IN THE COURT OF APPEALS OF IOWA

No. 1-673 / 00-2090
Filed December 12, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN PAUL BALMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

The defendant appeals following his convictions for second-degree robbery, assault while participating in a felony, first-degree theft, and willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill R. Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

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EISENHAUER, J.

John Balmer appeals following his convictions for second-degree robbery, assault while participating in a felony, first-degree theft, and willful injury. He contends trial counsel was ineffective in (1) failing to request the submission of the assault while participating in a felony charge as a lesser included offense of willful injury and (2) failing to object to the court's failure to merge the judgments. We affirm.

I. Background Facts and Proceedings. On August 13, 2000, fifteen-year-old Travis Dawdy was walking home from a friend's house when he encountered John Balmer and Ryan Newson. Upon their request, Dawdy showed the men the two Play Station memory cards he had in his pocket, but refused to show them the seven video games he held in a carrying case. Dawdy was thrown to the ground and kicked repeatedly in the back of the head until he lost consciousness. When Dawdy awoke, his video games were missing.

Balmer was arrested and charged with second-degree robbery, assault while participating in a felony, first-degree theft, and willful injury. The case was tried to a jury and Balmer was found guilty on all counts. The court sentenced him to a term not to exceed ten years on the robbery and theft charges, and five years each for assault while participating in a felony and willful injury. The court ordered the sentences run concurrently.

Balmer appeals. He contends trial counsel rendered ineffective assistance by failing to request the charge of assault while participating in a felony be submitted as a lesser included offense of willful injury. He also

contends the court erred in failing to merge assault while participating in a felony with the willful injury conviction and, therefore, counsel was ineffective by not objecting to this failure.

II. Scope of Review. We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)).

III. Ineffective Assistance of Counsel. To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *McBride*, 625 N.W.2d at 373. First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.* A presumption exists that counsel is competent and that counsel's conduct falls within a wide range of reasonable professional assistance. *Burgess v. State*, 585 N.W.2d 846, 847 (Iowa Ct. App. 1998). We will not second guess reasonable trial strategy. *Id.* The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (citing

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1994)).

Balmer first contends counsel erred in failing to request the charge of assault while participating in a felony be submitted as a lesser included offense of willful injury. He claims the instructions allowed the jury to consider willful injury as the "felony" within assault while participating in a felony.

We find counsel did not fail to perform an essential duty. Balmer begins his inquiry by utilizing the *Blockburger* same elements test to find assault while participating in a felony is a lesser included offense of willful injury. However,

> [w]here . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S. Ct. 673, 679, 74 L. Ed. 2d 535, 544 (1983). The Iowa Supreme Court has found the legislature intended to punish assault while participating in a felony and willful injury as separate offenses. *State v. Perez,* 563 N.W.2d 625, 628-29 (Iowa 1997). Therefore, counsel did not breach any duty by failing to request assault while participating in a felony be submitted as a lesser included offense of willful injury.

Assuming arguendo that counsel had failed to perform an essential duty, Balmer was not prejudiced by the alleged error. The jury was instructed that they could find Blamer guilty of assault while participating in a felony if, at the time of the assault, he was participating in either the crime of second-degree robbery *or*

willful injury. The jury found Balmer guilty of both second-degree robbery and willful injury. Because the outcome would not have been different if Balmer had successfully objected to the jury instruction, we cannot find counsel was ineffective.

Balmer next complains trial counsel was ineffective by not requesting the court merge assault while participating in a felony and willful injury. He argues merger was required because the requirements of Iowa Code section 701.9 (1999) had been met. However, when double jeopardy is not implicated, Iowa Code section 701.9 is not violated. *State v. Hickman,* 576 N.W.2d 364, 368 (Iowa 1998). The double jeopardy clause of the federal Constitution is not violated when judgment and sentence is entered against a defendant for assault while participating in a felony and willful injury. *Perez,* 563 N.W.2d at 629. Therefore, merger was not required. Counsel did not breach an essential duty by failing to request the court merge the charges.

AFFIRMED.