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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-44 / 89-722

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MICHAEL RICHARD MUSSO,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Tama County, L. Vern Robinson, Judge.

Appellant appeals from the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1989). **AFFIRMED.**

Thomas J. O'Flaherty, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Julie A. Halligan, Assistant Attorney General, and Brent Heeren, County Attorney, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Appellant, Michael Musso, appeals from the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1989). We affirm.

Appellant was convicted of first-degree robbery, following a jury trial, in 1985. His conviction was reversed by this court, but was later reinstated by the Iowa Supreme Court upon further review. State v. Musso, 398 N.W.2d 866 (Iowa 1987). Appellant later filed the present application for postconviction relief in order to challenge his conviction. The district court denied postconviction relief, and appellant has appealed.

The facts of the underlying crime of this case are detailed in Musso, 398 N.W.2d at 866-67, and need not be recounted again here. Appellant was charged by trial information which alleged, in part, that appellant "while armed with a sawed off shotgun, robbed the Gas Light Tavern, Tama, Iowa, and at the time of said robbery did display a firearm to Betty L. Smith . . . ." Appellant's trial counsel waived the submission of a special interrogatory regarding the use of a firearm. See Iowa R. Crim. P. 21(2). The marshaling instruction, however, informed the jury that unless the State proved beyond a reasonable doubt that at the time of the offense charged appellant was armed with a sawed-off shotgun, it was to find appellant not guilty of robbery in the first degree.

Appellant's trial counsel initially reserved his opening statement. Upon completion of the State's case, trial counsel waived opening statement and did not present any evidence.

On appeal, appellant contends his trial counsel was ineffective in two regards: (1) in his waiver of the submission of a special interrogatory regarding the use of a firearm; and (2) in waiving opening statement and presenting no evidence for the defense.

I.

When a postconviction appellant asserts violations of a constitutional safeguard such as the sixth amendment right to effective assistance of counsel, we make our own assessment of the totality of the circumstances. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. Id.

We note at the inception that the alleged acts or omissions of counsel underlying appellant's ineffective assistance claims were known to appellant at the time his direct appeal was instituted, and even though appellant had this knowledge, appellant failed to pursue these claims on direct appeal. In this respect, Iowa Code section 663A.8 (1987) provides, in pertinent part:

> Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application [for postconviction relief] unless the court finds a

> ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

It is clear appellant failed to raise his claims of ineffective assistance of counsel on direct appeal. As a result, appellant is only entitled to raise his claims on postconviction by proving, by a preponderance of the evidence, "sufficient reason" for his failure to raise the issue either at trial or on appeal. Id. at 31. Additionally, appellant must demonstrate that actual prejudice resulted from the error in order to prevail upon his claim. See Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). Inadequacy of appellate counsel, if established, would provide "sufficient reason" to permit appellant to raise this issue now for the first time. Hinkle, 290 N.W.2d at 31.

We apply the same standards to a claim of ineffective appellate counsel as we do to a claim of ineffective trial counsel. Id.; Gering v. State, 382 N.W.2d 151, 155-56 (Iowa 1986). In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel's performance was deficient in that counsel failed to perform an essential duty, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984); see Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985).

Appellant's claim, in essence, then boils down to whether his appellate counsel could have prevailed upon a claim of ineffective assistance of trial counsel on direct appeal. We conclude upon a thorough review of the record that his appellate counsel would not have prevailed upon appeal on the aforementioned claim.

II.

Iowa Rule of Criminal Procedure 6(6) states:

> If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to a minimum sentence because of use of a firearm, the allegation of such use, if any, shall be contained in the indictment. If the use of a firearm is alleged as provided by this rule, and if the allegation is supported by the evidence, the court shall submit to the jury a special interrogatory concerning this matter, as provided in R. Cr. P. 21(2).

Iowa Rule of Criminal Procedure 21(2) provides in relevant part:

> Where a defendant is alleged to be subject to the minimum sentence provisions of section 902.7, The Code (use of firearms) and the allegation is supported by the evidence, the court shall submit a special interrogatory concerning that matter to the jury.

Appellant's trial counsel waived submission of such a special interrogatory. Such an action will not constitute the basis for an ineffective assistance of counsel claim absent prejudice to appellant. In State v. Beaver, 429 N.W.2d 778 (Iowa App. 1988), this court held that

> the prescribed duty to submit the interrogatory as to the use of firearms before considering the enhanced punishment is not mandatory where other jury instructions also require the jury to find beyond a reasonable doubt the use of a firearm.

Id. at 779 (quoting State v. Kinzenbaw, 344 N.W.2d 258, 261 (Iowa App. 1983)).

Instruction No. 17, the marshaling instruction, in this case informed the jury that unless the State proved beyond a reasonable doubt that at the time of the offense charged appellant was armed with a sawed-off shotgun, it was to acquit appellant on the charge of robbery in the first degree. We, therefore, find no prejudice befell appellant due to the absence of a special interrogatory concerning the use of a firearm. Since appellant was not prejudiced by his attorney's inactions, his ineffective assistance of counsel claim on this issue is without substance.

III.

Appellant also claims that his trial counsel was ineffective in failing to give an opening statement and in failing to present evidence. Appellant's trial counsel reserved the right to make its opening until the close of the State's case. After the State had closed its case, by which time defense counsel had resolved that he would present no evidence, defense counsel waived opening statement. Waiver of opening statement, by and of itself, does not constitute ineffective assistance of counsel, but is simply a matter of professional judgment. Karaseu v. State, 310 N.W.2d 190, 191 (Iowa 1981).

Similarly, we find appellant's trial counsel's reasons for not presenting any evidence to be a matter of prudent

trial strategy and ethical professionalism. The defense presented was one of general denial of defendant's involvement in the crime. To this end, defense counsel sought to discredit the testimony of the State's witnesses upon cross-examination. Defense counsel refused to call an alleged alibi witness because he wanted no part in suborning perjured testimony and apparently elected against calling appellant to the witness stand because of his prior criminal convictions. We find these actions by appellant's trial counsel to be well within the bounds of professional judgment.

Finally, we conclude that the appellant is unable to demonstrate that the offering of evidence, following an opening statement, would result in a different outcome. At trial, the State presented overwhelming evidence establishing the appellant's participation in the robbery of the Gas Light Club. Two eyewitnesses at the club testified as to the events which occurred and described the perpetrator's appearance and actions. The same witnesses identified the appellant at an identification lineup and stated that to the best of their knowledge the appellant was the perpetrator. One of those witnesses made a positive in-court identification of the appellant, and the other witness was not asked to identify the appellant at trial. Indeed, the supreme court, in ruling on the direct appeal of the appellant, stated:

> From a criminal perspective, this robbery was not well executed. A cardinal rule among thieves is to leave nothing at the crime scene. Nevertheless, two items were inadvertently dropped when this routine tavern hold-up occurred. A pillowcase matching some later identified with the defendant was left inside the tavern and a camper was inadvertently dropped off the getaway vehicle [defendant's pickup truck] as it roared away from the scene.
>
> Needless to say, defendant does not assign sufficiency of the evidence as error in this appeal which follows his conviction of first-degree robbery.

State v. Musso, 398 N.W.2d 866 (Iowa 1987).

We, therefore, conclude appellant has failed to substantiate his claims of ineffective assistance of counsel on this point.

AFFIRMED.