FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ELMER BUFORD, JR.,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed March 31, 1986

5-683
84-1836

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Appeal from the Iowa District Court for Polk County (No. PCR 286) - M. C. Herrick, Judge.

Petitioner appeals the district court's denial of his application for postconviction relief on ineffective assistance of counsel grounds. **AFFIRMED.**

Alfredo G. Parrish, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa; Elizabeth E. Ciebell, Assistant Attorney General; and Jim Smith, Polk County Attorney, Des Moines, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

Petitioner appeals the district court's denial of his application for postconviction relief on ineffective assistance of counsel grounds. We affirm.

Petitioner bases this appeal on two grounds. The first contends that his counsel erred by failing to object to a police officer's testimony regarding a codefendant's incriminating statements as violative of the confrontation clause. Secondly, he contends his counsel was ineffective in failing to introduce an alleged prior misidentification of the petitioner by the victim.

After a jury trial, petitioner was found guilty of Robbery in the First Degree in violation of Iowa Code sections 711.1 and 711.3 (1983). On July 18, 1983, the petitioner was sentenced to be imprisoned for a period not to exceed twenty-five years.

Notice of appeal was filed, and the appellate defender's office was appointed after trial counsel withdrew. The appellate defender's office then moved to withdraw pursuant to Iowa Rule of Appellate Procedure 104, and the appeal was dismissed.

A pro se application for postconviction relief was filed and amended. A hearing on this application was held before the Honorable M. C. Herrick where petitioner-appellant and his trial counsel, Ted Prine, testified. The Honorable M. C. Herrick found each contention made by petitioner-appellant to be without merit and denied his application for postconviction relief. Notice of appeal was filed.

Chay Leovan, a Laos citizen, and the victim of the robbery, testified that in the early morning hours of November 4, 1982, he drove to his girlfriend's house after work. He stated that a man walked up to his car, knocked on his window and asked him for a ride. Mr. Leovan eventually agreed, and drove him to an alley on 20th Street. He stopped the car and the passenger, later identified as

the defendant's brother, Victor Buford, asked if he would wait. Victor went into a home and returned with a younger boy, later identified as Larry Turner. Leovan stated that Victor wanted Leovan to drive him to get some money. When Leovan stated he did not understand, Turner went back to the house and returned with another man, later identified as defendant Elmer Buford. Leovan stated that defendant opened the car door, pulled him out and started beating and kicking him. Leovan stated that defendant took his keys, moved his car, pulled him across the alley and tied him to a porch with a cord. He testified that the three then went into the house and he eventually untied himself and ran away.

Officer David Murillo testified that he came upon Leovan in the 1800 block of Ingersoll and found him to be "beat up real bad." He called an ambulance and Leovan was taken to the hospital.

Detective James Rowley testified that he interviewed the victim at Broadlawns Hospital and showed him a picture spread. The victim identified Victor Buford as the man who asked for a ride. The detective later showed another picture spread to the victim and Elmer Buford was identified as the man who pulled Leovan from his car and beat him.

Larry and Victoria Turner also testified that it was "Champ," or Elmer Buford, who beat Chay Leovan.

It was the defendant's testimony that his brother, Victor Buford, and Larry Turner beat Chay Leovan. He testified that he did not get involved in the fight, but rather went to Bill Turner's home and later to his mother's home.

When a claim of ineffective assistance of counsel is made, the court must make "an independent evaluation of the totality of the relevant circumstances; this is equivalent to a de novo review." Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984) (citations omitted). "When a defendant relies on a specific act or omission to prove such a claim, two conditions must be demonstrated: 'It must

be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom.'" State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984), citing Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Both of these elements must be proven by a preponderance of the evidence. Taylor v. State, 352 N.W.2d at 685; Sallis v. Rhodes, 325 N.W.2d 121, 122 (Iowa 1982).

The supreme court in Taylor, recently articulated the following standards for analysis of these issues:

> In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982); Hinkle v. State, 290 N.W.2d at 30-31. Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94 (1984) (Because of the difficulties inherent in making the evaluation, 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 sound trial strategy.'). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).
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> In deciding the second component of a claim of ineffectiveness of counsel, prejudice, we have required the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231 234 (Iowa 1984). The United States Supreme Court has recently articulated the following test for determining whether specified errors of counsel have resulted in the required prejudice.
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> > The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

> sufficient to undermine confidence in the outcome.

Strickland v. Washington, ___ U.S. at ___, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We apply this appropriate test for prejudice to the facts of this case.

Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

On reviewing the record, this court finds that neither of the cited elements are satisfied here.

Attorney Prine proceeded in trial through a reasonable pursuit of a trial strategy which this court will not second guess. The failure of that strategy reflects more on the strength of prosecution evidence than on any alleged incompetence in the defense.

Prine testified in the court below that he allowed the codefendant's testimony to go unchallenged despite its inculpatory effect on petitioner. Although the alleged hearsay testimony placed petitioner at the scene of the crime, Prine testified that little was to be gained by its exclusion since two other witnesses also would testify to petitioner's proximity. Prine noted that petitioner did not intend to deny his presence anyway.

Prine's decision to forego a challenge to this testimony was an element of a reasonable trial strategy designed to direct the jury's attention to petitioner's brother as the assailant rather than petitioner.

The failure of this strategy does not overcome the presumption that counsel acted competently in the original trial court.

On petitioner's insistence that the victim misidentified his assailant we find no merit. Evidence of any misidentification is absent from the record and petitioner has not brought any such evidence to our attention.

AFFIRMED.