IN THE COURT OF APPEALS OF IOWA

No. 6-570 / 95-0623

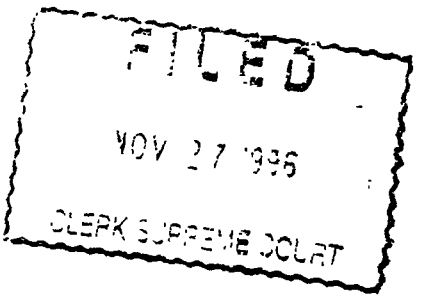
JERRY L. MILES,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, James E. Kelley (postconviction hearing) and Bobbi M. Alpers (postconviction motion to dismiss), Judges.

Jerry Miles appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Sackett, C.J., and Cady and Streit, JJ.

PER CURIAM

This is an appeal by an applicant claiming the district court should have granted his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Jerry Miles was convicted of being a felon in possession of a firearm. He represented himself and had stand-by counsel at the criminal trial. The supreme court affirmed his conviction on appeal. *State v. Miles*, 490 N.W.2d 798 (Iowa 1992).

Miles filed an application for postconviction relief. The district court denied Miles' request to dismiss his postconviction counsel and his request to have three prisoners transported to his postconviction hearing. The court also denied Miles' request for postconviction relief. The court found Miles had failed to show he received ineffective assistance from stand-by counsel at his criminal trial. Miles appealed.

I. Miles contends the district court should have granted his motion to dismiss his court-appointed postconviction counsel. He states she failed to present all of the issues he wanted to present and she failed to sufficiently discuss the case with him. We find no error in the court's refusal to dismiss postconviction counsel. As the district court noted, the fact Miles disagreed with his counsel was not sufficient cause to dismiss her and appoint other counsel. *See United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983). The evidence shows postconviction counsel attempted to present the legitimate issues she found in the record.

II. Miles claims the district court erred by refusing to allow him to depose three prisoners or to transport them for the postconviction hearing. The trial court concluded there were significant concerns about the safety and necessity of bringing three convicted persons to the hearing. Miles has not alleged what these witnesses would have testified to, and we find he failed to show he was prejudiced by not being able to present the testimony of these witnesses.

III. Miles contends his postconviction counsel was ineffective because she failed to raise the following issues: (1) racial bias on the jury pool; (2) insufficiency of the evidence; (3) ineffective assistance of appellate counsel; and (4) ineffective assistance of stand-by counsel. To establish a claim of ineffective assistance of counsel, an applicant must show that the attorney failed to perform an essential duty, and prejudice resulted to the extent that it denied applicant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

A. We determine Miles has failed to show he received ineffective assistance of postconviction counsel on the first two issues raised. The issues of racial bias on the jury pool and sufficiency of the evidence were decided against Miles in his direct appeal. *Miles*, 490 N.W.2d at 799-800. Counsel was not ineffective for failing to raise issues which were barred by the doctrine of res judicata.

B. Miles claims his appellate counsel was ineffective because she failed to raise the issue of racial bias in the jury pool and did not properly set out his argument

concerning sufficiency of the evidence. The tactical decision of which issues to raise on appeal is usually immune from subsequent attack by an aggrieved applicant claiming ineffective assistance of counsel. *Jones v. State,* 479 N.W.2d 265, 272 (Iowa 1991). We find no ineffective assistance on this ground.

C. The issue of ineffective assistance of stand-by counsel at his criminal trial was presented at the postconviction hearing. Miles asserts his postconviction counsel could have presented the issue differently, but does not state how. Also, he has not shown the result of his postconviction hearing would have been different. We conclude Miles has not shown he received ineffective assistance from his postconviction counsel.

IV. Finally, Miles contends the cumulative effect of the actions of his counsel at the criminal trial, direct appeal, and postconviction hearing constitute ineffective assistance of counsel. As discussed above, we have not found ineffective assistance of counsel, and our conclusion does not change when Miles' arguments are viewed as a whole.

We affirm the decision of the district court denying Miles' application for postconviction relief. Costs of this appeal are assessed to Miles.

AFFIRMED.