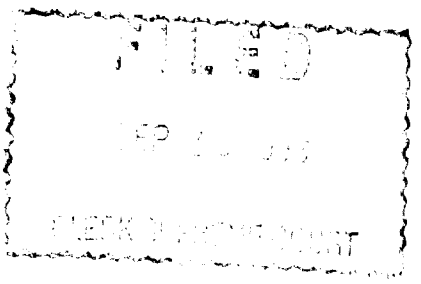
IN THE COURT OF APPEALS OF IOWA

No. 8-264 / 97-0228
Filed September 30, 1998



MICHAEL S. EWART,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Lee County, D.B. Hendrickson, Judge.

Michael Ewart appeals from the district court order denying his application for postconviction relief. **AFFIRMED.**

Barry M. Anderson, Keokuk, for applicant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael Short, County Attorney, and David Andrusyk, Assistant County Attorney, for respondent.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

This is an appeal by an applicant seeking postconviction relief. Michael Ewart claims he received ineffective assistance of counsel at his criminal trial. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Ewart was charged with killing his estranged wife, Melissa, while they were exchanging custody of their daughter. Gary Jenkins had accompanied Melissa to the exchange, and witnessed Ewart stabbing Melissa with a knife. At the criminal trial, Ewart did not deny killing Melissa. His defense was he had not formed the requisite intent to commit first-degree murder. Ewart was convicted of murder in the first degree. His conviction was affirmed on appeal. *State v. Ewart,* 502 N.W.2d 624, 626 (Iowa App. 1993).

Ewart filed an application for postconviction relief, raising 188 instances where he believed he received ineffective assistance of counsel. The district court did not find any of Ewart's allegations amounted to ineffective assistance of counsel. Ewart's application for postconviction relief was denied.

I. Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, an applicant must show: (1) the attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it denied applicant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

II. Ewart contends he received ineffective assistance because his trial counsel did not request an instruction on self-defense. At the criminal trial, Ewart testified Melissa and Jenkins got out of the car, yelled at him, and started running toward him. He testified he could remember nothing after that until he found himself lying on top of Melissa's body, holding a knife.

At the postconviction hearing, Ewart's trial counsel, Alfredo Parrish, testified he did not seek an instruction on self-defense because the evidence did not support it. A review of the evidence presented at the trial shows there was not sufficient evidence to present an instruction on self-defense. No witnesses saw Jenkins getting out of the vehicle or attacking Ewart. Witnesses only saw Melissa trying to get away, and not attacking Ewart. Neither Melissa nor Jenkins had a weapon. Ewart has failed to show ineffective assistance on this ground.

III. Ewart claims he received ineffective assistance due to his trial counsel's failure to object to evidence of prior bad acts. Two witnesses testified Ewart had previously assaulted Melissa.

Parrish testified at the postconviction hearing that he felt this evidence supported his theory of defense, and he made a tactical decision not to object. The theory of defense was Ewart was an angry and jealous man, who acted in a moment of passion to kill his wife, and who had not acted with premeditation. We find this defense was a valid trial strategy. Improvident trial strategy, miscalculated tactics,

or mistakes in judgment do not necessarily amount to ineffective assistance. *State v. Kone,* 557 N.W.2d 97, 102 (Iowa App. 1996).

We find Ewart has failed to show he received ineffective assistance of counsel. We also note the physical evidence against Ewart was overwhelming. We determine he was not prejudiced by trial counsel's alleged defective performance.

We affirm the decision of the district court denying Ewart's application for postconviction relief. Costs of this appeal are assessed to Ewart.

AFFIRMED.