon by the court); *Collins*, 477 N.W.2d at 376 (court may affirm on appeal where any proper basis appears for the district court's ruling, even though it is not the one upon which the court based its ruling).

**Ineffective Assistance of Counsel.** Even if Jones had preserved error, the district court correctly granted summary judgment to the State. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996). "A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Such a claim may be

disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, a conviction may be affirmed based on Jones's failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa Ct. App. 1996).

To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. It is not enough to simply claim counsel should have done a better job. *Dunbar*, 515 N.W.2d at 15. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation would have changed the outcome. *Id.* The court will generally presume counsel is competent, and we will not second-guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *Dunbar*, 515 N.W.2d at 15; *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa Ct. App. 1995). "A reasonable probability is one sufficient to undermine confidence in the outcome." *Kone*, 557 N.W.2d at 102.

Jones contends the postconviction court erred in granting the State's motion for summary judgment because the following genuine issues of material fact surrounding his ineffective assistance of counsel claim existed: (1) whether counsel compelled him to plead guilty; (2) whether counsel's failure to take

deposition of the State's witnesses compromised his defense; (3) whether counsel failed to explore defense witnesses who might support his claim of innocence; and (4) whether counsel revealed information to the State about witnesses who would help the State prove its case. We disagree.

The guilty plea transcript demonstrates Jones knowingly and voluntarily entered his guilty plea and a factual basis existed for the plea. The court made Jones aware of his right to depose the State's witnesses and subpoena witnesses to testify on his behalf. Jones has not asserted the existence of newly discovered evidence. He does not assert what exculpatory evidence the witnesses would have provided if they had been interviewed or how he was harmed by the State knowing the witnesses' names.

Jones cannot demonstrate how he was prejudiced from counsel's alleged error in failing to interview potential witnesses or providing their names to the State. Jones received favorable treatment from the State and the court in conjunction with his guilty plea. The State agreed to a guilty plea on a lesser charge. The court suspended his sentence. Only after his own actions led to the revocation of his probation and his incarceration did Jones object to his trial attorney's actions. Jones has failed to raise any genuine issue of material fact. We conclude the district court correctly granted summary judgment for the State.

**AFFIRMED.**