

FILED

MAY 30 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

MICHAEL SHANE,)

Plaintiff-Appellant,)

Filed May 30, 1980

vs.)

STATE OF IOWA,)

Defendant-Appellee.)

0-52
2-63332

Appeal from Black Hawk District Court - Forest E. Eastman, Judge.

Plaintiff appeals denial of application for postconviction relief from conviction of robbery with aggravation in violation of section 711.2, The Code 1975, contending postconviction court erred in not determining that trial counsel rendered ineffective assistance of counsel by not raising issue of victim's identification of plaintiff on direct appeal. - AFFIRMED.

Douglas V. Coonrad, of Patterson Law Firm, Waterloo, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff appeals the denial of his application for postconviction relief from his conviction of robbery with aggravation in violation of section 711.2, The Code 1975. Plaintiff contends, as grounds for good cause for failure to raise the issue of the victim's out-of-court identification of plaintiff on direct appeal from his conviction, that his trial counsel who also handled the direct appeal was incompetent. Plaintiff then contends that the trial court erred in not suppressing the evidence of the out-of-court identification. We affirm.

On December 16, 1975, two men held up a store in Waterloo. The next morning, the robbery victim identified one of the robbers by a mug shot. That evening, the victim accompanied the police officers investigating the crime to Cedar Rapids. The identified robber and plaintiff were apprehended by the officers in a motel room in Marion. Once the suspects were both handcuffed and placed in custody, the victim entered the motel room and identified both as the men who robbed him the night before.

Plaintiff's counsel moved to suppress the identification evidence, but the motion was overruled after a hearing. The case proceeded to trial and plaintiff was convicted of robbery with aggravation in violation of section 711.2, The Code 1975. Plaintiff appealed directly from that conviction, raising several issues, but not raising the identification issue. The supreme court affirmed plaintiff's conviction. State v. Shane, 255 N.W.2d 324, 328 (Iowa 1977).

Plaintiff filed his application for postconviction relief on September 28, 1978, challenging the trial court's overruling of the motion to suppress the identification evidence, and asserting the ineffective assistance of his trial counsel on appeal as grounds for good cause for not raising the identification issue on direct appeal. The postconviction court found that plaintiff's trial counsel did not act incompetently by not raising the identification issue on appeal, and thus did not reach the merits of the identification issue.

When a postconviction plaintiff asserts a violation of a constitutional safeguard, we make our own evaluation of the totality of the circumstances under which the postconviction court's ruling was made. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). Thus, our review is essentially de novo. Id.

In asserting a claim of ineffective assistance of counsel, plaintiff must bear the burden of proof to establish by a preponderance of the evidence that his counsel was ineffective. Id. The inquiry must turn on whether under all the circumstances, the challenged performance of counsel was within the range of normal competency. Id. To justify a finding of ineffective assistance of counsel, the circumstances considered must include an affirmative factual basis demonstrating counsel's inadequacy of representation. Hinkle, 290 N.W.2d at 30. The same standards regarding competency of counsel at trial are applied to competency of counsel on appeal. Id.

Plaintiff asserts his trial counsel acted incompetently by not raising the identification issue on appeal. We do not believe plaintiff has satisfied his burden of proof by establishing that incompetency by a preponderance of the evidence. Plaintiff's trial counsel testified at the postconviction hearing that he had considered raising the identification issue on appeal, but determined as a matter of tactics and strategy that the likelihood of success on that issue was controlled by the case of State v. Salazar, 213 N.W.2d 490, 491 (Iowa 1973), in which one of two suspects in a service station robbery was more completely described by the robbery victim than the other. When the suspects were apprehended and brought back to the service station one hour after the robbery, the victim positively identified both while they were placed against the police car, handcuffed, and surrounded by police officers. Id. at 492. The Iowa Supreme Court held that although the one-on-one identification was "suggestive," it was not "unnecessarily suggestive," and was substantially reliable so as not to constitute a due process violation. Id. at 493-95. We cannot conclude that an attorney acting within the range of normal competency, in light of Salazar and the principles recently restated in State v. Mark, 286 N.W.2d 396, 403-07 (Iowa 1979) (citing Manson v. Brathwaite, 432 U.S. 98, 109, 113, 114, 116, 97 S. Ct. 2243, 2250, 2252-54, 53 L. Ed. 2d 140, 151, 153-55 (1977) and Neil v. Biggers, 409 U.S. 188, 199, 201, 93 S. Ct. 375, 382-83, 34 L. Ed. 2d 401, 411-12 (1972)), would not arrive at the same conclusion as that reached by plaintiff's counsel regarding the merits of appealing the identification issue in the case at bar.

In essence, plaintiff is challenging his trial counsel's judgment on a matter of the appropriate allocation of effort on appeal. In such a situation, counsel is not required to "shotgun" appeals and raise every conceivable issue." Hinkle, 290 N.W.2d at 32.

Moreover, we must resist "the temptation to Monday morning quarterback the lawyer in the arena." Id. at 30. We must not allow our wisdom of hindsight to interfere with attorneys' judgments that fall within the normal range of competency. We find this to be a case deserving of the application of that sentiment.

Plaintiff was made aware of what issues his trial counsel was intending to raise on appeal. He had the opportunity to object or make suggestions. He did not do so. Under all the circumstances, we cannot conclude plaintiff was denied effective assistance of counsel.

Plaintiff further contends he is entitled to post conviction relief on the issue of identification. In light of the determination above, plaintiff has failed to meet his burden of showing good cause for not raising the identification issue on direct appeal. Consequently, he is barred from raising that issue in a postconviction proceeding. See Hinkle, 290 N.W.2d at 31; Armento v. Baughman, 290 N.W.2d 11, 13 (Iowa 1980); Bledsoe v. State, 257 N.W.2d 32, 33-34 (Iowa 1977); § 663A.8, The Code 1979.

AFFIRMED.