

IN THE COURT OF APPEALS OF IOWA

No. 7-560 / 96-1580

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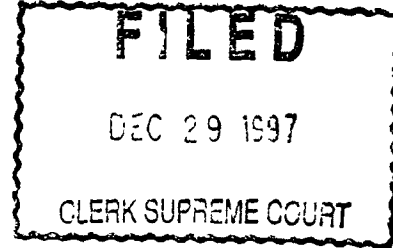
KENNETH ALAN HACK,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Grundy County, Robert E. Mahan,
Judge.

Kenneth Hack appeals from the district court order denying his application for
postconviction relief. **AFFIRMED.**

Christopher A. Clausen of the Boliver Law Firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Julie Brown, Assistant Attorney General,
Don Kliebenstein, County Attorney, and Bradley J. Harris, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Sackett and Huitink, JJ. Mahan, J., takes no
part.

SACKETT, J.

Petitioner-appellant Kenneth Alan Hack appeals from the denial of his petition for postconviction relief filed following his conviction of assault with intent to commit sexual abuse. This conviction was affirmed by this court in *State v. Hack*, 548 N.W.2d 190 (Iowa App. 1995). In affirming, this court reserved Hack's right to challenge his trial counsel's effectiveness as to treatment of an intoxication defense and alternative theories of responsibility. The trial court denied him relief on the preserved claims. We affirm.

The charges stem from a fight Hack and his fiancée had at a Grundy Center bar in January of 1993. Hack slammed her head into a lottery terminal, struck her with his fist and poked her in the crotch with a broken broom handle. His fiancée testified Hack pulled her jeans down and put his hand in her vagina and told her he was going to rape her. Hack admits assaulting his fiancée but denies he threatened to rape her or placed his hand in her vagina.

The attorney representing Hack at the inception of the case filed a notice of diminished responsibility. The notice stated Hack intended, "to rely on the defense of intoxication at the time of the alleged incident," to the extent that he was not able to form requisite intent to commit sexual abuse.

By trial, Hack had a different attorney who did not present evidence concerning intoxication and its effect on intent. His second attorney also did not

argue Hack's intoxication precluded him from having the requisite intent or request an instruction on it.

At the postconviction hearing, Hack's attorney testified he believed the affirmative defense of intoxication was not well accepted by jurors in northeast Iowa or northwest Iowa. The testimony was a general statement and indicated no attempt to analyze the defense under the specific facts of this case.

There was substantial evidence introduced at trial Hack had consumed substantial alcohol prior to the event. This court, in affirming the conviction, specifically found, "There is also undisputed evidence Hack had been drinking heavily prior to the assault."

Hack argues with the evidence in this case that he was drinking heavily, his attorney should have presented additional evidence on the issue, argued it to the jury, and requested an instruction.

To succeed on this claim, Hack must show by a preponderance of evidence his trial attorney failed to perform an essential duty, and he was prejudiced by the failure. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

There is a presumption Hack's trial attorney was competent. *See State v. Thornton*, 498 N.W.2d 670, 675 (Iowa 1993). To overcome the presumption, Hack must show his trial counsel's performance is not within the normal range of competency. *Id.* A trial counsel's tactical decision is not reason to find him or her ineffective. *Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa App. 1989). More must

be shown ~~than that~~ trial strategy backfired or another attorney would have advanced a different defense. *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992).

The prejudicial evidence as to Hack's drinking was in the record. Hack admitted the assault and the only issue was the sexual assault. Hack's first attorney filed a notice of an intoxication defense. There is evidence in the record that would support an instruction on an intoxication defense. The question is whether, if it were raised, there is a reasonable probability the result of the trial would have been different. *See id.* The record does not support a finding had the jury been advised of the intoxication defense there is a reasonable probability they may have looked at the facts differently. We affirm on this basis.

Hack next contends his trial counsel was not effective for he did not request an instruction on the offense of assault with the intent to commit sexual abuse causing no bodily injury. There was considerable and undisputed evidence Hack's fiancée was injured. We find no merit to this contention.

Hack advances a third and fourth issue not preserved on direct appeal. We find these claims to have no merit.

AFFIRMED.