

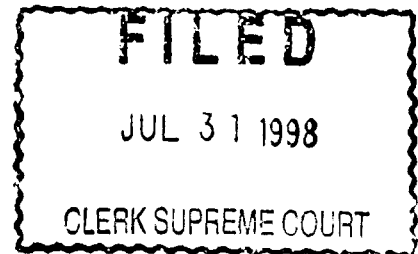
IN THE COURT OF APPEALS OF IOWA

No. 8-324 / 97-0507

JOHN ALLEN HOLMES,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

On appeal from the district court's denial of postconviction relief, the applicant argues his trial and appellate counsel were ineffective. **AFFIRMED.**

Jeffrey M. Lipman of the Lipman Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Ronald E. Robertson, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

CADY, C.J.

John Allen Holmes appeals the district court's denial of postconviction relief. He claims his trial and appellate counsel were ineffective. We affirm the district court.

Holmes was convicted of first-degree murder following a jury trial. The district court sentenced him to a term of life imprisonment without parole. We affirmed his conviction on direct appeal, but preserved his ineffective assistance of trial counsel claim for postconviction relief. *State v. Holmes*, No. 4-278/93-554, slip op. at 7 (Iowa App. Nov. 28, 1994).

Holmes subsequently filed an application for postconviction relief. In his application he claimed ineffective assistance of trial counsel based upon: (1) inadequate pretrial investigation; (2) inadequate trial preparation; (3) inadequate questioning of witnesses; (4) failure to make an offer of proof and preserve error; and (5) failure to submit material evidence. He also asserted he received ineffective assistance of appellate counsel based upon appellate counsel's failure to preserve various errors on direct appeal. The district court dismissed his postconviction claims. On appeal Holmes reasserts each of the errors raised in the postconviction court.

Generally, we review postconviction relief claims for errors at law. *State v. Voelkers*, 547 N.W.2d 625, 634 (Iowa App. 1996). To the extent constitutional claims are involved, however, we conduct a de novo review. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997).

In order to assert a claim for ineffective assistance of trial counsel in a postconviction proceeding, an applicant must ordinarily demonstrate preservation of the claim for review through a direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995); *see also Collins*, 477 N.W.2d at 376 (ineffective assistance claim may be made in postconviction proceeding if applicant establishes sufficient reason or a cause for not raising it on direct appeal). A claim of ineffective assistance of appellate counsel must meet the same standards as a claim for ineffective assistance of trial counsel. *Stringer v. State*, 522 N.W.2d 797, 799 (Iowa 1994).

To prevail on an ineffective assistance of counsel claim, Holmes must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). He must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

When considering the adequacy of an attorney's representation, we have observed:

... it is not enough to simply claim that counsel should have done a better job. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome.

Dunbar v. State, 515 N.W.2d 12, 15 (Iowa 1994).

Holmes contends appellate counsel should have preserved his claims trial counsel: (1) failed to conduct a reasonable investigation of hairs and cigarette butts in the victims' apartment as well as a shoe print outside of the apartment; (2) failed to place certain receipts into evidence that would have helped establish an alibi; (3) failed generally to object to leading questions; (4) failed to attack the credibility of certain witnesses; and (5) failed to adequately prepare for certain testimony. The State maintains Holmes failed to preserve these claims and failed to establish a sufficient reason for failing to raise the claims on direct appeal.

Appellate counsel raised the issue Holmes was denied effective assistance of counsel by trial counsel's failure to make an offer of proof as well as an argument insufficient evidence existed to corroborate his admissions to various friends. Appellate counsel's decision to omit general assertions trial counsel should have conducted a broader investigation and should have handled witnesses in a better fashion does not overcome the strong presumption of appellate counsel's competence.

To the contrary, we recognize experienced appellate attorneys understand raising every conceivable complaint on appeal is often a tactical blunder and highly

competent attorneys generally rely on only the strongest points for reversal. *See Osborn v. State*, 573 N.W.2d 917, 922-23 (Iowa 1998). Holmes has failed to establish appellate counsel's performance fell outside the normal range of competency. Because we conclude Holmes did not establish he received ineffective assistance of appellate counsel, he has failed to preserve error on the new ineffective assistance of trial counsel claims. We therefore turn to the claim we preserved on direct appeal.

Holmes claims trial counsel erred by failing to make an offer of proof and preserve error after the trial court sustained the State's objection to testimony from defense witness LeClare Taylor. Taylor testified he discussed the murder with Holmes. After defense counsel asked what Holmes said, the prosecutor objected to the question and the trial court sustained the objection. Defense counsel did not make an offer of proof to show what testimony could have been elicited if the court had permitted Taylor to answer. Holmes maintains, had an offer of proof been given, Taylor would have said Holmes told him he did not commit the murder.

Although defense counsel could have made an offer of proof, we find the failure to do so did not prejudice Holmes. In light of the overwhelming evidence of Holmes' guilt, and the doubtful admissibility of the evidence, we fail to see how preservation of this claim would have would have changed the result of his appeal. Accordingly, we find the district court properly denied postconviction relief.

We have considered all the issues raised. We affirm the district court.

AFFIRMED.