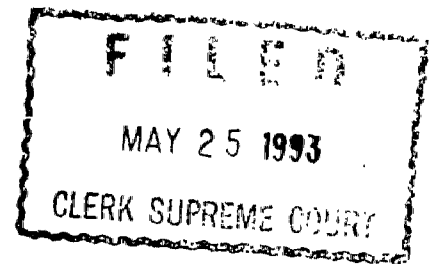


IN THE COURT OF APPEALS OF IOWA

No. 3-163 / 91-1858



RONALD DEAN SWARTZ,
Applicant-Appellant,

000601

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk
County, Larry J. Conmeyer, Judge.

The applicant appeals from the district court's denial
of his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of The Mears Law Office, Iowa City, and
Ronald Dean Swartz, pro se, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Jr., Assistant Attorney General, Thomas J. Ferguson, County
Attorney, and Thomas N. Bower, Assistant County Attorney,
for appellee.

Heard by Schlegel, P.J., and Oxberger, C.J., and
Sackett, J.

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PER CURIAM

Applicant-appellant Ronald Dean Swartz appeals the trial court denial of his application for postconviction relief challenging a 1976 conviction for breaking and entering. We affirm.

Swartz was charged after police in Waterloo, responding to an alarm at the Canteen Service Company, found Swartz and a codefendant on top of the building hiding behind an air conditioning duct. There was evidence the building had been broken into by prying open a rear door.

Swartz appealed the conviction raising as his only issue on appeal that a prior conviction, which was set aside because of an illegal search, and another charge dismissed following sustaining a motion to suppress under the Fourth Amendment, should not be considered by the trial court in determining a sentence to be imposed in a third, unrelated case. State v. Swartz, 278 N.W.2d 22 (Iowa 1979). The issue was one of first impression. Id.

In this appeal, Swartz contends his trial attorney in the 1976 trial was not effective because he failed to challenge an amended trial information, failed to file a motion in limine to exclude information his codefendant had pled guilty, and did not request an instruction on criminal trespass. He also contends his appellate counsel was not effective. He further contends the trial court should have allowed him to discharge his trial counsel.

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None of the issues Swartz now raises were raised on direct appeal. Therefore, to succeed, Swartz must first show his appellate counsel was not effective. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989). The State contends Swartz has not adequately raised this issue and his application should be denied. Without deciding the State's preservation of error argument, we look to whether Swartz has met the burden of showing his appellate counsel was not competent. To show appellate counsel was not effective, Swartz must prove his appellate counsel's failure to raise the issue of the ineffective assistance of his trial counsel was a breach of a material duty and he suffered prejudice as a result of the purported breach. Strickland v. Washington, 466 U.S. 668, 687, 690, 694, 104 S. Ct. 2052, 2064, 2066, 2068 80 L. Ed. 2d 674, 693, 695, 698 (1984).

Appellate counsel is not always required to raise a particular issue even if the issue has some merit, but must use his or her professional judgment in deciding issues to be raised on appeal. See Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987). Competent appellate lawyers frequently assign only the strongest issues and rely on them for reversal. See id.

The issue raised by appellate counsel was one of first impression and one on which federal circuits were split. Swartz, 278 N.W.2d at 24-26.

There was substantial evidence in the record of Swartz's guilt. On the night of Swartz's arrest, a fence

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had been cut to gain access to the backyard of the Canteen Service Company. The silent alarm of the business was triggered when the back door was opened with screwdrivers and crowbars. Responding to the alarm, the police surrounded the Canteen Service Company. A skylight was broken and witnesses observed a person climb to the roof. Police found Swartz and his codefendant hiding behind an air conditioning unit on the roof of the building wearing ski masks. Photographs were taken of Swartz with his mask on and his mask off. Swartz's clothing was muddy, and the area where the fence was cut was muddy. Swartz's wife's car was parked in the area. The evidence against Swartz was very strong.

We have examined and considered all allegations of ineffective assistance raised by Swartz in the brief filed by his attorney and the brief he filed pro se. We do not find Swartz has shown he was prejudiced by any failure of his appellate counsel to raise other issues on appeal. To show actual prejudice, Swartz must show any alleged error worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. See Polly v. State, 355 N.W.2d 849, 855 (Iowa 1984). We affirm.

AFFIRMED.