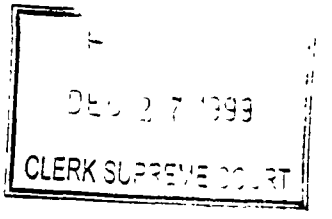
IN THE COURT OF APPEALS OF IOWA

No. 1999-467 (9-724) / 98-2064
Filed December 27, 1999



MICHAEL JESPERSEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lucas County, James W. Brown, Judge.

Michael Jespersen appeals from the denial of his application for postconviction relief, contending his trial counsel was ineffective. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, **Roxann M. Ryan,** Assistant Attorney General, **and Paul Goldsmith,** County Attorney, **for appellee.**

Heard by Huitink, P.J., Mahan and **Hecht, JJ. Streit, J., takes no** part.

HECHT, J.

Michael Jespersen ("Jespersen") was convicted of first-degree murder in 1984. He now appeals from the denial of his application for postconviction relief contending his trial counsel was ineffective in various respects. We affirm.

I. Factual Background and Proceedings. On November 24, 1983, Jespersen and his friend, Jeff Woolums ("Woolums"), spent the evening together visiting various bars and drinking heavily. Jespersen and Woolums returned to Woolums's mother's house around 4:00 a.m. Jespersen went upstairs with Woolums's girlfriend, Stephanie Clark ("Clark.") Conflict between Woolums and Jespersen ensued and they left the house in Woolums's pickup truck. Woolums's mother, his stepfather, and Clark pursued the truck in another vehicle. Upon finding the truck, they discovered Woolums had been stabbed. Woolums's stepfather assaulted Jespersen who then fled from the scene. Jespersen stole two vehicles, wrecked both of them, and was hiding in a hayloft when he was discovered several hours later. Woolums died as a result of the stabbing.

In 1984, a jury found Jespersen guilty of first-degree murder. He subsequently appealed his conviction, and it was affirmed by the Iowa Supreme Court on January 16, 1985. *State v. Jespersen*, 360 N.W.2d 804, 808 (Iowa 1985). He filed his application for postconviction relief on October 27, 1997. The district court denied Jespersen's request for postconviction relief on October 19, 1998.

II. Standard of Review. Postconviction relief proceedings are actions at law and therefore are reviewed on error. *Osborn v. State,* 573 N.W.2d 917, 920 (Iowa 1998). However, when the postconviction petitioner asserts violations of constitutional safeguards, we make an evaluation of the totality of circumstances in a de novo review. *Jones v. State,* 479 N.W.2d 265, 271 (Iowa 1991). We apply the de novo review in claims of ineffective assistance of counsel. *Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1995).

III. Ineffective Assistance of Counsel. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). A defendant shows ineffective assistance of counsel by proving (1) the defense attorney failed in an essential duty and (2) prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). 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).

In proving the first prong of this test, Jespersen must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *See State v. Hildebrant,* 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong, Jespersen must establish 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. *State v. Query*, 594 N.W.2d 438, 444-45 (Iowa App. 1999). With these principles in mind, the court will now consider Jespersen's specific allegations of ineffective assistance of counsel.

A. Juror Acquainted with Witness. Jespersen asserts he received ineffective assistance of counsel because trial counsel failed to object to a juror who was acquainted with Stephanie Clark, the State's "star witness." The record indicates Clark told the prosecutor she recognized one of the jurors and knew the juror's sons. Trial counsel testified at the postconviction relief trial he did not remember the issue occurring at the original trial but, if that had happened, he would not have necessarily wanted the juror removed from the jury. There is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered trial strategy." *Burgess v. State*, 585 N.W.2d 846, 847 (Iowa App. 1998) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95). To succeed on this issue, defendant must show more than his attorney should have done a better job. *State v. Engle*, 590 N.W.2d 549, 552 (Iowa App. 1998). The record indicates Clark's reputation was not necessarily positive. Jespersen has not overcome the presumption having a member of the jury who was familiar with that reputation was a legitimate function of trial strategy which

might have actually benefitted Jespersen. We affirm the district court's decision on this issue. Trial counsel breached no duty and his actions fall well within the realm of acceptable trial strategy.

B. Instruction on Flight. Jespersen next asserts his trial counsel was ineffective because he failed to object to the use of a flight instruction. Trial in this case occurred in 1984, just after the Iowa Supreme Court had approved the use of a flight instruction. *See State v. Brokaw,* 342 N.W.2d 864, 865 (Iowa 1984). Although the Iowa Supreme Court has since stated such instructions are rarely advisable, *see State v. Marsh,* 392 N.W.2d 132, 134 (Iowa 1986), the instruction used in Jespersen's trial was in accordance with the law in place at the time. Counsel is not required to know what the law may become in the future in order to provide effective assistance of counsel. *Jasper v. State,* 477 N.W.2d 852, 858 (Iowa 1991). An ineffectiveness claim cannot be sustained on failure to object when such objection would have no merit. *See State v. Neuzil,* 589 N.W.2d 708, 711 (Iowa 1999). Trial counsel did not, therefore, breach an essential duty when he failed to object to the flight instruction which was supported in the evidence by proof of Jespersen's conduct after the stabbing.

C. Excused Juror's Misconduct. Jespersen contends counsel was ineffective for failing to make an objection when a potential juror who was dismissed from the panel remained in the courthouse and spoke with other potential jurors. The juror in question had been excused for cause after he stated he could not be fair in

consideration of Jespersen's case. Though Jespersen testified at the postconviction relief trial the excused juror had thereafter spoken to other potential jurors, he admitted he did not personally observe the juror speak to anyone, did not know whom the juror had spoken to, and did not know the subject of the alleged conversation(s). The excused juror was not called as a witness at the postconviction relief trial even though his identity was known. No other witnesses were called who could verify Jespersen's allegations. Jespersen has failed to establish by a preponderance of the evidence any conversation occurred and, consequently, cannot show his trial counsel breached a duty by not objecting. Moreover, there is no evidence in the record from which we could conclude Jespersen was prejudiced by the conduct of the excused juror because the evidence of guilt was overwhelming. We may dispose of an ineffective assistance of counsel claim if the defendant fails to prove either prong of the ineffectiveness standard. *Query,* 594 N.W.2d at 445. In this case, we conclude Jespersen failed to prove either a breach of duty or resulting prejudice. We affirm the district court's denial of Jespersen's application for postconviction relief.

AFFIRMED.