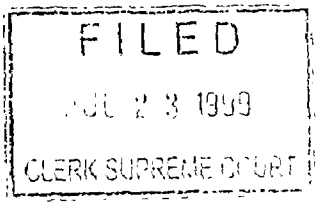
IN THE COURT OF APPEALS OF IOWA

No. 1999-121 (9-337) / 98-1137
Filed July 23, 1999



JEFFREY M. BLANK,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Jeffrey Blank appeals from the denial of his application for postconviction relief. **AFFIRMED.**

John C. Nelson, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

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STREIT, J.

Jeffrey Blank appeals the trial court's denial of his application for post-conviction relief contending his trial counsel was ineffective for failing to pursue his motion to suppress and not having certain witnesses testify at trial. Because we find Blank's counsel acted competently, we affirm.

I. Background Facts & Proceedings.

Blank was found guilty by a jury of second-degree theft of an automobile. His direct appeal was dismissed by the Iowa Supreme Court as frivolous pursuant to Iowa Rule of Appellate Procedure 104. Blank filed an application for postconviction relief.

In his postconviction application, Blank contends his trial counsel was ineffective for failing to pursue his motion to suppress, and instead, entering a stipulation with the State regarding the evidence. He also contends counsel was ineffective for not having several allegedly exculpatory witnesses testify at trial. The trial court denied the application. Blank appeals.

II. Preservation of Error.

The State argues Blank did not raise his claims on direct appeal because our supreme court dismissed his direct appeal at frivolous. An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. *See* Iowa Code § 822.8 (1997). Generally, before an applicant may raise a claim of ineffective assistance of trial counsel for the first time in postconviction proceedings, he must demonstrate a

"sufficient reason" for not raising the claim on direct appeal. *See id.*; *Polly v. State*, 355 N.W.2d 849, 855 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). This burden, however, does not attach following a contested dismissal of an applicant's direct appeal as frivolous under Iowa Rule Appellate Procedure 104. *Ailes v. State*, 574 N.W.2d 353, 355 (Iowa App. 1997); *Munz v. State*, 382 N.W.2d 693, 695 (Iowa App. 1985); *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 34 (Iowa 1979). Accordingly, we address the merits of Blank's claim.

III. Standard of Review.

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

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.; Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

> 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.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

IV. Motion to Suppress.

Blank contends his counsel was ineffective in not pursuing a motion to suppress the statements he made to the officer who arrested him in his motel room.

A hearing on the motion to suppress was scheduled by the court. Blank informed his counsel he would not attend the hearing. For this reason, his counsel entered into a stipulation regarding the evidence and no hearing was held. The terms of the stipulation were that the State would not use any statements made by Blank while inside his motel room or the physical objects found inside the motel room against him *unless* Blank took the stand and denied the specific elements of the crime. If he did, the evidence could be used by the State for impeachment. Blank's trial counsel discussed the stipulation with him, and Blank agreed. Blank now argues he was entitled to a hearing on his motion to suppress; he did not waive a hearing; and he never agreed to the stipulation.

Blank has not established his trial counsel breached an essential duty or that prejudice has resulted from his counsel's decision to enter into a stipulation regarding Blank's statements to the officer. It was Blank's decision not to attend the motion to suppress hearing. Because the likely success of the motion was small if Blank did not attend the hearing and testify, Blank's counsel entered into a stipulation regarding the evidence. Blank agreed this was the best course of action. He cannot now argue this decision was a breach of an essential duty.

Furthermore, Blank cannot establish prejudice resulted from his counsel's actions. The officer's testimony most damaging to Blank's case was Blank's admission to the officer he took the vehicle and his reason for doing so. These statements were likely admissible because they were made after Blank had been read his *Miranda* rights. *See State v. Thai*, 575 N.W.2d 521, 525 (Iowa App. 1997).

Blank's ineffective assistance claim based on counsel's failure to pursue his motion to suppress fails.

V. Witnesses.

Blank contends his trial counsel was ineffective for failing to have Kay Spreng, Aundrea Plummer and Shain Malloy testify at trial. Blank alleges these witnesses would have presented exculpatory evidence.

Trial counsel has a duty to adequately prepare for trial, and failure to do so may constitute ineffective assistance of counsel. *State v. McCray*, 231 N.W.2d 579, 581 (Iowa 1975). However, "[c]ounsel's duty to investigate and prepare a defense is not limitless and does not require counsel to pursue each possible witness and delve into every line of inquiry." *Id.* Defense counsel's duty is to make reasonable investigation or a reasonable decision that a particular investigation is unnecessary. *Origer v. State*, 495 N.W.2d 132, 136 (Iowa App. 1992).

Blank's ineffective assistance claim implicates his trial counsel's trial strategy and tactics. Upon reviewing the record, including his counsel's testimony at the postconviction hearing, we find counsel's decision not to call these witnesses a

reasonable tactical decision. *See Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa App. 1989) ("[w]hen counsel makes a reasonable tactical decision, this court will not engage in second-guessing"). Spreng had potentially exculpatory testimony. She could have testified that Blank contacted her to get the phone number of the victim's daughter, presumably, to return the car to the victim. However, this testimony was cumulative of the victim's own testimony. The victim testified her daughter received a phone call from Spreng telling her the location of her car. Blank's counsel did not fail an essential duty by failing to have Spreng testify to facts already brought out by the victim.

In regard to Plummer, her testimony would have hurt Blank's case. Plummer told police her mother absolutely did not give Blank the car.

In regard to Malloy, Blank's counsel was concerned about her credibility. Malloy had a criminal record. Blank's defense was that he took the car on a joyride rather than stole it. His counsel thought Malloy, with a criminal record, would make this defense less believable to a jury, and for this reason, he decided not to call Malloy. This was a reasonable tactical decision.

Blank's counsel did not fail an essential duty in deciding not to call these three witnesses. His ineffective assistance of counsel claim based on this ground fails.

For these reasons, the trial court is affirmed.

AFFIRMED.