

IN THE COURT OF APPEALS OF IOWA

No. 4-561 / 93-0118

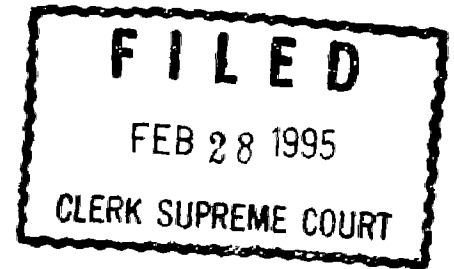
FREDERICK STEENS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County,
Robert Hutchison, Judge.

Steens challenges the district court's denial of his
application for postconviction relief. **AFFIRMED.**

Sandra Lyons, Des Moines, until withdrawal, and then
Christopher Cooklin, Des Moines, until withdrawal, and then
Robert A. Wright, Sr., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Martha A. Boesen,
Assistant Attorney General, John P. Sarcone, County
Attorney, and Dan Voogt, Assistant County Attorney, for
appellee.

Heard by Donielson, C.J., and Cady, J., and Schlegel,
S.J.*

*Senior judge from the Iowa Court of Appeals serving on
this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Frederick Steens appeals the district court's denial of his application for postconviction relief based on claims of ineffective assistance of both trial and appellate counsel. We affirm.

Steens was convicted, following a jury trial, of second-degree burglary. The facts indicated another individual broke a window in a home and let Steens in the front door. A neighbor watched the entry and phoned the police. The police found Steens hiding in a bathtub with the victims' stereo and camera equipment. The district court used a marshaling instruction involving only the "breaking" alternative of burglary in the second degree. The district court also submitted an instruction on criminal trespass as defined in Iowa Code section 716.7(2)(d)(1989) as a lesser-included offense.

On direct appeal, the court of appeals reversed Steens' conviction. It determined the trial court erred in failing to submit criminal trespass, as defined under section 716.7(2)(a), as a lesser-included offense of second-degree robbery. The supreme court granted further review, vacated the court of appeals decision, and affirmed the conviction. The supreme court determined the district court was not required to instruct on the section 716.7(2)(a) version of criminal trespass since it is not a lesser-included offense of "breaking" alternative of second-degree burglary which was submitted to the jury.

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Steens then filed this application for postconviction relief. The primary basis of his application is a claim that his trial counsel failed to object or otherwise ensure he received a marshaling instruction on the "entry" alternative of second-degree burglary. He argues his defense was based upon his claim that he did not "break" into the home but merely entered it believing the individual he was with had permission to enter. Steens also claims his appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel on direct appeal.

The trial court denied Steens' application. It determined Steens failed to prove his trial counsel breached an essential duty. Additionally, it found the evidence against Steens overwhelming and determined the corrected marshaling instruction would not have changed the outcome of the case. Steens appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

I. Ineffective assistance of trial counsel.
Ordinarily, a claim of ineffective assistance of trial

counsel must be preserved on direct appeal in order for it to be heard in postconviction proceedings. Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991). Such a claim may be raised in postconviction proceedings, even if not raised on direct appeal, if the applicant can show by a preponderance of the evidence: (1) "sufficient reason" or "cause" for not having raised the issue at trial and on direct appeal; and (2) prejudice resulting from the alleged errors. Id.; Kane v. State, 436 N.W.2d 624, 626-27 (Iowa 1989). Ineffective assistance of appellate counsel may provide sufficient reason for not raising the issue on direct appeal. Kane, 436 N.W.2d at 627-28.

In order to prevail on a claim of ineffective assistance of counsel, applicant must show by a preponderance of the evidence: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). A claim of ineffective assistance of appellate counsel must satisfy an analogous standard. Kane, 436 N.W.2d at 627. We find Steens has failed to meet this test, and as a result has failed to preserve error on the issue of ineffective assistance of trial counsel.

In proving the first prong of the ineffective assistance of counsel test regarding failure to perform an essential duty, Steens must overcome the strong presumption appellate counsel's actions were reasonable under the circumstances. Id. at 627. Steens is not entitled to

perfect representation, but only to that which is within the range of normal competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985). Improvident strategy, miscalculated tactics, or mistakes in judgment do not necessarily lead to findings of ineffective assistance of counsel. Id.

Although appellate counsel did not state why the issue of ineffective assistance of trial counsel was not included on direct appeal, appellate counsel did state the appellate defender's office often exercises the strategy of not raising issues of ineffective assistance claims because they distract from other stronger issues which may constitute reversible error. Appellate counsel was successful, at least in part, in employing the above-stated strategy, whether it was intended or not, since Steens was successful in reversing the conviction at the court of appeals level. Although the court of appeals decision was later vacated, it is difficult to fault an appellate strategy which proved effective in at least one court.

We find Steens has failed to overcome the strong presumption that appellate counsel's actions were within the range of normal competency. As a result, we conclude Steens has failed to establish by a preponderance of the evidence ineffective assistance of appellate counsel. As this was Steens' only ground argued for preservation of error, we further find Steens' claim of ineffective assistance of trial counsel in these postconviction

proceedings should be denied for failure to preserve error since he ~~has~~ not shown either sufficient reason or cause for failing to raise the claim on direct appeal.

II. Ineffective assistance of appellate counsel.
Steens alleges his appellate counsel was ineffective due to its failure to raise the ineffective assistance of trial counsel claim on direct appeal. As was thoroughly discussed above, we find this claim is without merit.

AFFIRMED.