IN THE COURT OF APPEALS OF IOWA

No. 0-324 / 99-1030
Filed June 28, 2000

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CLERK SUPREME COURT

WINSTON JORDAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

Winston Jordan appeals the district court's grant of summary judgment for the State on his application for postconviction relief. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Paul E. Kittredge, Jr., Assistant County Attorney, for appellee.

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

HUITINK, J.

I. Background Facts and Proceedings.

On February 2, 1996, Jordan was convicted of first-degree robbery, second-degree robbery, two counts of conspiracy, and assault while participating in a felony. The charges stemmed from the shooting and robbery of Jose and Fernando Flores. As a result, the district court sentenced him to a term of incarceration of twenty-five years. Jordan directly appealed his convictions challenging the sufficiency of the evidence. We affirmed Jordan's conviction. *State v. Jordan*, No. 96-880 (Iowa App. June 26, 1997).

On May 20, 1998, Jordan filed an application for appointment of counsel for purposes of postconviction relief arguing five grounds for relief. On January 28, 1999, Jordan filed an application for postconviction relief. The State filed an answer resisting Jordan's application. On April 20, 1999, the State filed a motion for summary judgment, arguing that only one of Jordan's postconviction claims had been resolved on direct appeal. The State argued the other four claims were not asserted on direct appeal but were raised for the first time in his postconviction relief application. Following a hearing, the district court granted the State's motion for summary judgment.

On appeal Jordan argues the district court improperly granted summary dismissal of his application for postconviction relief under Iowa Code sections 822.6 and 822.8.

II. Standard of Review.

Postconviction relief proceedings are actions at law and are reviewed on error. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997). But when the postconviction applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). We apply the de novo review in claims of ineffective assistance of counsel. *Id.*

III. Merits.

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994).

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The petitioner must overcome a strong presumption of counsel's competence, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Osborn v. State*, 573 N.W.2d at 922. Appellate counsel's failure to

raise issues of claimed ineffectiveness of trial counsel are tested the same as ineffective assistance of trial counsel claims. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

The court may grant summary judgment in a postconviction relief proceedings "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits" that there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Summage v. State*, 579 N.W.2d 821, 821 (Iowa 1998); Iowa Code § 822.6. Summary disposition is not proper if a material issue of fact exists. *Summage*, 579 N.W.2d at 821. The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa R. Civ. P. 237(e). A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa App. 1994).

Jordan argues the allegation of ineffective assistance of appellate counsel set forth in his postconviction affidavit constitutes sufficient reason under section 822.8 for his failure to raise the claims set forth in his application on direct appeal. He claims he should now have an opportunity to develop the record on the claim of ineffectiveness of trial counsel.

Jordan argues his appellate counsel, James Tonka, failed to raise issues before the court of appeals that he wanted him to raise. However, Jordan does

not elaborate which issues he wanted appellate counsel to present. The district court provided:

> Aside from the fact that Jordan has not provided any indication of the points he wanted raised on appeal, Jordan has also failed to make a showing of how he was prejudiced by Tonka's failure to raise these issues. First, Jordan argues that he filed his own brief with the Clerk of Iowa Supreme Court to supplement Tonka's brief. If this is indeed true, then this Court must assume the issues Jordan wanted raised were indeed before the Iowa Court of Appeals and were not considered relevant. In that case, Jordan had the opportunity to raise his issues and simply was not victorious. Second, even if this Court assumes that the issues Jordan wanted to raise were not before the Court of Appeals, Jordan has provided no indication of how the issues he would have raised would have affected the outcome of the trial. He merely states he suffered actual prejudice. This does not constitute "specific facts constituting competent evidence to support a prima facie claim." *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872 (Iowa 1997).
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> Based upon the above reasoning, the Court finds that Jordan has not provided sufficient evidence to make a prima facie showing that his appellate counsel was ineffective. This precludes him from raising in his post conviction hearing any issues that were not raised in his direct appeal. Because Jordan cannot raise new issues in his application for post conviction relief and is precluded from relitigating the claim of insufficient evidence, the Court holds that there is no basis for the post conviction relief application and that summary judgment is proper.

We agree with the district court that Jordan cannot satisfy his burden under section 822.6 and 822.8 due to his failure to address how appellate counsel's performance affected the outcome of his case. We find the district court properly granted the motion for summary judgment. The judgment of the district court is affirmed.

AFFIRMED.