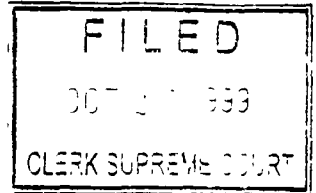


IN THE COURT OF APPEALS OF IOWA

No. 9-474 / 98-0827
Filed October 27, 1999



ALTON SHEARS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Alton Shears appeals from the denial of postconviction relief following his conviction of robbery in the first degree in violation of Iowa Code section 711.2 (1995). He claims ineffective assistance of counsel for failure to object to irrelevant evidence and failure to file a notice of appeal. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant
County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Alton Shears appeals from the denial of postconviction relief following his conviction of robbery in the first degree in violation of Iowa Code section 711.2 (1995). He claims ineffective assistance of counsel for failure to file a notice of appeal and failure to object to irrelevant evidence. We affirm.

I. Factual Background and Proceedings. On April 2, 1995, the Family Dollar store in Waterloo was robbed at gun point. On April 26, 1995, Alton Shears was charged with robbery in the first degree in violation of Iowa Code section 711.2 (1995). Trial commenced on August 1, 1995, and on August 3, 1995, a jury returned a verdict of guilty. On August 28, 1995, Shears was sentenced to an indeterminate prison term not to exceed twenty-five years, but not less than five years. The trial court informed Shears of his right to appeal and asked Shears' trial counsel to take care of the notice of appeal. Counsel stated he would do so. Shears and his trial counsel now disagree as to what occurred after sentencing.

Shears testified he told his trial counsel to file an appeal. Trial counsel testified at the postconviction hearing Shears decided not to appeal. A notice of appeal was not filed. On February 28, 1996, as a result of a letter from Shears inquiring about his appeal, the district court appointed Robert Thompson to file an application for postconviction relief on Shears' behalf. Shears' application for postconviction relief was based upon ineffective assistance of counsel. On April 23, 1998, the court denied his application. Shears appeals.

II. Standard of Review. Postconviction relief proceedings are actions at law and therefore are reviewed on error. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, when the postconviction petitioner asserts violations of constitutional safeguards, we make an evaluation of the totality of circumstances in a de novo review. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). We will apply the de novo review in claims of ineffective assistance of counsel. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

III. Postconviction Relief -- Ineffective Assistance of Counsel. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App.1996). A defendant shows ineffective assistance of counsel by proving (1) the defense attorney failed in an essential duty and (2) prejudice resulted. *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). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

In proving the first prong of this test, Shears must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong, Shears must establish prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional

errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Query*, 594 N.W.2d 438, 444-45 (Iowa App. 1999). With these principles in mind, the court will now consider Shears' specific allegations of ineffective assistance of counsel.

A. Failure to File Notice of Appeal. Shears first alleges his trial counsel was ineffective by failing to file a notice of appeal after his sentencing. Trial counsel testified he and Shears had a conversation about whether the State would be willing to reduce his twenty-five-year sentence if he provided information regarding the crime to the prosecution. Trial counsel approached the prosecution, but the State was unwilling to make a deal with Shears. At the postconviction relief hearing, trial counsel recalled "since the State wasn't willing to do anything on the twenty-five-year sentence, he just wanted to go serve it and not create any waves with any other individuals that may be responsible." Therefore, he did not file an appeal on Shears' behalf. Shears, on the other hand, now maintains he never wavered in his desire to file an appeal and contends trial counsel's failure to file an appeal was a breach of an essential duty. When considering the conflicting versions of the events, the postconviction district court found trial counsel's testimony more credible than Shears' testimony and denied his application for relief. We give weight to the court's findings regarding credibility. Iowa R. App. P. 14(f)(7); *Taylor v. State*, 352 N.W.2d

683, 684 (Iowa 1984). After a review of the entire record, we find the testimony of Shears' trial counsel credible. We hold Shears has not proved a breach of an essential duty by his trial counsel. Shears was not prejudiced when his trial counsel failed to file a notice of appeal because Shears had expressed his decision not to appeal.

B. Failure to Object to Evidence. Shears next claims his trial counsel's failure to object to irrelevant evidence at trial deprived him of effective assistance of counsel. During the trial of this matter, the prosecution introduced several items of physical evidence found during the execution of two search warrants. Among the prosecution's evidence was a black revolver. All witnesses, however, described the gun used by the robber as a small silver gun. Ammunition was received in evidence that clearly would not be used with a small gun such as was described by the witnesses. The State offered bed sheets in evidence in an apparent effort to link them with a pillowcase which witnesses claimed was used by the robber to carry stolen money from the store. Several witnesses described the pillowcase as "cream color", but the bed sheets received in evidence were blue. Shears claims his trial counsel breached an essential duty when he failed to object to evidence of such dubious relevance.

Trial counsel testified his decision not to object to the introduction of this evidence was part of his defense strategy:

[M]y view was to let them throw out all this stuff that I thought didn't make any sense and did not help them and try to convince the jury that they were throwing up a bunch of stuff because they didn't have anything. And they had a fingerprint, but we had a -- a way around

that. And that's where they were trying to bolster, you know their case by presenting irrelevant things that they themselves conceded were not the weapon.

A claim of ineffectiveness of counsel must be premised on more than simply questionable or unsuccessful trial tactics. *State v. Risdal*, 404 N.W.2d 130, 133 (Iowa 1987); *Kyle v. State*, 364 N.W.2d 558, 565 (Iowa 1985). Shears must make more than a showing trial strategy backfired or than another attorney would have prepared and tried the case somewhat differently. *See Wycoff v. State*, 382 N.W.2d 462, 471 (Iowa 1986). Shears' trial counsel had tried several criminal cases before, including serious felony cases. The record shows he used the stated strategy in closing argument when he told the jury the State's case was so weak the prosecution had offered a gun, ammunition, and bed sheets which the State's own witnesses did not link to the robbery. We will not, with the benefit of hindsight, consider his strategy ineffective merely because it was not successful in winning the case or because another attorney would have approached the case differently. *See Osborn*, 573 N.W.2d at 924. Viewing the record in its totality, we cannot conclude Shears' trial counsel's actions fell outside of the normal range of competency. Because we have determined Shears cannot show by a preponderance of the evidence the first prong of the *Strickland* analysis, we do not reach the question of whether counsel's actions were prejudicial to him. We affirm the district court's denial of Shears' application for postconviction relief.

AFFIRMED.