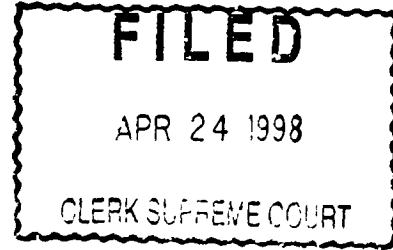


IN THE COURT OF APPEALS OF IOWA

No. 8-068 / 96-2233



MICHAEL LEE DULANEY,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Washington County, Robert Bates,
Judge.

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

Anders L. Johnson, Marengo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, and Gerald N. Partridge, County Attorney, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Michael Dulaney appeals the denial of his application for postconviction relief. Dulaney contends the trial court erred when it denied his application claiming ineffective assistance of counsel. Dulaney asserts four instances of ineffective assistance. He argues his trial counsel was ineffective when he: (1) failed to motion the district court to sever the gun charge from the vehicular homicide charges or to object to evidence regarding the gun charge; (2) failed to impeach witnesses regarding the rate of speed he was traveling prior to the accident and failed to locate witnesses to present an alternate theory regarding the accident; (3) failed to impeach the expert testimony of the State's medical witness by using the witness's own written articles; and (4) failed to challenge the vehicular homicide statute as unconstitutionally vague. We affirm.

A jury convicted Dulaney of three counts of vehicular homicide and one count of unlawful transporting of a pistol. The State presented evidence a two-vehicle accident occurred at approximately 12:50 a.m. on Highway 218 in Washington County. One of the vehicles was driven by Dulaney. Dulaney survived, but the three passengers in the other vehicle died as a result of injuries sustained in the crash. The State presented witnesses who testified Dulaney was speeding and swerving. Shortly after the accident, a police officer observed the road conditions were good and the road was straight, level, dry, and provided good traction. An Iowa state trooper

trained in accident reconstruction determined Dulaney's vehicle crossed the center line, causing a head-on collision with the decedents' vehicle.

Witnesses who were at the scene of the accident testified Dulaney was intoxicated and a state trooper testified he smelled liquor on Dulaney's breath. A doctor at the hospital where Dulaney was taken testified Dulaney was intoxicated. He based his opinion on Dulaney's smell, the fact Dulaney felt little pain despite the extent of his injuries, and when Dulaney vomited, there was a very powerful smell of alcohol.

Dulaney testified he had only drank two or three beers between 10:00 p.m. and midnight, approximately one hour before the crash. Dr. Thomas Bennett, the state medical examiner, testified a blood sample taken from Dulaney several hours after the crash showed his blood alcohol level to be .018. Based on Dulaney's blood alcohol level several hours after the crash, Bennett testified it was not possible Dulaney consumed only two or three beers. Bennett testified the test results showed Dulaney would have actually had to drink eight or more beers before the accident.

During the trial, the State also produced evidence Dulaney had Teflon-coated bullets which were good for penetrating armored vests and other metallic surfaces. Further, the State informed the jury Dulaney had speed loaders for the revolver but that it was not a crime to possess them. At the end of the trial, prior to the submission of the case to the jury, the State advised the jury it had been mistaken about the bullets -- they were not Teflon-coated, but instead were plastic-coated.

On direct appeal to the supreme court, Dulaney challenged the blood testing and implied consent laws of Iowa. The conviction for transportation of a pistol was not raised for review; neither were any claims of ineffective assistance of counsel. The supreme court affirmed the convictions.

I. STANDARD OF REVIEW. Where, as here, the postconviction petitioner asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances. *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980). This is the equivalent of a de novo review. *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL. The State argues Dulaney failed to preserve any of the issues for postconviction relief because they were not raised on direct appeal. The State admits certain exceptions exist to the requirements for raising claims of ineffective assistance on direct appeal, including ineffective assistance of appellate counsel; however, it claims Dulaney has failed to meet the terms of these exceptions.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show his claim was preserved for review by being made on direct appeal. *LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995). However, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence sufficient reason or cause

for not having raised the issue on direct appeal. *Id.* Ineffective assistance of appellate counsel may provide “sufficient reason” to permit the issue of ineffective assistance of trial counsel to be raised even though Dulaney did not do so on direct appeal. *Id.*; *Hinkle*, 290 N.W.2d at 31. Thus, prior to determining the merits of the new issues, we must proceed to an examination of the totality of the circumstances under which the postconviction court’s ruling was made to determine if Dulaney has established by a preponderance of the evidence the inadequacy of his appellate counsel. *Id.* If Dulaney was competently represented on appeal, he cannot raise the new claims now. *Id.* The same standards applied to trial counsel competency apply in measuring the competency of appellate counsel. *Id.*

Dulaney bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). “A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

To prove counsel failed in an essential duty, the defendant must prove the attorney’s performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. We will generally presume counsel is competent, and not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered trial strategy."

Id. (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95).

"The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Kone*, 557 N.W.2d at 102. It is not enough to simply claim counsel should have done a better job. *Dunbar*, 515 N.W.2d at 15. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation would have changed the outcome. *Id.*

The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). "A reasonable probability is one sufficient to undermine confidence in the outcome." *Kone*, 557 N.W.2d at 102.

In his reply brief, Dulaney states:

The defense counsel's incompetency should have been raised by the appellate counsel. It is submitted that trial counsel was incompetent, and therein appellate counsel was incompetent for failing to challenge the trial counsel's conduct. Thus, cause exists as to why the issue was not raised on appeal.

We find Dulaney failed to prove appellate counsel was ineffective and failed to raise any other reason for not arguing ineffective assistance of trial counsel on direct appeal. Clearly, an allegation appellate counsel should have raised trial counsel's incompetency and therefore he was ineffective begs the question. Thus, none of the issues raised on appeal are properly before this court.

Notwithstanding that finding, counsel was not ineffective when it allowed the gun charge to be tried along with the vehicular homicide questions without objection. We may examine the prejudice element prior to determining whether counsel's performance is deficient. *Wissing*, 528 N.W.2d at 564. We find Dulaney did not suffer prejudice. The State presented overwhelming evidence on the vehicular homicide charges. Even if the charges had been severed or the challenged evidence had not been presented, there is no reasonable probability the outcome of the trial would have been different. We have examined Dulaney's remaining contentions and find they have no merit. Even if the claims did have merit, we find Dulaney suffered no prejudice because of the overwhelming evidence presented by the State.

For these reasons, we affirm the decision of the district court.

AFFIRMED.