IN THE COURT OF APPEALS OF IOWA

No. 8-317 / 96-1869

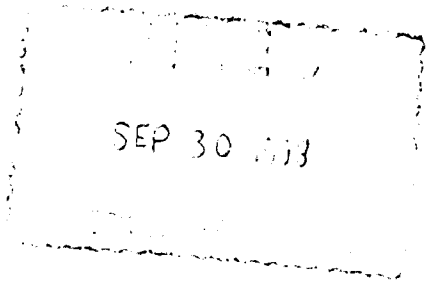
DANIEL CLARKSON,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

On appeal from the denial of his application for postconviction relief, Daniel Clarkson argues his trial and appellate counsel were ineffective. **AFFIRMED.**

F. John Spellman, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

CADY, C.J.

Appellant, Daniel Clarkson, challenges the district court's denial of his application for postconviction relief. We affirm by memorandum opinion pursuant to Iowa Supreme Court rule 9. In his application, Clarkson claimed ineffective assistance of both trial counsel and appellate counsel. We affirm the court's denial of his application for postconviction relief.

During the course of Clarkson's trial for murder, his trial counsel moved for a change in venue and sought to remove a juror for cause. The court denied both requests. On appeal, appellate counsel did not challenge the court's denial of these requests. Clarkson's trial counsel presented an intoxication/diminished capacity defense, using expert testimony and the testimony of several witnesses and family members. Counsel made a strategic decision not to call Clarkson's girlfriend or his brother to testify in Clarkson's defense. Clarkson's appellate counsel did not claim trial counsel was ineffective in not calling these two witnesses. On appeal, this court affirmed Clarkson's conviction, which followed a jury trial.

Because postconviction proceedings are law actions, our review is on error. *Carter v. State*, 537 N.W.2d 715, 716 (Iowa 1995). When a constitutional issue is raised, however, such as ineffective assistance of counsel, 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).

Clarkson first asserts his appellate counsel was ineffective in not raising several issues on appeal: (1) the trial court's denial of a change of venue, (2) the trial court's refusal to strike a juror for cause, and (3) the trial counsel's ineffectiveness in failing to call Clarkson's brother and girlfriend as witnesses. To prevail on this claim Clarkson must first overcome a strong presumption appellate counsel acted competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Second, as with any claim of ineffective assistance of counsel, Clarkson must prove counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 690, 694, 104 S. Ct. 2052, 2064, 2065, 2068, 80 L. Ed. 2d 674, 693, 695, 698 (1984); *Gering v. State*, 382 N.W.2d 151, 153-54, 156 (Iowa 1986).

Although Clarkson contends he should have been granted a change of venue because pretrial publicity would prevent him from receiving a fair trial, he offers nothing more than his bald assertion as evidence. He does not offer any evidence the pretrial publicity caused any juror to hold such fixed opinions on the merits of the case that they could not judge the issues impartially. *State v. Farmer*, 492 N.W.2d 239, 241 (Iowa App. 1992); *see also State v. Dague*, 206 N.W.2d 93, 95 (Iowa 1973). We determine appellate counsel did not have a duty to raise this claim on appeal and that Clarkson has not demonstrated raising this claim would have changed the result of the appeal. We affirm the postconviction court on this issue.

Clarkson also asserts Iowa Rule of Criminal Procedure 17(5)(e) allows a challenge for cause to a juror who stands in an employer-employee relationship with a party, arguing his daughter's preschool teacher stood in that relationship. We

disagree a preschool teacher stands in an employer-employee relationship with the parents of the students in the school. A dismissal for cause is not required under rule 17(5); rather, it is permitted. Appellate counsel is not required to raise every issue on appeal, even if it has some merit. *Cuevas v. State*, 415 N.W.2d 630, 632-33 (Iowa 1987). We determine Clarkson has not demonstrated his appellate counsel breached an essential duty by not raising this claim or that raising this claim would have changed the outcome of the appeal. We affirm the postconviction court on this issue.

Finally, Clarkson claims his appellate counsel was ineffective in not claiming his trial counsel was ineffective. We disagree. In order for appellate counsel to have a duty to claim trial counsel was ineffective, Clarkson must demonstrate the ineffectiveness of trial counsel in breaching an essential duty resulting in prejudice. The testimony of trial counsel was that he made a tactical decision not to call the two witnesses because they were not as credible, their testimony would have been cumulative, and calling them could have damaged Clarkson's defense. Such a tactical decision is within the normal bounds of attorney competency, even if unsuccessful. *See State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982); *State v. Veverka*, 271 N.W.2d 744, 750 (Iowa 1978). Given the evidence against him at trial, we see no reasonable possibility the testimony of these two witnesses would have changed the result of the trial. Because Clarkson's trial counsel did not breach an essential duty and no prejudice resulted, Clarkson's appellate counsel was not ineffective in not raising this claim on appeal. We affirm the postconviction court on this issue.

AFFIRMED.