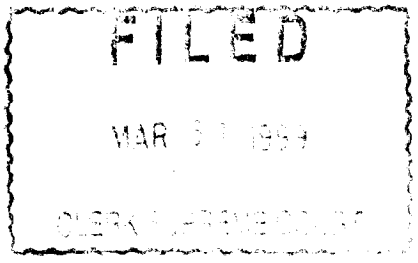
IN THE COURT OF APPEALS OF IOWA

No. 9-128 / 98-1041
Filed March 31, 1999

ROBERT OBLETON,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Scott County, David H. Sivright, Judge.

On appeal from the district court's denial of postconviction relief, Robert Obleton contends his trial counsel, appellate counsel, and postconviction counsel were ineffective. **AFFIRMED.**

Penelope C. Souhrada, Davenport, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, William E. Davis, County Attorney, Robert E. Weinberg, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

STREIT, J.

The applicant, Robert Obleton, appeals the district court's denial of postconviction relief, contending his trial counsel, appellate counsel, and postconviction counsel were ineffective. We affirm.

The State charged Obleton and a co-defendant with possession with intent to deliver cocaine and a tax stamp violation. Trial counsel negotiated with the prosecutor, but was unable to obtain a plea agreement. Before trial, the court discussed with Obleton his waiver of jury trial.[1] The defendants proceeded to a joint bench trial on February 21, 1994. The court found both defendants guilty. It sentenced Obleton to a twenty-five year term of imprisonment for the possession charge and a five-year term for the tax stamp violation.

We affirmed Obleton's convictions on direct appeal. *State v. Obleton*, No. 94-593 (Iowa App. July 27, 1995). The issue raised on direct appeal was the sufficiency of the evidence. No claim of ineffective trial counsel was raised.

Obleton filed an application for postconviction relief on June 2, 1997. He raised various claims of ineffective assistance of counsel: failure to secure a plea

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[1] Besides the routine colloquy, discussing rights given up by waiving a jury trial and whether or not the waiver was voluntary and informed, this interaction between the court and Obleton took place:

Court: Oh, and I forgot to ask, Mr. Obleton and Mr. Miller, do you understand that you don't both have to waive jury trial? If one of you wanted a jury, we could still go to trial, and one of you could waive the jury and one of you could waive the jury trial. Do you both understand?

Obleton: Yes, sir.

Court: And do you both still wish to waive jury trial?

Obleton: Yes.

agreement, failure to move to sever the trials, and waiver of a jury trial. He withdrew several other claims made in his application prior to the hearing because this court decided them on direct appeal.

Obleton's pretrial counsel and appellate counsel testified at the hearing. Pretrial counsel said he attempted to secure a plea agreement but the prosecutor said no. He also testified he thought the co-defendants actually benefitted from the joint trial. Finally, he confirmed he discussed the jury trial waiver with Obleton. Appellate counsel discussed his evaluation of the merits of the appeal and why he chose the issue for appeal. He said he examined trial counsel's performance and did not see any basis for a claim of ineffective assistance. He also said he recognized the value of presenting the strongest claims on appeal and not raising every possible issue.

The district court denied the application. It determined trial counsel performed his duty in seeking to negotiate a plea agreement. It found Obleton did not show prejudice from being tried jointly and he did not overcome the strong presumption the decision not to seek separate files fell within the normal range of competency. The court also rejected Obleton's claim his right to a jury trial was waived improperly or he was prejudiced by the waiver.

On appeal, Obleton contends his trial counsel was ineffective for failing to obtain a plea bargain or to discuss with him jury trial waiver and severance of the trials. He claims he did not sign a waiver[2] of jury trial, and he told the court he did

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[2] Obleton did not sign a written waiver of jury trial. Olbeton's trial counsel filed a waiver of jury trial containing only the attorney's signature, not Obleton's.

not want a jury trial only because he thought he "had no choice." He states he believed he was not entitled to a jury trial because his trial was not severed and the co-defendant waived his right to a jury trial. He argues his appellate and postconviction counsel were ineffective for failing to raise this issue. Obleton argues his appellate counsel was ineffective in not presenting "every possible appeal issue." He also claims his postconviction counsel was ineffective for failing to present testimony from his trial counsel.

When an applicant alleges error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975); *State v. Means*, 547 N.W.2d 615, 621 (Iowa App. 1996). "Defendant bears the burden of proving 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, 131-32 (Iowa 1987).

In proving the first prong of this test, Obleton must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). Second, the applicant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987) (citing *Strickland v. Washington*, 466 U.S.

668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980).

Obleton first complains trial counsel failed to obtain a plea agreement. A prosecutor need not offer or accept a plea agreement. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."). The prosecutor's discretion is not under the control of trial counsel. Therefore, trial counsel cannot be ineffective for failing to obtain a plea agreement.

Obleton also asserts trial counsel should have moved to sever the trials. Neither defendant testified at trial. Counsel testified he had considered severance but did not find valid ground to sever and thought the joint trial actually benefitted Obleton. Iowa Rule of Criminal Procedure permits the trial court to try defendants jointly if, in its discretion, one or more defendants will not be prejudiced. Iowa R. Crim. P. 6(4)(b). Obleton has not offered proof he was prejudiced by the joint trial or that the defenses conflicted to the point of being irreconcilable and mutually exclusive. *State v. Leutfaimany*, 585 N.W.2d 200, 203 (Iowa 1998). Because severance was not required in this case, trial counsel did not fail to perform an essential duty by not moving to sever the trials.

Obleton next claims trial counsel was ineffective by waiving a jury trial. Waiver of a jury trial must be a voluntary, knowing, and intelligent act, done with

awareness of the relevant circumstances and likely consequences. *State v. Johnson*, 318 N.W.2d 417, 426 (Iowa 1982), *cert. denied*, 459 U.S. 848, 103 S.Ct. 106, 74 L.Ed.2d 95. Although Obleton now claims he thought he had no choice but to waive a jury trial because his co-defendant had waived a jury trial, the record does not support his claim. The court specifically informed both defendants they need not waive a jury trial regardless of the other defendant's choice. The colloquy between the court and the defendants reveals Obleton's waiver was a voluntary, knowing, and intelligent act and he was aware of the likely consequences.[3] This argument has no merit.

Because the claims discussed above were not raised on direct appeal, Obleton must demonstrate good cause for not raising them or they are waived. Ineffective assistance of appellate counsel may provide "sufficient reason" or "cause" to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Consequently, Obleton asserts appellate counsel was ineffective in failing to "preserve error by argument of every possible issue." *See Polly v. State*, 355 N.W.2d 849, 855 (Iowa 1984).

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[3] Olbeton does not contend the waiver was ineffective for its failure to be written. His attorney filed a written waiver containing only the attorney's signature. Even if Obleton had raised this claim, it is only a factor we consider in determining whether or not his waiver was voluntary. The written waiver substantially complies with Iowa Rule of Criminal Procedure 16(1). *See State v. Buck*, 510 N.W.2d 850, 851-53 (Iowa 1994).

Appellate counsel testified at the postconviction hearing he examined trial counsel's performance but did not consider it ineffective. He testified he sought Obleton's input about issues to appeal, but no claim of ineffective assistance was made. Counsel also chose to present the strongest argument on appeal, rather than raise every possible issue. Raising every issue possible may be a mistake:

> A heavy professional responsibility devolves upon an appellate lawyer when it comes to assessing possible assignments of error. Of course error is waived if it is not assigned. On the other hand most experienced appellate lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint. Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal.

Cox v. State, 554 N.W.2d 712, 716 (Iowa App. 1996) (quoting *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987)). Appellate counsel must be discerning in the determination of those issues to be presented on appeal with the idea of presenting the most effective argument for the client. *Stringer v. State*, 522 N.W.2d 797, 799 (Iowa 1994). We determine appellate counsel represented Obleton effectively.

Finally, Obleton raises an ineffective assistance of counsel claim against postconviction counsel because counsel did not call John Moeller, the attorney who actually tried the case, to testify. Obleton calls Mr. Moeller, "possibly the most important figure in this case." However, his claims of ineffective assistance of trial counsel are directed toward the attorney who handled all the pretrial matters and negotiations. Postconviction counsel called as witnesses the two attorneys against whom Obleton had raised ineffective assistance claims. Obleton suggests he was

prejudiced because the court did not get the full story. This claim is without merit. The postconviction court heard from the two allegedly ineffective attorneys. Obleton has not demonstrated prejudice nor an essential duty to call every possible witness.

From our independent evaluation of the totality of the relevant circumstances we determine Obleton has failed to prove trial, appellate, or postconviction counsel was ineffective. Consequently, we affirm the district court's denial of his application for postconviction relief.

AFFIRMED.