IN THE COURT OF APPEALS OF IOWA

No. 6-509 / 95-1126

DAVID HILL,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
AUG 30 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Poweshiek County, James P. Rielly, Judge.

David Hill appeals from the denial of his application for postconviction relief.

AFFIRMED.

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Victoria Siegel, Wapello County Attorney, and Ron Kelly, Assistant Wapello County Attorney, for appellee.

Considered by Habhab, P.J., Huitink, and Vogel, JJ.

PER CURIAM

This is an appeal by an applicant claiming the district court should have granted his application for postconviction relief from his conviction for being a felon in possession of a firearm. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

In 1989, David Hill pled guilty to the crime of assault by displaying a dangerous weapon. Because the offense involved a firearm, under Iowa Code section 724.25(1), it is considered a felony.

In March 1991, Hill was charged with the crime of possession of a firearm by a felon, in violation of section 724.26. His defense was based on a claim he did not have dominion and control over the firearms, which had been found in his home. A jury found Hill guilty of the crime charged. His conviction was upheld on appeal. *State v. Hill,* No. 3-112 / 92-264 (Iowa App. July 6, 1993).

Hill filed an application for postconviction relief, claiming he received ineffective assistance of trial and appellate counsel. The district court denied the application for postconviction relief. Hill now appeals.

I. At his trial, Hill had wanted to raise a defense that he had been misled at the time of his 1989 guilty plea. He claimed he pled guilty with the understanding he would be able to possess firearms. The district court did not permit him to submit this mistake of fact defense to the jury. Hill then made an offer of proof in which he asserted the prosecutor told him he could apply to the sheriff's department for the

return of his guns, although he admitted the guns were not returned. Hill contends he received ineffective assistance of appellate counsel because counsel failed to raise the issue in the direct appeal that he had no knowledge it was illegal for him to possess firearms.

A postconviction applicant bears the burden to prove a claim that appellate counsel was ineffective for not raising a particular issue on direct appeal. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The tactical decision of which issues to raise on appeal is usually immune from subsequent attack by an aggrieved defendant claiming ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

Appellate counsel testified he believed there was evidence Hill knew he could not possess firearms. The matter had been discussed with Hill's probation officer and had been raised in a 1989 postconviction application which was dismissed. Also, contrary to Hill's assertions, there was no evidence the right to bear firearms was made a part of Hill's plea agreement. We find no breach of duty due to failure to raise this issue on appeal.

II. Hill contends he received ineffective assistance from his trial counsel due to counsel's failure to advise him in 1991 to file an application for relief from the 1989 conviction. He believes his misrepresentation claims should have been raised in an action to overturn the 1989 conviction, and which would have provided a defense to the charge of possession of a firearm by a felon.

We find no breach of duty by trial counsel on this issue. Trial counsel testified he had decided to concentrate on the criminal case. As he noted, an unsuccessful decision in the postconviction action would have undermined the mistake of fact defense he planned to present at the criminal trial. An attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. *State v. Foell*, 512 N.W.2d 809, 814 (Iowa App. 1993). We conclude trial counsel's decision not to file a postconviction action was a reasonable tactical decision.

After considering all issues raised in this appeal, we affirm the decision of the district court. Costs of this appeal are assessed to Hill.

AFFIRMED.