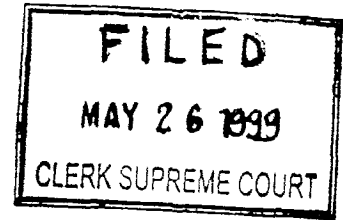


IN THE COURT OF APPEALS OF IOWA

No. 9-150 / 97-0313



JERRY MILES,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Applicant appeals the denial of his application for postconviction relief.

AFFIRMED.

Jerry L. Miles, Fort Madison, pro se, and Philip T. Ramirez, Davenport, stand-by counsel for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ. Sackett, C.J., takes no part.

PER CURIAM.

Jerry Miles appeals the denial of his application for postconviction relief. We affirm.

In the early evening of August 20, 1992, Davenport police officers were surveilling an area of known drug activity. Officer Eric Court was viewing the area from a distance using a telescope. After viewing what he believed to be a drug transaction involving Miles, Officer Court directed other officers in the area to stop the vehicle in which Miles was riding.

Based on police observations and investigation, the Scott County attorney charged Miles with delivery of cocaine in violation of Iowa Code section 204.401(1)(c) (1991). Miles represented himself during pretrial proceedings, but prior to jury selection his standby counsel, Michael A. Woods, assumed responsibility for the case.

A jury convicted Miles as charged and the trial court sentenced him to an indeterminate ten-year sentence. Miles appealed the conviction and sentence to the Iowa Supreme Court. Following transfer, the Iowa Court of Appeals affirmed, rejecting his challenges to the sufficiency of the evidence, prosecutorial misconduct, and selection of the jury panel. *See State v. Miles*, No. 93-239 (Iowa App. Sept. 19, 1994). The court, however, did preserve for subsequent proceedings Miles' argument that he had received ineffective assistance of counsel.

On March 24, 1995, Miles applied for postconviction relief alleging ineffective assistance of counsel. Following an evidentiary hearing, his application was denied.

He appeals the denial of his application. He contends his trial counsel, Michael Woods, was ineffective in a number of respects, including: (1) failing to adequately investigate and present evidence regarding Officer Court's use of the telescope; (2) failing to request a *Batson* hearing regarding the lack of African-Americans on the jury panel; (3) providing incompetent legal advice by failing to inform him of all of the State's plea offers; (4) providing incompetent legal advice by failing to inform him he could be convicted on circumstantial evidence; and (5) failing to object to the State's closing arguments which he alleges improperly raised religious and racial issues and misstated the record.

I. Scope of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *See 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.*

II. Ineffective Assistance of Counsel.

A. Applicable Law. To prevail on his ineffective assistance claims, Miles must prove by a preponderance of the evidence both of the following conditions: (1) trial counsel failed in an essential duty; and (2) prejudice resulted from counsel's error. *See State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998); *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To establish trial counsel failed in an essential duty, Miles must show that his attorney's performance fell outside the normal range

of competency. *Id.* To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *See State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice without deciding whether counsel's representation was deficient. *See State v. Howell*, 557 N.W.2d at 913.

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). "The object of an ineffectiveness claim is not to grade counsel's performance." *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984) (quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699–700 (1984)). When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *See State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). The applicant must state the specific ways in which counsel's performance was inadequate. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance." *See Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982) (quoting *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980)). Similarly, we will not find trial counsel incompetent for failing to pursue a meritless issue. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998).

B. Merits. Miles first claims his trial attorney was ineffective for not more thoroughly challenging the reliability of the telescope used by Officer Court while observing Miles' drug activities. Miles apparently wanted his attorney to place the telescope into evidence in the hope the jury would conclude Officer Court could not have clearly seen the drug transaction with the aid of the telescope he was using. Woods did not place the telescope into evidence, but rather questioned its reliability as an investigatory tool by eliciting testimony during trial that it was not standard police-issue.

Woods testified during the postconviction relief hearing his decision not to place the telescope into evidence was strategic. He claimed if he placed the telescope into evidence, the jury might be permitted to examine it. He feared if allowed to do so, the jury might determine the telescope actually worked quite well and was of sufficient quality to permit Officer Court to see in detail the drug transaction. We determine Woods' decision not to place the telescope into evidence was a reasonable tactical decision that we will not second-guess. *See Fryer v. State*, 325 N.W.2d at 413.

We also find it significant that during trial Miles had asked the court to admit the telescope, but following an off-the-record discussion between Miles and Woods regarding that request, the matter was not raised again. It appears from the record that after this discussion Miles no longer had any interest in placing the telescope into evidence. Woods testified to this fact during the postconviction relief hearing when he described how he explained his rationale to Miles for not placing the telescope into

evidence. He further testified he felt Miles understood his reasoning, accepted it, and was thereafter no longer interested in pursuing the matter. On our review of the record, we cannot say Woods acted ineffectively in not placing the telescope into evidence.

Miles next claims trial counsel was ineffective for not seeking a *Batson* hearing as Miles had asked him to do. He argues his request was based on the lack of African-Americans on his jury panel and alleged improper racial exclusionary practices by the court administrator. We determine counsel did not breach any duty in failing to request such a hearing. In *Batson*, the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment prevents a prosecutor from using peremptory strikes to challenge potential jurors “solely on account of their race.” *See State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997) (citing and quoting *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986)). *Batson* does not apply here because petitioner does not challenge the State’s use of peremptory challenges. The Court of Appeals reached the same conclusion in Miles’ direct appeal in 1994. *See State v. Miles*, No. 93-239 at 12. Because *Batson* does not apply, Woods was not obligated to make Miles’ request. *See State v. McPhillips*, 580 N.W.2d at 754 (trial counsel not incompetent for failing to pursue a meritless issue).

Miles claims in his third argument that Woods provided incompetent legal advice by failing to inform him of all of the State’s plea offers. The record shows two plea offers were contemplated by the State prior to trial. One offer was placed in writing by the State, was presented to Miles, and was subsequently rejected by him.

That offer provided he plead guilty to delivery of cocaine and face a ten-year sentence. Miles rejected it, however, because he was unwilling to serve jail time. Woods testified at the postconviction relief hearing that the State had made a second offer of the lesser offense of simple possession. He stated the offer was made verbally to him, but was then revoked by the State because it was Miles' position that he would plead guilty to simple possession only if he was guaranteed no jail time. Miles claims he was unaware of this second plea offer.

The evidence concerning a second plea offer is conflicting and limited in scope. We conclude Miles has not proven by a preponderance of the evidence his trial counsel breached an essential duty by failing to notify him of a plea offer. We further conclude Miles has not shown prejudice. The evidence suggests that Miles was unwilling to plead guilty to any offense unless guaranteed he would not serve jail time. The State was unwilling to agree to Miles' conditions and thus no plea agreement was possible.

Miles next contends he received ineffective assistance of counsel by claiming his attorney failed to inform him he could be convicted on circumstantial evidence. However, Miles has failed to indicate how the course of his criminal proceedings would have changed had he known direct evidence and circumstantial evidence are equally probative. *See, e.g., Iowa R. App. P. 14(f)(16)* ("Direct and circumstantial evidence are equally probative."); *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). There is some implication that had he been aware he could be convicted on circumstantial evidence alone, he might not have proceeded to trial. Nevertheless, the

record does not adequately demonstrate Miles would have actually opted for a plea rather than proceed to trial. Furthermore, Miles maintained throughout the prosecution that he was innocent and would not accept any plea offer requiring jail time. We find it inconsistent with the record to say Miles might have proceeded differently had he known he could be convicted by circumstantial evidence. Because Miles has not shown how these circumstances prejudiced his right to a fair trial, his claim of ineffective assistance must fail.

In his final claim, Miles argues trial counsel was ineffective for failing to object to certain portions of the prosecutor's closing argument. Miles alleges the prosecutor improperly raised religious and racial issues during his closing. Miles also claims the prosecutor misstated the record.

In determining whether trial counsel's failure to object amounted to ineffective assistance, we first decide whether the State actually engaged in prosecutorial misconduct.¹ Thus, we must ask whether the claimed improper argument was so prejudicial to the defendant that he was denied a fair trial. *See State v. Trudo*, 253 N.W.2d 101, 106 (Iowa 1977); *State v. Monroe*, 236 N.W.2d 24, 29 (Iowa 1975).

We have carefully reviewed Miles' claims. After thoroughly considering the prosecutor's entire closing argument, we find Miles' claims lacking in merit. We do not find any impropriety in the statements made by the prosecutor during his closing

¹ Error was not preserved on these particular prosecutorial misconduct issues. We nevertheless consider the arguments here because they inhere in Miles' claim of ineffective assistance of counsel. *See State v. Mulder*, 313 N.W.2d 885, 891 (Iowa 1981), *cert. denied*, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982).

argument to the jury. Even if we assume, without deciding, some of the prosecutor's closing statements were improper, we cannot say they were so prejudicial as to have denied the defendant a fair trial. We determine trial counsel was therefore under no obligation to object to the prosecutor's closing argument. Miles did not receive ineffective assistance in this regard.

We have considered all issues properly raised on appeal. We determine Miles did not receive ineffective assistance of trial counsel.

AFFIRMED.

No. 97-0313. [9-150] MILES v. STATE

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.
AFFIRMED. Heard by Vogel, P.J., and Mahan and Zimmer, JJ. Sackett, C.J., takes
no part. Per Curiam. (9 pages \$3.60)

Miles appeals the denial of his application for postconviction relief. **Background.** Officer Eric Court was surveilling an area of known drug activity with a telescope. Court viewed what he believed to be a drug transaction involving Miles. Miles was thereafter charged with and convicted of delivery of cocaine. He contends his trial counsel, Michael Woods, was ineffective. **OPINION HOLDS:** Miles first claims his trial attorney was ineffective for not more thoroughly challenging the reliability of the telescope. Miles apparently wanted his attorney to place the telescope into evidence in the hope the jury would conclude Officer Court could not have clearly seen the drug transaction with the aid of the telescope he was using. We determine Woods' decision not to place the telescope into evidence was a reasonable tactical decision that we will not second-guess. Miles next claims trial counsel was ineffective for not seeking a *Batson* hearing as Miles had asked him to do. He argues his request was based on the lack of African-Americans on his jury panel and alleged improper racial exclusionary practices by the court administrator. We determine counsel did not

No. 97-0313. [9-150] MILES v. STATE (continued)

breach any duty in failing to request such a hearing. Under *Batson*, the equal protection clause of the Fourteenth Amendment prevents a prosecutor from using peremptory strikes to challenge potential jurors "solely on account of their race." *Batson* does not apply here because petitioner does not challenge the State's use of peremptory challenges. Because *Batson* does not apply, Woods was not obligated to make Miles' request. Miles next claims Woods provided incompetent legal advice by failing to inform him of all of the State's plea offers. The record shows two plea offers were contemplated by the State prior to trial. Miles claims he was unaware of the second plea offer. The evidence concerning a second plea offer is conflicting and limited in scope. We conclude Miles has not proven his trial counsel breached an essential duty by failing to notify him of a plea offer. We further conclude Miles has not shown prejudice. Miles next contends his attorney failed to inform him he could be convicted on circumstantial evidence. However, Miles has failed to indicate how the course of his criminal proceedings would have changed had he known direct evidence and circumstantial evidence are equally probative. Because Miles has not shown prejudice, his claim of ineffective assistance must fail. Miles also argues trial counsel failed to object to certain portions of the prosecutor's closing argument. He alleges the prosecutor improperly raised religious and racial issues and misstated the record. After thoroughly considering the prosecutor's entire closing argument, we find Miles' claims lacking in merit. We do not find any impropriety in the statements made by the prosecutor during his closing argument to the jury. Even if we assume, without deciding, some of the prosecutor's closing statements were improper, we cannot say they were so prejudicial as to have denied the defendant a fair trial. Trial counsel was therefore under no obligation to object to the prosecutor's closing argument. Miles did not receive ineffective assistance in this regard.