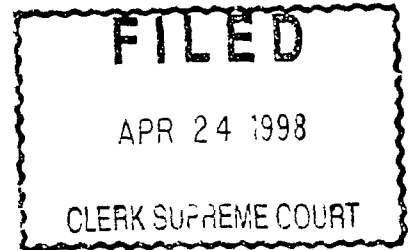


IN THE COURT OF APPEALS OF IOWA

No. 7-668 / 96-2086
Filed April 24, 1998



MICHAEL EUGENE BLACKWELL,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson,
Judge.

Michael Blackwell appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Roman Vald of Roman Vald Law Offices, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steven M. Foritano, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ. Streit, J., takes no part.

HUITINK, P.J.

Michael Blackwell appeals the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

Blackwell was charged with murder and burglary after he broke into Thea Duffek's home and brutally beat Duffek and her mother, Cynthia Neighbors, to death with a baseball bat.

Following a bench trial, the district court convicted Blackwell of two counts of first-degree murder and one count of first-degree burglary. The court sentenced Blackwell to two consecutive life terms of imprisonment for his murder conviction and a concurrent term of twenty-five years for his burglary conviction. This court affirmed the conviction by operation of law, and the supreme court denied further review. Blackwell subsequently filed an application for postconviction relief, alleging ineffective assistance of his trial counsel, John Wellman, based on his trial preparation and conduct at trial.

On appeal, Blackwell contends he was denied effective assistance of counsel based on several alleged failures of Wellman to investigate and present an adequate defense.

II. Standard of Review.

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction

petitioner asserts violations of constitutional safeguards—such as ineffective assistance of counsel—we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

III. Lack of Trial Preparation.

Blackwell asserts Wellman's assistance in preparing for trial was ineffective. He maintains Wellman failed to: (1) examine toxicology reports thoroughly; (2) interview Blackwell adequately; (3) review police reports with Blackwell; (4) investigate the paternity of Duffek's son for support of a diminished responsibility defense¹; and (5) interview and depose witnesses.

¹ The evidence indicates Blackwell is listed as the father on the child's birth certificate, and Blackwell supported the child under the belief he was the father. Genetic testing while Blackwell was incarcerated determined Blackwell was not the biological father of Duffek's son.

Trial counsel has a duty to adequately prepare for trial and failure to do so may constitute ineffective assistance of counsel. *State v. McCray*, 231 N.W.2d 579, 581 (Iowa 1975). When lack of preparation is asserted as the basis of denial of adequate representation, the entire record must be examined and the totality of the circumstances evaluated to determine counsel's effectiveness. *State v. Massey*, 207 N.W.2d 777, 780 (Iowa 1973). The supreme court has stated "[c]ounsel's duty to investigate and prepare a defense is not limitless and does not require counsel to pursue each possible witness and delve into every line of inquiry." *Id.* Defense counsel's duty is to make reasonable investigation or a reasonable decision that a particular investigation is unnecessary. *Origer v. State*, 495 N.W.2d 132, 136 (Iowa App. 1992).

Blackwell's ineffective assistance claims based on lack of trial preparation implicate Wellman's trial strategy and tactics. Upon reviewing the record, including Wellman's testimony at Blackwell's postconviction review hearing, we find Wellman's trial preparation was reasonable under the circumstances. Accordingly, we find Blackwell's claim without merit. *See Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa App. 1989) ("[w]hen counsel makes a reasonable tactical decision, this court will not engage in second-guessing").

Moreover, Blackwell does not suggest how anything discovered in further investigation would have affected his conviction. There was no question at trial Blackwell was the person who committed the crime. Wellman did not depose the

State's witnesses; however, he cross-examined them at trial. There is no evidence Wellman was unfamiliar with the circumstances surrounding the crime. Wellman testified at the postconviction hearing he reviewed police reports. He also testified he did not meet with Blackwell more than three times because Blackwell had no recollection of the events surrounding the murders. We conclude Blackwell was not prejudiced by Wellman's trial preparation. *See State v. Yaw*, 398 N.W.2d 803, 807 (Iowa 1987) (speculative claims of prejudice, unsupported by the record, will not support an ineffectiveness claim). We accordingly affirm the postconviction court on these issues.

IV. Representation at Trial.

Blackwell maintains Wellman was ineffective based on his conduct at trial. In support of this argument, Blackwell cites Wellman's failure to present intoxication, insanity, and diminished responsibility defense theories. He also cites Wellman's failure to present any defense witnesses.

"Selection of the primary theory or theories of defense is a tactical matter." *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984). Counsel's choice whether and which evidence to present is also a strategic matter. We must determine whether Wellman's conduct was reasonable. *See State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992)(improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel).

At the postconviction relief hearing, Wellman gave the following testimony:

Q. Did you list Doctor Taylor as a witness?

A. No.

Q. Why is that?

A. Because Doctor -- I would not call Doctor Taylor as a witness because his evaluation of Michael was not helpful. He could not -- he would have established for the State premeditation, deliberation, and intent to kill. He would not have helped us in any sort of mental-health defense.

...

Q. Mr. Wellman, about the other possibility, a defense of intoxication, did you discuss that with Doctor Taylor?

A. Yes. He did not feel that was a factor.

...

Q. If you contact a person as a potential expert witness in providing a defense and you decide that that person has not arrived at an opinion that would be helpful to you, is the existence of that person's opinion discoverable by the opposition?

A. It would be had we proceeded with another witness and that is one reason I told Doctor Taylor not to write me a report . . . it was of no use to us. It would only be used against us.

...

Q. There were several months that Michael was in jail prior to trial. What was the number of times you met with him and for what length?

A. I probably only met with him for maybe three times during all the time he was in jail.

Q. Why was that?

A. Because he had no information to give me. He couldn't -- I met with him to try to find out the facts of the case, and that is when he -- he was of no help. He couldn't remember anything

...

A. He [the state medical examiner] did establish through his testimony -- [that] these people were -- were beaten in a manner more than it would take if a person just had the intent to kill them. And I asked the medical examiner if indeed that in his opinion didn't indicate an act of -- with great passion, and he said yes; and an act that may have been preceded by a provocation that didn't allow the person who's acting in this great passion to cool down, and he said yes . . . that is about the only trial strategy I had by the time we came to trial.

...

Q. What was the purpose in not calling any witnesses or presenting any defense?

...

A. The defense hopefully came from the State's evidence. . . .

The district court denied Blackwell's application.

We conclude Wellman's decision not to present intoxication, insanity, or diminished responsibility theories was a reasonable, strategic choice. Wellman's decision not to offer defense witnesses was also reasonable under the circumstances. *See Kellogg v. State*, 288 N.W.2d 561 (Iowa 1980) (failure to call witnesses not ineffective assistance of counsel when such witnesses would not have been helpful to defendant's case). We hold Wellman's assistance was effective. *See State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984) ("[w]hen trial counsel makes a reasonable decision concerning strategy, [reviewing courts] will not interfere simply because the chosen strategy does not achieve the desired result").

We note Blackwell fails to establish a reasonable probability the outcome of the case would have been different had Wellman presented witnesses or theories of intoxication, insanity, or diminished responsibility. *See State v. Yaw*, 398 N.W.2d at 807. The district court considered Blackwell's assertions he did not have the intent to commit first-degree murder. In its verdict, the court stated "[s]uch contentions [that Blackwell did not have the requisite state of mind to commit first-degree murder] are wholly without merit." In addition, evidence of Blackwell's blood alcohol content was before the court. We find Blackwell was not prejudiced by Wellman's conduct at trial. We affirm on this issue.

Upon considering all of Blackwell's claims, we conclude the postconviction court correctly denied his application for postconviction relief. We affirm the postconviction court decision in its entirety.

AFFIRMED.