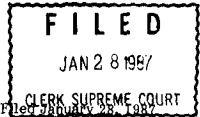


IN THE COURT OF APPEALS OF IOWA

JEFFREY C. MACK,)
Petitioner-Appellant,)
vs.)
STATE OF IOWA,)
Respondent-Appellee.)



6-313
85-1170

95

Appeal from the Iowa District Court for Scott County (No. 69693) - James R. Haverkamp, Judge.

Petitioner appeals from the district court's denial of his application for postconviction relief, contending that he was denied effective assistance of trial and appellate counsel. **AFFIRMED.**

Bobbi M. Alpers of Davenport for petitioner-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and James L. Ottesen, Assistant County Attorney, for respondent-appellee.

Heard by Oxberger, C.J., Donielson and Sackett, JJ.

This is the second time that the defendant, Jeffrey C. Mack, has presented an appeal to this court. In 1982, Mack was convicted by a jury for first degree robbery and assault with intent to inflict serious injury. In February of 1984, we considered Mack's direct appeal, in which he asserted that the jury had been improperly instructed on the issue of justification. Specifically, Mack argued that the trial court erred in including proof of an alternative course of action among the various ways that the state may defeat an alleged justification defense. We rejected this contention.

In a concomitant argument, Mack asserted a direct appeal that if the jury were instructed on the alternative course of action issue, it should also have been instructed that a defendant is not required to pursue an alternative course if a risk of danger inheres therein. At the trial court level, Mack did not challenge the court's failure to include such an instruction; on appeal, however, Mack argued for the first time that the supreme court's decision in State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979), required submission of the risk of harm instruction. Because this argument was not presented to the trial court, we held that it had not been preserved for appellate review.

Mack then filed the underlying application for postconviction relief in which he alleged that he had been rendered ineffective assistance of trial and appellate counsel in eight particular respects. After considering each of Mack's contentions, the district court denied his petition for relief. Mack has appealed from the district court's decision, raising three arguments: (1) Mack contends that his trial attorney's failure to preserve error on the risk of harm instruction denied him effective assistance of counsel; (2) Mack argues that his trial attorney rendered ineffective assistance in failing to call his co-defendant's brother as a defense witness; and (3) Mack asserts that his

appellate counsel was ineffective because the attorney presenting his appeal failed to raise an issue preserved at trial concerning the definition of "theft" contemplated by the robbery statute. We affirm.¹

Because Mack asserts a violation of his constitutional right to the effective assistance of counsel guaranteed by the sixth amendment, we make our own evaluation of the totality of the relevant circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). This is the equivalent of a de novo review. Id.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must prove by a preponderance of the evidence: (1) that counsel's performance was so deficient as to deprive him of "counsel" within the meaning of the sixth amendment; and (2) that the deficient performance so prejudiced him that he was denied a fair trial. White v. State, 380 N.W.2d 1,3 (Iowa Ct. App. 1985). Moreover, the petitioner must overcome a presumption of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of representation. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). This requires more than a mere showing that trial strategy backfired or that another attorney would have handled the case differently. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Our ultimate inquiry is whether, under the record as a whole, counsel's performance was within the normal

¹Among the other bases for relief presented to the postconviction trial court, Mack argued pro se that he received ineffective assistance because his trial and appellate counsel failed to argue that the evidence was insufficient to support the verdict; that assault is a lesser included offense of robbery; that counsel was not present during a critical stage of interrogation; and that he had been entrapped. Although these allegations were not appealed from and therefore have not been preserved for our consideration, Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983); Iowa R. App. P. 14(a)(3), we nevertheless note that these contentions were properly resolved by the postconviction trial court.

range of competency. Id. With these principles in mind, we now address the arguments presented in this appeal.

We first consider Mack's assertion that he is entitled to relief because his trial attorney rendered ineffective assistance in failing to present and preserve the argument that the court was required to instruct the jury that a defendant need not pursue an alternative course of action if a risk of danger inheres therein. We find it unnecessary to specifically determine whether counsel's performance was deficient in this respect; our examination of the record discloses that Mack has failed to satisfy the prejudice component of his ineffectiveness claim.

In Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984), the supreme court specified that in order to prevail in a postconviction proceeding on grounds not previously urged because of the alleged ineffectiveness of counsel, the petitioner must establish "actual prejudice resulting from the errors." In Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984), the court adopted the following test for determining whether the requisite showing of prejudice has been made:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

(quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984)). Furthermore, in Gering v. State, 382 N.W.2d 151, 154 (1986), the court noted that "it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of [the] claim."

The record in the present case discloses that although the jury was instructed that the State could rebut the defendant's justification defense by proving the existence of an alternative course of action, neither of the parties

actually presented evidence on this issue. Rather, the evidence adduced by both parties was offered to negate or establish the additional theories recognized to defeat the defense. The fighting issue at trial was whether or not the defendant had reasonable grounds for believing that he was in imminent danger and that his use of deadly force was necessary and reasonable in the circumstances. The existence or nonexistence of an alternative course of action and the propriety of the defendant's decision not to use the same was not an issue. In these circumstances, we cannot say that the outcome of the trial was influenced by counsel's alleged error. See State v. Blackford, 335 N.W.2d 173, 178 (Iowa 1983) (counsel's failure to object to court's exclusion of element in instructions not a basis for relief where it was unlikely that the inclusion of the element would have produced any difference in the verdict). Accordingly, we conclude that the defendant has failed to satisfy the prejudice component of his claim. See Taylor v. State, 352 N.W.2d at 686.

The appellant maintains that this case cannot be distinguished from State v. Rupp, 282 N.W.2d 125 (Iowa 1979), in which the supreme court found that the trial court's failure to submit an instruction identical to that at issue in the present case constituted reversible error. We think that Rupp is factually distinct. The defendant's failure to pursue an alternative course of action was a critical issue in Rupp. See State v. Rupp, 282 N.W. 2d at 127-30. As discussed above, the same cannot be said in the present case. The defendant in Rupp presented evidence designed to establish that he could not pursue an alternative course without posing a threat to his safety; by contrast, in the case at bar, neither party presented any evidence concerning either the existence of an available alternative or the threats inherent therein. As such, we are disinclined to conclude that Rupp mandates a new trial in the circumstances of this case.

The defendant further argues that his trial counsel was ineffective in failing to call his co-defendant's brother, William Morgan, as a witness. In an addendum filed with this appeal, the petitioner has, for the first time, presented an affidavit delineating the contents of William Morgan's testimony had he been called as a witness at trial. This affidavit presents no new evidence, but rather indicates that Morgan's testimony would merely have been cumulative. It is well settled that "the withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffectiveness of counsel." Taylor v. State, 352 N.W.2d at 687.

Moreover, we think it significant that Morgan's testimony concerned the events preceding the assault; these events were undisputed at trial. The testimony would not have impacted upon the State's case, nor would it have contributed to the petitioner's alleged justification defense. In these circumstances, we conclude that the petitioner has failed to show that he was prejudiced by his counsel's failure to call the witness. See Taylor v. State, 352 N.W.2d at 687. He has failed to demonstrate any reasonable probability that the outcome of the trial would have been different if Morgan's testimony had been elicited. Accordingly, his claim for relief upon this basis is denied.

Finally, Mack argues that he was denied effective assistance of appellate counsel because the attorney presenting his appeal failed to raise an issue preserved at trial concerning the definition of "theft" contemplated by the robbery statute. At the outset, we note that the same standards govern claims concerning the effectiveness of both trial and appellate counsel. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). In addition, it is well recognized that an appellate attorney is not required to raise every colorable claim preserved at trial, but may choose as a matter of trial strategy to limit the issues raised

on appeal to those considered the most viable. Jones v. Barnes, 363 U.S. 745, 751-52, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987, 994 (1983).

Mack's trial attorney argued that the definition of "theft" contemplated by the robbery statute, Iowa Code section 711.1, includes only common law larceny and therefore required a showing of "theft by taking" rather than by misappropriation or deception. Mack's attorney contended that because the State had not produced any evidence indicating that Mack ever had actual control of the money exchanged in the transaction out of which the robbery charge arose, the charge could not stand. The trial court rejected this argument.

Although Mack's appellate counsel did not testify at the postconviction proceeding, the record discloses that appellate counsel consciously abandoned this argument because it is not meritorious. The authorities considering the definition of "theft" contemplated by Iowa Code section 711.1 indicate that it includes an intent to commit all types of theft, not merely the larceny type. Yeager and Carlson, 4 Iowa Practice §§ 251, 252 (1978). In these circumstances, we think it clear that Mack has failed to establish that he could have prevailed upon appeal if this issue had been raised. Consequently, we hold that no prejudice has been shown and that the claim of ineffective assistance must fail.

AFFIRMED.