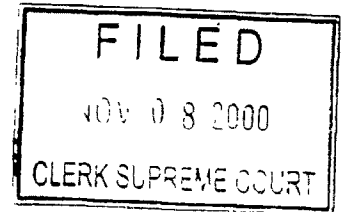


IN THE COURT OF APPEALS OF IOWA

No. 0-538 / 99-1949
Filed November 8, 2000



STEVEN WAYNE RAINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, John J. Bauercamper, Judge.

Steven Rains appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

HECHT, J.

Steven Rains appeals the district court's denial of his application for postconviction relief and contends the district court erred in concluding trial counsel was not ineffective for advising him not to testify at trial. We affirm the district court's denial of postconviction relief.

I. Factual Background and Proceedings. On July 14, 1996, at 2:15 a.m., Officers Andrew Clark and Cory Allspach were on patrol and noticed a car weaving in its lane and nearly hitting the median. They followed the car until it entered a parking lot and the driver got out. The officers entered the parking lot from another direction and parked their car approximately ten feet in front of the other car, with their headlights facing the other car. They did not turn on the patrol car's flashing lights or the siren. As the patrol car stopped, the driver of the other car got back in the driver's seat. Suspecting the driver was intoxicated, Officer Clark approached the vehicle and asked if he needed any help. Rains replied he was having some car troubles. Officer Clark noticed at this time Rains's speech was slurred and the odor of alcohol emanated from him. When the officer asked him how much he had to drink, Rains replied "a couple."

Officer Allspach stood off to the side of the car providing back up to Officer Clark. Clark asked to see some identification and Rains turned toward the passenger seat. When he turned to face Officer Clark again, Rains stated he was going to pull the car forward. Officer Clark told him to leave the car where it was but noticed the car started to move. Assuming Rains was either too intoxicated to control the vehicle or had not understood the request to keep the

car at a stop, Officer Clark reached inside the vehicle through the open window, placed his hands on Rains's arms, and repeated his command to stop the car. In response, Rains accelerated quickly carrying Officer Clark with him. The officer attempted to run with the car but it was moving too quickly and he was in danger of being dragged by the car or run over.

Officer Clark pulled his torso into the car and repeatedly told Rains to stop the car. Rains ignored him and sped up. He then turned into an alley where Officer Clark could feel the car jerking back and forth as if Rains was attempting to dislodge him from the car. He feared Rains would attempt to "scrape" him off the vehicle by running into a building. Clark then grabbed Rains by the throat and commanded him to stop the car, which was not effective. As Rains began to speed up again, Officer Clark reached down to his holster, pulled out his gun, and shot Rains in the left side. Rains did not stop the vehicle. Officer Clark then put the gun to Rains's head and commanded him to stop. Rains then stopped the car. Rains was taken to the hospital and recovered from his gunshot wound.

On October 7, 1996, the State charged Rains with several offenses: Count I – assault on a police officer with intent to inflict serious injury; Count II – interference with official acts with the intent to inflict serious injury; Count III – operating while intoxicated, second offense; Count IV – driving while license revoked; and Count V – driving while license suspended. In February of 1997, a jury found Rains guilty on all five counts. Rains appealed his convictions and our supreme court affirmed them on February 18, 1998. *See State v. Rains*, 574 N.W.2d 904 (Iowa 1998).

Rains filed an application for postconviction relief on May 6, 1998, and asserted his trial attorney was ineffective for refusing to allow Rains to testify on his own behalf. Rains claims he was prejudiced because the decision not to testify led to the exclusion of the testimony of his expert on police procedure. The district court denied the application on November 30, 1999.

II. Standard of Review. When a postconviction relief action implicates constitutional issues, our consideration is in the nature of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). When no constitutional safeguards are at issue, our review is for errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). When reviewing for errors at law, we will not disturb the district court's denial of postconviction relief if the trial court's findings of fact are supported by substantial evidence and are justified as a matter of law. *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa App. 1990).

III. The Merits. Rains bears the burden of demonstrating ineffective assistance of counsel by a preponderance of the evidence. See *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). Our ultimate concern is with the "fundamental fairness of the proceedings 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). We must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v.*

Bugely, 562 N.W.2d 173, 178 (Iowa 1997). The defendant establishes prejudice by showing “there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

Rains asserts he received ineffective assistance of counsel because his trial counsel advised him not to take the stand on his own behalf during the trial. Rains claims he wanted to testify at trial as to his version of events on the evening in question to further his claim of self-defense. The record indicates Rains would have testified at trial that, while stopped in the parking lot, an unidentified man confronted him and then jumped through his car window, causing him to fear for his life. He further would have testified he did not recognize the car as a police vehicle, did not recognize the man as a police officer, and drove off with a man hanging from his car in an attempt to defend himself. Rains offered the testimony of an expert to establish the procedures followed by Officers Allspach and Clark when they confronted him were inappropriate under the circumstances, but the district court ruled the evidence was irrelevant. Rains asserts if he had testified on the issue of self-defense, his expert’s testimony would have been admissible.

The police vehicle was a fully marked white patrol car, with large red and gold stripes on the sides and lights on the top. Both officers were wearing standard black police uniforms with prominent “Waterloo Police” patches on the shoulders and silver badges on their chests. Officer Clark testified, “it was

abundantly apparent that we were a police unit.” In his postconviction relief deposition, trial counsel testified he advised Rains not to testify based on his belief the jury would not find his version of events credible. Trial counsel further testified he left the ultimate decision whether to testify up to Rains and Rains decided not to testify.

There is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance; that is, a defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered trial strategy.” *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999). On de novo review, we find trial counsel's advice on the question of whether Rains should testify related to reasonable trial strategy. The advice was reasonable given the implausibility of appellant's claim he did not know Allspach and Clark were police officers. Rains has not shown a breach of duty or resulting prejudice in connection with trial counsel's recommendations he not testify at trial. We therefore affirm the district court's denial of postconviction relief.

AFFIRMED.