IN THE COURT OF APPEALS OF IOWA

No. 1999-533 (9-794) / 98-1805
Filed February 9, 2000

MICHAEL RAY ROBINSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Michael Ray Robinson appeals the denial of his application for postconviction relief. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Sackett C.J., and Vogel and Hecht, JJ.

HECHT, J.

Michael Ray Robinson ("Robinson") brought an action for postconviction relief. He appeals from the order of the Linn County District Court denying such relief. We reverse and remand to the district court.

I. Factual Background and Proceedings. Robinson was found guilty of kidnapping in the first degree and two counts of robbery in the second degree following a jury trial in May 1992. The district court sentenced him to life in prison. On direct appeal, he challenged the sufficiency of the evidence and claimed he was denied effective assistance of counsel. Among his contentions of ineffectiveness was trial counsel's failure to challenge the systematic exclusion of blacks from the jury pool. This court affirmed the convictions, but reserved the claims of ineffective assistance of counsel for postconviction proceedings. *See State v. Robinson,* No. 92-1145 (Iowa App. Oct 5, 1993).

Robinson filed an application for postconviction relief on December 30, 1994. A hearing on the application was held on July 8, 1998. Though he presented evidence advancing other theories of ineffectiveness, Robinson presented no evidence supporting the claim blacks had been systematically excluded from the jury pool. The Honorable William R. Eads filed his conclusions and rulings on September 24, 1998, dismissing the application.

On appeal, Robinson claims he received ineffective assistance from both trial counsel and postconviction relief counsel when they failed to present evidence and argument in support of his claim blacks were improperly excluded from the jury pool.

II. Standard of Review. We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998); *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996).

III. The Merits. Robinson bears the burden of demonstrating ineffective assistance of counsel by a preponderance of the evidence. *See State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone,* 557 N.W.2d 97, 102 (Iowa App. 1996). Our ultimate concern is with the "fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93.

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Id.* at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). The defendant establishes 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).

Robinson contends his postconviction counsel was ineffective by not presenting any evidence in support of his claim blacks were improperly excluded from the jury pool. Because trial counsel made no objection to the jury pool at

trial, there was insufficient evidence regarding the make-up of the jury pool to make a determination on direct appeal. This court preserved the issue for postconviction relief proceedings. However, because no evidence was presented at the postconviction relief hearing on the issue, there is no evidence in the record indicating whether blacks were systematically excluded from the jury pool. We cannot determine from the record whether counsel's failure to present evidence was a result of ineffective assistance or proper trial strategy. In any event, Robinson is entitled to an evidentiary hearing to develop evidence as to this issue.

We reverse and remand for the purpose of developing a more complete record as to whether trial and postconviction relief counsel were ineffective in failing to raise the issue of systematic exclusion of blacks from the jury pool.

REVERSED AND REMANDED.