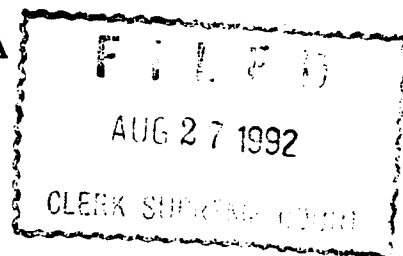


IN THE COURT OF APPEALS OF IOWA

No. 2-217 / 91-724



HOWARD DAVIS,
Appellant,
vs.
STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Pottawattamie
County, Leo F. Connolly, Judge.

Applicant appeals the denial of his application for
postconviction relief based on his claim that he was denied
effective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes,
Assistant Attorney General; Richard Crawl, County Attorney;
and Timoth O'Grady, Assistant County Attorney, for
appellee.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

OXBERGER, C.J.

The applicant, Howard Q. Davis, was convicted of first-degree robbery and carrying weapons following a jury trial. In 1987, a pharmacy was robbed at gunpoint by two men wearing nylon stockings over their heads. The police traced the Ford van used in the robbery to a local Inn. The police began knocking on doors to remove people from rooms because the men were armed and dangerous. After receiving no response from room 137, the police entered the room. The officers observed a red duffel bag, a police scanner, and numerous drug bottles under the bed. The officers did not remove the items, but locked the room and left.

The police returned later with an identification technician. The police did not obtain a search warrant to conduct the search. Subsequently, Davis was charged with first-degree robbery and carrying weapons. Following his conviction, Davis appealed.

The court of appeals reversed his conviction on the grounds the trial court erred in admitting prejudicial hearsay testimony, but noted Davis did not have standing to challenge the search of the motel room. The supreme court vacated the judgment of the court of appeals and affirmed Davis's convictions. See State v. Davis, 446 N.W.2d 289 (table) (Iowa 1989).

Davis sought postconviction relief, alleging he received ineffective assistance of counsel when his

attorney failed to assert his standing to challenge the illegal search and seizure. Trial counsel testified he decided not to subject Davis to possible impeachment on this issue because he thought Davis would incriminate himself. Trial counsel testified he discussed this with Davis and Davis agreed. The trial court denied Davis's application for postconviction relief on the grounds that Davis's trial counsel had a reasonable trial strategy in not placing Davis on the stand to assert a possessory interest in the motel room. Davis has appealed.

Davis maintains the postconviction court erred in holding he was not denied effective assistance of counsel. Davis argues that without standing to challenge the search and seizure of items from the motel room, he could not complain of the seizure of the items. Davis argues trial counsel's fears about impeachment were unfounded since he did not testify at trial. Davis argues that even if he had testified, he could have asserted his theory of defense.

Scope of Review

Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Defendant bears the burden of proving by a preponderance of the evidence

that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1987). If the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. White v. State, 380 N.W.2d 1, 3 (Iowa App. 1985). It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an effectiveness claim. Gering v. State, 382 N.W.2d 151, 154 (Iowa 1986). The crux of the prejudice component rests on whether the defendant, Davis, has shown there is a reasonable probability that, but for counsel's "unprofessional errors", the result of the proceeding would have been different. Whitsel v. State, 439 N.W.2d 871, 873 (Iowa App. 1989); (quoting Strickland, 466 U.S. at 694, 104 S.Ct at 2069, 80 L.Ed. at 698).

We find no merit in the defendant's claim that his attorney's failure to assert standing in the suppression motion resulted in prejudice. The defendant was positively identified by a store clerk from whom he purchased black nylon stockings forty minutes prior to the robbery. A driver's license, Salvation Army identification card, and social security card belonging to the defendant were found in the van identified as the vehicle used in the robbery shortly after the robbery occurred. The next morning, the defendant was apprehended. He had the same clothes, height, build, race, and hair color as one of the two men involved in the robbery. The revolver he was carrying

contained spent shell casings. The ammunition was consistent with the bullet recovered from the pharmacy. He was also carrying twenties, tens, five and ones; the denominations stolen from the pharmacy. He was also carrying a piece torn from a map which exactly matched a map found in the van. Finally, an expert witness testified Davis's right shoe left the shoeprint in the mud in the parking lot outside the pharmacy. Even if the defendant established he had a possessory interest in items seized from the motel room search, which may have resulted in suppression, he has not been prejudiced. There is no reasonable probability that the result of the proceedings would have been different. Substantial evidence supported the defendant's guilt. The defendant has failed to satisfy the "prejudice" component of his claim of ineffective assistance of counsel.

AFFIRMED.