

IN THE COURT OF APPEALS OF IOWA

No. 4-099 / 93-336

FILED

APR 26 1994

CLERK SUPREME COURT

LEONARD BERG,
Appellant,
vs.
STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Linn County,
Thomas L. Koehler, Judge.

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

Philip B. Mears of Mears Law Office, Iowa City, for
appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald,
Assistant Attorney General, Denver D. Dillard, County
Attorney, and Scott C. Peterson, Assistant County Attorney,
for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

~~CONFIDENTIAL~~

HUITINK, J.

Leonard Berg appeals from the judgment of the district court denying his application for postconviction relief. We affirm.

Berg was convicted of first-degree murder in the June 1989 shotgun slaying of Cedar Rapids police officer Bret Sunner. This court, in an unpublished opinion, rejected Berg's argument that his confession was involuntary and affirmed his conviction.

Berg now contends his trial counsel was ineffective for failing to call a defense expert to testify about his mental condition at the suppression hearing concerning his confession. The expert would have testified as he did at trial, that Berg's abnormally passive personality and level of intoxication made him more likely to consent to giving a statement. Berg argues his confession would have been suppressed as involuntary had this testimony been offered and he is therefore entitled to a new trial.

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

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel

failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131. More is required than a showing that a given trial strategy backfired or that another attorney would have prepared and tried a case differently. State v. Tracy, 482 N.W.2d 675, 679 (Iowa 1992).

The postconviction record indicates trial counsel made a strategic decision to rely on the "cat out of the bag theory." This strategy required counsel to link Berg's confession to earlier statements that were suppressed as involuntary. Counsel's professional judgment indicated an undue emphasis on intoxication was inconsistent with the theory selected. We conclude counsel's decision to pursue this theory was well within the normal range of competency.

The trial court found no prejudice resulted from counsel's failure to use expert testimony at the suppression hearing. The trial judge stated and we agree:

The Court is not convinced that Dr. Garfield's testimony at the suppression hearing would have been especially helpful to presenting Mr. Berg's argument of involuntariness. See Kellogg v. State, 288 N.W.2d 561, 564 (Iowa 1980) (failure to call experts not ineffective assistance of counsel where experts would not have been helpful in presenting defendant's theories). Mr. Berg testified to the amount of alcohol he consumed prior to the shooting. The trial court would have been generally aware that intoxication impairs

000005
passive personality would not itself be grounds to find the third statement involuntary. Mental subnormality does not deprive a confession of voluntariness as long as the subnormality does not deprive the defendant of the capacity to understand the meaning and effect of the confession. [State v.] Davis, 446 N.W.2d [785,] 789 [Iowa 1989].

We, like the trial court, conclude the expert's testimony would not in all likelihood have changed the result of these proceedings. The judgment of the district court is therefore affirmed.

AFFIRMED.