

**FILED**

JUN 04 1986

CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**DALE ARTHUR DAVIS,**

)

Petitioner-Appellant,

)

vs.

)

Filed June 4, 1986

**STATE OF IOWA,**

)

6-70

Respondent-Appellee.

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85-613

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Appeal from the Iowa District Court for Pottawattamie County (No. 53997),  
Leo F. Connolly, Judge.

Petitioner appeals from the district court's denial of his application for  
postconviction relief taken from his conviction for first-degree kidnapping.

**AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant  
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Att  
General; and Joseph J. Hrvol, Assistant County Attorney, for respondent-e

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

**OXBERGER, C.J.**

Petitioner pleaded guilty to one count of kidnapping in the first degree a violation of section 710.3, the Code 1978. Petitioner's appeal claims he received ineffective assistance of counsel in the trial proceedings. We affirm.

Petitioner raises one issue in this appeal: "Was David denied effective assistance of counsel in that his attorney failed to advise him that voluntary intoxication was a viable defense in his case."

Petitioner's task in seeking postconviction relief based on ineffective assistance from counsel is twofold. He must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Petitioner must prove his allegations by a preponderance of the evidence including a showing of an affirmative factual basis demonstrating the inadequacy of counsel's representation. State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981). We make an independent evaluation of the totality of circumstances. Id.

Petitioner claims that trial counsel failed to retain private psychiatric or psychological testing. The trial court found "no reason to conjecture that an additional psychiatric examination would disclose any more insight into the deviant innerworkings of the petitioner's mind on the date of the rape/attempted murders."

The petitioner did not offer psychiatric evidence at the postconviction hearing. Trial counsel testified he consulted Dr. Margules and Dr. Rassek, local medical doctors. Trial counsel filed an application for psychiatric examination of the petitioner at the Iowa Medical Security Facility in Oakdale. The report from the psychiatrist indicated no support for the intoxication defense.

We conclude that trial counsel's advice to the petitioner that the intoxication defense was weak, was within the bounds of competency. Petitioner

has not established any facts "post mortem" that would support his claim that trial counsel should have retained additional psychiatric experts. We refuse to speculate that if trial counsel had retained private psychiatric experts it would have strengthened petitioner's intoxication defense.

Petitioner in his written argument in support of his statement of issue presented for review contends that he could not have been convicted of sexual abuse in the first degree because "the attacks on the girls were not within the course of the sexual abuse. He argues that since the attacks occurred after the sexual abuse they do not meet the requirements of section 709.2, The Code.

The Iowa appellate courts have not ruled on the issue. Trial counsel was not ineffective in failing to pursue an open issue. Hinkle v. State, 290 N.W.2d 28, 34-35 (Iowa 1980).

**AFFIRMED.**