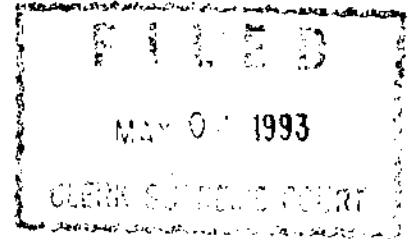


IN THE COURT OF APPEALS OF IOWA

No. 3-110 / 92-158



LAWRENCE THOMAS GLADSON,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Jasper County,
William H. Joy, Judge.

The postconviction relief applicant appeals from the district court's ruling dismissing his second application for postconviction relief challenging his 1986 convictions for first-degree murder and first-degree robbery.
AFFIRMED.

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and James R. Wilson, County Attorney, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab,
JJ.

HAYDEN, J. 000178

In 1986 Lawrence Thomas Gladson, applicant, was convicted of first-degree murder and first-degree robbery stemming from a Hy-Vee grocery store robbery and shooting. A police officer was killed in the incident. During the course of his trial Gladson asserted a posttraumatic stress syndrome defense resulting from his military service in Vietnam. During the trial, defense counsel did not object to evidence regarding Gladson's participation in another robbery, use of bad checks by Gladson's friend, and the fact Gladson is the father of three illegitimate children.

During the course of the appeal from his convictions of first-degree murder and first-degree robbery, Gladson was allowed to proceed with an unsuccessful postconviction relief action challenging his convictions. On December 22, 1990, this court affirmed the convictions of Gladson and the district court's denial of his application for postconviction relief. *State v. Gladson*, No. 86-608 (Iowa App. Dec. 22, 1988), cert. denied, 493 U.S. 835 (1989). During the first postconviction relief action and the appeal Gladson did not raise a claim regarding the improper introduction of other bad acts.

On April 18, 1990, Gladson filed a second postconviction relief application asserting, in part, he received ineffective assistance of counsel. Gladson contended his counsel rendered ineffective assistance by failing to object to bad acts evidence, including his

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participation in another robbery and his friend's use of bad checks.

At a hearing on the application Gladson's trial counsel indicated his failure to object to the evidence of other bad acts involving the defendant was due to strategic considerations regarding the use of the defense of posttraumatic stress syndrome and tactical decisions.

On January 3, 1992, the district court entered an order denying the second application for postconviction relief. The court determined defense counsel's failure to object to his client's involvement in prior bad acts was based on strategic considerations involving the use of the posttraumatic stress syndrome defense and tactical considerations involving the impeachment of a state witness. On this basis, the court concluded Gladson did not satisfy his burden of showing trial counsel was ineffective.

On January 28, 1992, Gladson filed a notice of appeal.

We review de novo the totality of the circumstances relating to counsel's conduct. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). The test for ineffectiveness of counsel is whether the attorney's performance was outside the range of normal competency. Pettes v. State, 418 N.W.2d 53, 56 (Iowa 1988). There exists a presumption counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). We will not reverse where counsel has made a reasonable, albeit unsuccessful, decision

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 concerning trial strategy and tactics. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989) (citations omitted). Gladson bears the burden of proving by a preponderance of evidence counsel failed to perform an essential duty and prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986).

I. Breach of Essential Duty. A trial strategy of Gladson's trial counsel was the defense of posttraumatic stress syndrome.

A. Bad Character Evidence. At trial two witnesses testified concerning the robbery of Thode's sporting goods store a few days prior to the Hy-Vee robbery. Pamela Novak testified Zitek and Gladson came to her home with an orange box containing approximately eight guns. In his testimony Zitek explained how he and Gladson stole the weapons from Thode's sporting goods store.

Gladson's counsel testified he did not object to this bad character evidence because it supported the posttraumatic stress syndrome defense.

Q. And there's the Thode's robbery and the Hy-Vee robbery and if he didn't suffer PTSD [posttraumatic stress syndrome] at the Thode's robbery, why in your strategy of Posttraumatic Stress Disorder would you not object to that evidence coming in? A. [Defense counsel] I don't know if he did or not. Dr. Fitz indicated or would have indicated that's the kind of an aggressive behavior -- robbery, as opposed to simple assault, is evidence or attributable to PTSD. He actually had a flashback on the second robbery. When the gun started firing is when he had his flashback. That's the different part of PTSD. You can have episodes of PTSD and you can get violent or not violent but you still might be having an episode, and those were the two classic examples according to Dr. Fitz of episodic PTSD.

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Q. To raise PTSD you need to be just a little bit feisty before the traumatic stressing event? A. Right. I can't recall exactly how he put it. I don't know if you had to be a little goofy before or more goofy afterwards. That's how Dr. Fitz put it. That's why the small skirmishes prior and during the service, which I wanted admitted, were important because they established, according to Dr. Fitz, according to his DSM 3R [Diagnostic and Statistic Manuall, whatever it is, it fits DSM 3, and every one of those incidents he could just put right into a slot and we did that.

Q. Based upon your conferences and conversations with Dr. Fitz, is this evidence which was necessary to get the total diagnosis of PTSD? Is that your testimony today? A. Yes, it is. I think for any doctor to give a diagnosis he must know all the facts.

Counsel contended if this evidence had not come in under these two witnesses, it would have come in through Dr. Fitz. On cross-examination the prosecutor could have asked Dr. Fitz if he knew or based his diagnosis on Gladson's participation in the Thode's robbery. Iowa Rule of Evidence 705 provides an expert witness "may in any event be required to disclose the underlying fact or data [upon which his opinion is based] on cross-examination." Iowa R. Evid. 705. In order for Dr. Fitz to be a convincing and credible defense witness, he had to have a complete knowledge of significant events in Gladson's life. Trial counsel was justifiably concerned his defense would be destroyed if it appeared to the jury he was trying to hide evidence from them or if Dr. Fitz had based his diagnosis of defendant on an incomplete personal history.

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B. Bad Checks. Gladson contends his trial counsel rendered ineffective assistance by allowing the introduction of bad conduct of defendant's friend, Russell Zitek. Zitek testified he had written bad checks. Trial counsel made a reasonable tactical decision not to object because there was no evidence Gladson had participated in the check-writing scheme. The absence of objection by trial counsel was a reasonable trial strategy in that the testimony tended to discredit Zitek, who was a witness for the State.

C. Illegitimate Children. On cross-examination the prosecutor elicited from Dr. Fitz that Gladson was the father of three illegitimate children. Trial counsel stated he allowed the admission of this testimony because it was admissible under Iowa Rule of Evidence 705. In addition, this evidence was elicited during cross-examination of Dr. Fitz regarding Gladson's relations with other individuals and its relation to a posttraumatic stress syndrome.

The lifestyle of Gladson was significant in diagnosing the syndrome. The effectiveness of Dr. Fitz as a witness depended on the credibility of his diagnosis of Gladson, which in turn depended on him having knowledge of significant events in Gladson's life.

Gladson has failed to show his trial counsel breached an essential duty by failing to object to evidence concerning Thode's robbery, the bad check writing by

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Gladson's friend, and Gladson's illegitimate children. We affirm the district court on this issue.

D. Appellate Counsel. Gladson contends appellate counsel rendered ineffective assistance by failing to raise certain issues in this application on his appeal from his conviction and denial of his first application for postconviction relief. The record shows these issues have been addressed either in the direct appeal, the first application for postconviction relief, or this second application for postconviction relief. Gladson has failed to satisfy his burden to show his appellate counsel failed to perform or breached an essential duty. We affirm the district court on this issue.

II. Prejudice. Gladson bears the burden of proving he was prejudiced by the actions of his trial counsel and appellate counsel. In order to sustain the burden, Gladson must show the alleged ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984) (citations omitted).

We find Gladson has not demonstrated he was prejudiced by the actions of his trial or appellate counsels. Defendant's theory of defense was Gladson could not form the requisite intent necessary for the crimes because he suffered from a posttraumatic stress syndrome. Trial counsel made reasonable strategic decisions and developed defenses within the range of normal competency. The

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actions of appellate counsel also did not prejudice Gladson because all of defendant's claims have been heard and adjudicated.

Gladson has failed to prove his counsel's failure to object placed him in an actual and substantial disadvantage of constitutional magnitude. We affirm the district court's denial of Gladson's application for postconviction relief.

AFFIRMED.