IN THE COURT OF APPEALS OF IOWA

No. 1999-118 (9-334) / 98-1053
Filed June 23, 1999

JOHN WAYNE KIRSCH,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
JUN 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Decatur County, Gregory A. Hulse, Judge.

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

Matthew S. Sheeley of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Carol Clark, County Attorney, for appellee.

Heard by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

John Wayne Kirsch appeals the denial of his application for postconviction relief. We affirm.

Kirsch was charged with nine counts of theft involving cattle rustling and farm equipment theft. Following a jury trial, Kirsch was convicted on all counts. On direct appeal, we affirmed his convictions and reserved his ineffective assistance of counsel claim for postconviction proceedings. *State v. Kirsch*, No. 94-2058 (Iowa App. March 27, 1996).

In his application for postconviction relief, Kirsch contends his trial counsel was ineffective for failing to object to the admission of "other crimes" evidence regarding the theft of the Graham and Derscheid cattle. Kirsch asserts if the jury had not heard about the Graham and Derscheid cattle thefts, he would not have been convicted of three of the thefts: Naylor cattle (first-degree), Leih cattle (second-degree), and Kubota tractor (second-degree).

The district court denied postconviction relief based upon Kirsch's inability to prove trial counsel's failure to perform an essential duty. Kirsch appeals.

I. STANDARD OF REVIEW. Ordinarily, our review of postconviction relief proceedings is for errors of law. *State v. Hoeck*, 547 N.W.2d 852, 862 (Iowa App. 1996) (citing *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. This is the equivalent of de novo review. *Id.*

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 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). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Kirsch asserts trial counsel's failure to object to the admission of the Graham and Derscheid thefts constitutes ineffective assistance of counsel. He claims it is reasonably probable that but for counsel's omissions, the outcome of this case would have been different. We disagree.

A defendant is not entitled to perfect representation but rather only that which is within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981); *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); *Howell*, 557 N.W.2d

at 913. Improvident trial strategy, miscalculated tactic, or mistakes in judgment do not necessarily amount to ineffective assistance. *Kone*, 557 N.W.2d at 102 (citing *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982)). During postconviction proceedings, trial counsel demonstrated his failure to object to the "other crimes" evidence was related to his trial strategy: to show the State was overreaching and trying to clean up a lot of cases by accusing Kirsch. Specifically, the district court summed up trial counsel's testimony as follows:

> Prior to trial, defense counsel filed a motion in limine requesting the trial court to prohibit the State and its witnesses from referring to charges "arising out of the arrest herein, which are presently filed in Madison County, Iowa, and which are immaterial to this case . . ." or "other alleged criminal acts with which this Defendant has not been charged." Defense counsel never requested a ruling on this motion prior to trial.
>
> [Defense counsel] testified that prior to trial, he developed a strategy which was discussed with and agreed to by the Defendant which was to focus on the lack of direct evidence of Defendant's participation in the thefts and to contend that the State was overreaching in an attempt to clean up a lot of cases by accusing Mr. Kirsch. Although Defendant was not actually charged with the Graham and Derscheid thefts, counsel theorized that a showing of the weak evidence of his involvement in those crimes would raise reasonable doubt in the minds of the jurors as to Defendant's involvement in the crimes with which he was charged and could be used as an example of the overreaching by the State in its attempt to clean up a lot of unsolved crimes. Trial counsel testified that he thought the value of the argument was more beneficial than prejudicial and that even without the presentation of evidence attempting to link Mr. Kirsch with the theft of cattle belonging to Richard Graham and Richard Derscheid, there was still sufficient evidence to convict Mr. Kirsch of the crimes with which he was charged. [Defense counsel] further testified that after his trial strategy was finalized, he decided to abandon his motion in limine because it would have been inconsistent with his trial strategy in that he wanted to use the same evidence that he had moved to exclude and for the reason that he believed said evidence would probably be admissible.

> In any event, trial counsel's failure to obtain a ruling on the motion in limine and failure to object to evidence introduced by the State relating to the thefts of cattle from Richard Graham and Richard Derscheid was intentional and calculated to be consistent with defense counsel's trial strategy.

We conclude Kirsch's trial counsel employed a strategy that was reasonable. It is clear he gave a great deal of thought to the matter; he originally filed a motion in limine and then withdrew it. We also note this strategy was agreed to by Kirsch. The fact this defense was ultimately unsuccessful does not establish ineffective assistance of trial counsel. *See Pettes v. State*, 418 N.W.2d 53, 56-57 (Iowa 1988); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Although not necessary for the determination of this appeal, we conclude Kirsch failed to establish prejudice. A defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)). Kirsch has failed to show such a reasonable probability.

In summary, we have carefully reviewed the record in this case and conclude trial counsel was employing a reasonable trial strategy and did not fail to perform an essential duty. We further conclude the evidence of the crimes for which Kirsch was

convicted was overwhelming and he failed to establish prejudice. *See State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996).

We conclude Kirsch failed to show he received ineffective assistance of counsel. For these reasons, we affirm the denial of Kirsch's application for postconviction relief.

AFFIRMED.

No. 98-1053. [1999-118 (9-334)] KIRSCH v. STATE

Appeal from the Iowa District Court for Decatur County, Gregory A. Hulse, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Mahan and Zimmer, JJ. Opinion by Mahan, J. (6 pages $2.40)

Kirsch was charged with nine counts of theft involving cattle rustling and farm equipment theft. Following a jury trial, Kirsch was convicted on all counts. In his application for postconviction relief, Kirsch contends his trial counsel was ineffective for failing to object to the admission of "other crimes" evidence regarding the theft of the Graham and Derscheid cattle. **OPINION HOLDS:** During postconviction proceedings, trial counsel demonstrated his failure to object to the "other crimes" evidence was related to his trial strategy. Counsel theorized that a showing of the weak evidence of Kirsch's involvement in those crimes would raise reasonable doubt in the minds of the jurors as to his involvement in the crimes with which he was charged and could be used as an example of the overreaching by the State in its attempt to clean up a lot of unsolved crimes. We conclude Kirsch's trial counsel employed a strategy that was reasonable. It is clear he gave a great deal of thought to the matter; he originally filed a motion in limine and then withdrew it. We also note this strategy was agreed to by Kirsch. The fact this defense was ultimately unsuccessful does not establish ineffective assistance of trial counsel.