IN THE COURT OF APPEALS OF IOWA

No. 0-259 / 99-1174
Filed May 31, 2000

PETER MAJOR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
MAY 31 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

On appeal from the denial of his postconviction relief application, Peter Major contends the court erred in finding he was not provided ineffective assistance of counsel due to his attorney's failure to object to the viewing of a videotape by the jury during deliberations. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Karen B. Doland, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Lisa Krigsten, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Applicant-Appellant, Peter Major appeals from an order of the district court dismissing after a hearing his application for postconviction relief. Major, convicted of first-degree burglary, claims his appellate attorney was ineffective in failing to move for a new trial after the district court allowed the jury to view a videotape of defendant's interview with a police officer. We affirm.

A jury convicted Major of first-degree burglary on April 7, 1995. Major challenged the sufficiency of the evidence on direct appeal. His conviction was affirmed. *See State v. Major*, 554 N.W.2d 897 (Iowa 1996). He subsequently filed this petition for postconviction relief.

Ordinarily, we review a postconviction proceeding for errors at law. *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996). However, we review ineffective assistance of counsel claims under a de novo standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998).

"The right under the Sixth Amendment to the federal Constitution to effective assistance of counsel extends to the assistance of counsel on appeal." *Cox v. State*, 554 N.W.2d 712, 715 (Iowa App. 1996) (quoting *Stringer v. State*, 522 N.W.2d 797, 799 (Iowa 1994)). The same standards applied to trial counsel also apply in measuring the competency of appellate counsel. *Id.*

To establish his claim of ineffective assistance of counsel, Major has the burden to prove that "(1) his ... counsel failed in an essential duty, and (2) prejudice resulted from counsel's error." *Fenske v. State*, 592 N.W.2d 333, 339 (Iowa 1999) (quoting *State v. Arne*, 579 N.W.2d 326, 328-29 (Iowa 1998)). We

may deny an application for postconviction relief if either element is unproven. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

To establish that his appellate counsel failed in an essential duty, Major must show that "his attorney's performance fell outside the normal range of competency." *Fenske*, 592 N.W.2d at 339 (quoting *State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995)). A presumption exists that counsel performed competently. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). In conducting this inquiry, "we examine the merits of the issue counsel allegedly failed to raise." *Fenske*, 592 N.W.2d at 339 (quoting *McPhillips*, 580 N.W.2d at 754). Counsel is not incompetent in failing to pursue an issue that has no merit. *See id.*; *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998).

Defendant's trial attorney filed a motion for new trial claiming the district court should not have allowed the jury during deliberations to view a video tape of defendant's interview with a police officer. The district court denied the motion. The issue was not raised on direct appeal. Major contends his appellate counsel failed in performing an essential duty in not raising the issue on direct appeal.

Counsel cannot be found incompetent for failing to raise a meritless issue. *McPhillips*, 580 N.W.2d at 754. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Osborn*, 573 N.W.2d at 922.

Major's counsel on direct appeal decided not to raise the issue. He testified at the postconviction hearing that after reviewing the trial court transcripts and case law he concluded that the district court did not abuse its

discretion in allowing the videotape to be viewed during jury deliberations. We agree.

The videotape was received and admitted as an exhibit. The officer who conducted the interview testified to establish the foundation for the tape's admission. He did not testify to the contents of the actual interview. At the time the tape was received as an exhibit it was played for the jury in open court.

When the jury retired for deliberation the tape went with them to the jury room, as did a television set and a VCR to allow them to view the videotape. The jury foreperson testified one portion of the videotape was replayed twice in the jury room during deliberations.

Iowa R. Crim. P. 18(5)(e) provides, in pertinent part, that "[u]pon retiring for deliberations the jury *may* take with it all papers and exhibits which have been received in evidence, and the court's instructions." (emphasis added). This rule "leaves it to the trial court, in its discretion, to determine whether exhibits are to be taken by the jury during deliberations." *State v. Jackson*, 387 N.W.2d 623, 629 (Iowa App. 1986) (quoting *State v. Thompson*, 326 N.W.2d 335, 337 (Iowa 1982). Appropriate considerations in the exercise of this discretion are:

> (i) whether the material will aid the jury in a proper consideration of the case;
> (ii) whether any party will be unduly prejudiced by submission of the material; and
> (iii) whether the material may be subjected to improper use by the jury.

Id. (quoting *State v. Shea*, 218 N.W.2d 610, 615 (Iowa 1974). Reversal is warranted only if the trial court abuses its discretion in sending evidence to the jury room and prejudice results. *Jackson*, 387 N.W.2d at 629.

Recordings of conversations do not constitute testimony, but are exhibits that can be released to the jury and played without limitation. *See Chennault v. State*, 667 S.W.2d 299 (Tex. App. 5 Dist. 1984). We are not dealing with the viewing of a testimonial videotape. Videotapes are considered testimonial when they record actual trial testimony of a witness. *See Duvall v. State*, 780 P.2d 1178, 1180 (Okla. 1989).

In *State v. Gathercole*, 553 N.W.2d 569 (Iowa 1996), the court addressed a defendant's complaint that the trial court abused its discretion by allowing the jury to use a tape recorder to listen to a tape recording of the defendant's interview. *Gathercole*, 553 N.W.2d at 575. The tape itself was admitted as a State's exhibit. *Id.* In *Gathercole*, the Court said, "[i]t is clear, however, that rule 18(5)(e) does not prohibit the use of a tape recorder in the jury room . . .". *Id.*

Using a tape recorder to hear an audio tape exhibit is analogous to using a television and VCR to view a videotape exhibit.

Major has failed to prove his appellate counsel failed in an essential duty. We may deny an application for postconviction relief if any element of an ineffective assistance of counsel claim is unproven. *See Brooks*, 555 N.W.2d at 448. The district court properly dismissed Major's application for postconviction relief.

AFFIRMED.