

IN THE COURT OF APPEALS OF IOWA

No. 7-138 / 96-0516

JUN 26 1997

MATTHEW M. TENSLEY,
Applicant-Appellant,

000521

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

On appeal from the denial of his application for postconviction relief.

AFFIRMED.

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, and William E. Davis, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

On appeal from the denial of his application for postconviction relief, appellant argues a myriad of errors were committed by the trial court and sentencing court. Appellant also claims his trial counsel, appellate counsel, and postconviction relief counsel were ineffective.

In 1992, appellant, Matthew M. Tensley, was found guilty by a jury of four counts of second-degree burglary, four counts of third-degree burglary, and one count of assault. The court sentenced Tensley to eight consecutive fifteen-year terms of imprisonment. Since Tensley had two prior felony convictions, the sentencing court determined the habitual offender provisions of Iowa Code section 902.8 (1991) applied. Tensley was required to serve a minimum of three years of each sentence, for a mandatory minimum of twenty-four years.

In his direct appeal Tensley's appellate counsel argued the trial court erred in failing to sever the multiple counts at trial and abused its discretion in sentencing Tensley to eight consecutive fifteen-year terms. Tensley filed a pro se brief arguing the sentencing court had erred in imposing eight habitual offender enhancements. The court of appeals affirmed. *State v. Tensley*, 93-93 (Iowa App. Jan. 25, 1994). Upon further review, the supreme court also affirmed Tensley's convictions in an unpublished opinion. *State v. Tensley*, 93-93 (Iowa June 22, 1994).

Tensley sought postconviction relief and raised numerous issues. Following a trial, the district court filed a ruling denying the application. The district court rejected the claim that one of the State's witnesses had lied at trial. The court found the witness was credible and disbelieved Tensley's witnesses. The court declined to address Tensley's challenge against multiple sentences since the issue had been previously addressed on appeal. The court found Tensley had not met his burden of proof to demonstrate a juror had been sleeping or that it would have prejudiced his case. The court rejected Tensley's claim his counsel had not informed him of a second plea agreement. The court concluded Tensley had not proven any basis for recusal of the trial judge. Finally, the court concluded Tensley had not met his burden of proof with respect to his claim that his counsel should have had closing arguments recorded and should have challenged prosecutorial misconduct which allegedly occurred during the argument.

Defendant asks on appeal this court consider the multiple counts, excessive punishment of his convictions, the habitual offender enhancement, and reversal of his convictions. These issues were previously adjudicated by the supreme court. This court cannot readdress the propriety of issues decided in a prior appellate decision. *See LeGrand v. State*, 540 N.W.2d 667, 669 (Iowa App. 1995); Iowa Code § 822.8 (1995). These matters are not appropriate for postconviction relief and are not reviewable by this court.

Likewise, defendant's claims of ineffective assistance of counsel for not objecting to prosecutorial misconduct, not reporting closing arguments, not informing the defendant of a second plea proposal; and the postconviction court failing to set aside his convictions based upon a showing of alleged perjury by a state's witness are rejected on this appeal. An appellate court gives weight to the findings made by a postconviction court regarding the credibility of witnesses. *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986). The postconviction court made explicit and/or implicit findings of credibility in rejecting these claims and we affirm.

The following issues remain on appeal: (1) trial counsel was ineffective in, (a) failing to seek the recusal of the presiding judge during a plea proceeding, (b) failing to raise defendant's constitutional challenges to the trial court's imposition of an illegal and excessive sentence, and (c) failing to object to a jury member sleeping during the trial proceedings; (2) the cumulative effect of defendant's trial counsel's errors denied him his right to the effective assistance of counsel; (3) his appellate counsel was ineffective; and (4) defendant's postconviction counsel was ineffective in failing to make an opening statement and in failing to specifically enumerate his constitutional challenges.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). Tensley has the burden of proving by a preponderance of the evidence his attorneys did not perform an essential

duty, and, as a result, he was prejudiced. *Id.* To demonstrate prejudice, Tensley must prove there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A court need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa App. 1987).

[T]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2070, 80 L. Ed. 2d 674, 700 (1984)).

Tensley's chutzpa is outlandish! He comes before this court asking for a new trial on postconviction relief, yet there is no question Tensley committed the burglaries he was convicted of under our state laws. At the postconviction relief hearing, in support of defendant's argument the prosecutor committed misconduct during closing arguments at trial, Tensley offered his personal notes from the original trial into evidence. (The closing argument was not recorded.) The first page of the

notes contains his contemporaneous comments in response to one of the victim's trial testimony. Tensley's supercilious remarks tell plenty. He writes:

That bitch is high. I wasn't going to rape her ass. I didn't touch her fucking tits. I might have touched her accidentally, but not on purpose. . . . There wasn't enough light in that room to see my face. . . .

The defendant is not entitled to perfect representation. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). After review of the record, there is no evidence the defendant was prejudiced by any of the complained defects in his representation at trial, appeal, or postconviction. Most of the defects at trial the defendant complains of were addressed by the postconviction court and found to be without merit. On the rest of the claims, defendant fails to adequately address how counsel's failures on appeal or postconviction prejudiced his interests. We determine there is no probability the outcome of the trial would have been different.

AFFIRMED.