

FILED

APR 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**DAVID E. THOMAS,**

)

Petitioner-Appellant,

)

Filed April 26, 1983

vs.

)

STATE OF IOWA,

)

3-462-68452

Respondent-Appellee.

)

Appeal from Lee District Court - D. B. Hendrickson, Judge.

Petitioner appeals from the order of the trial court denying his application for postconviction relief from his 1980 conviction for possession of marijuana with intent to deliver for profit in violation of Iowa Code § 204.401(1)(b) (1979).

AFFIRMED.

James P. Hoffman, Keokuk, for petitioner-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

PER CURIAM

Petitioner David Thomas appeals from the order of the trial court denying his application for postconviction relief from his 1980 conviction for possession of marijuana with intent to deliver for profit in violation of Iowa Code § 204.401(1)(b) (1979). He claims that he was not given effective assistance of counsel at trial due to counsel's various acts and omissions. We affirm.

In 1980, following trial to a jury, Thomas was convicted of the crime of possession of marijuana with intent to deliver for profit in violation of Iowa Code section 204.401(1)(b). The conviction was subsequently affirmed by this court on direct appeal. State v. Thomas, no. 66805 (Iowa Ct. App. January 26, 1982). The issue of ineffective assistance of counsel was not raised on direct appeal, but was preserved for presentation in a postconviction proceeding by order of the supreme court. In April 1981, Thomas filed this application under Iowa Code Ch. 663A for postconviction relief, alleging that his trial counsel, Steven Ort, rendered ineffective assistance at trial in eighteen particulars. Following a hearing, the postconviction court denied relief on March 3, 1982.

The principles relevant to a determination of effective assistance of counsel were set out in State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981):

The test for determining whether a defendant has been denied effective assistance of counsel is whether, considering all of the circumstances, the attorney's performance was within the normal range of competency.

A presumption exists that counsel is competent. Defendant has the burden of proof to establish by a preponderance of the evidence that counsel rendered ineffective assistance. "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." To warrant a finding of ineffective assistance of counsel, the "circumstances must include 'an affirmative factual basis demonstrating counsel's inadequacy of representation.' "

(citations omitted). Although Thomas raised eighteen specifications of ineffective

assistance of counsel in his application for postconviction relief, his appeal is based on only four of those specifications. Therefore, our review is limited to those four; the others are deemed waived. Iowa R. App. P. 14(a)(3).

Thomas first claims that trial counsel was ineffective because he deposed only two of the approximately ten witnesses for the State. This claim is without merit. Thomas does not indicate who else should have been deposed or what information would have been obtained therefrom. Nor does he show or even clearly allege any prejudice from counsel's failure to depose more than the two witnesses. Thomas' bare allegation of ineffectiveness in this regard is certainly inadequate to establish ineffective assistance of counsel.

Thomas next claims that counsel was ineffective in filing, on the morning of trial, an untimely motion to suppress evidence. The record, however, indicates that the trial court considered the merits of counsel's motion and, although the motion was ultimately overruled, it apparently was not overruled for being untimely. Since the motion was considered on the merits, Thomas was not prejudiced by the fact of its untimeliness. He cannot prevail on this issue.

Counsel's effectiveness was also challenged on the basis of his failure to object to allegedly inadmissible testimony. Without objection from defense counsel, various police witnesses gave considerable testimony regarding their surveillance of "known drug dealers" frequenting Thomas' apartment, other information allegedly implying that Thomas was part of a "drug ring", other drug transactions in which the informant participated, and alleged threats on the life of the informant and a member of his family. Although he had succeeded in getting evidence of the handgun suppressed, defense counsel asked a leading question which allowed a police officer to tell the jury that the handgun was seized at Thomas' apartment. Without objection from defense counsel, the prosecutor made a comment regarding the handgun during closing argument.

Counsel testified at the postconviction hearing that he did not object to this testimony pursuant to his strategy to make appear unreliable the testimony of Bill Gooley, one of the chief witnesses for the State. Counsel allowed Gooley to testify about prior dealings with Thomas and other issues in an attempt to bring out inconsistencies between his testimony at trial and his own prior statements with the hope of making his testimony less credible. Counsel also testified that, in his opinion, the benefits of demonstrating the unreliability of Gooley's testimony outweighed any possible harm to Thomas in letting the testimony in. Under these circumstances, we cannot hold that counsel's choice of strategy here was an unreasonable one. The success or failure of such strategy is irrelevant; it is sufficient to say that counsel's performance in this regard was within the normal range of competence. As to the statements referring to a gun found in Thomas' apartment, we may agree that they were irrelevant. Thomas, however, does not indicate or even clearly allege on appeal that he was prejudiced as a result of such statements. Although counsel arguably should have objected, we will not judge his overall performance on the basis of this one mistake in judgment. See Karasek v. State, 310 N.W.2d 190, 192 (Iowa 1981).

Finally, Thomas claims that counsel was ineffective because he failed to move for a directed verdict of acquittal. We believe the record supports counsel's conclusion that such a motion had no chance of being sustained. Counsel cannot be found ineffective for failing to take a futile course of action.

We have reviewed all of Thomas' claims and conclude that he has not sustained his burden of proving that counsel's performance at trial was not within the normal range of competence. We therefore affirm the lower court's denial of postconviction relief.

AFFIRMED.