FILED
MAY 25 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-164 / 91-1947

000197

ROGER WILLIAM GREAR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

The applicant appeals from the district court's judgment dismissing his application for postconviction relief challenging his 1986 conviction for first-degree robbery. **AFFIRMED.**

Elizabeth S. Kruidenier of Parrish & Kruidenier, Des Moines, for applicant-appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for respondent-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J. 000198

Applicant-appellant Roger William Grear appeals the dismissal of his application for postconviction relief challenging a 1986 conviction of first-degree robbery. Grear contends his trial counsel was not effective because he (1) did not conduct effective cross-examinations, (2) allowed defendant to testify at trial, (3) failed to seek to suppress an identification, and (4) did not have voir dire and the opening and closing arguments recorded. Grear contends he is entitled to a presumption of prejudice. We affirm.

Grear concedes there are facts showing he and Paul Palmer entered an Apco Service Station at S.E. 14th and Maury Street in Des Moines. Palmer told the attendant at the station he and Grear were there to rob the store. While the robbery was taking place, Palmer handed Grear an air pistol and pulled out a hand gun. The attendant gave the men money and they left.

Next the two men went to a service station at 1834 Hubbell Avenue. Grear entered the store carrying the air pistol and Palmer entered carrying the hand gun. The men told the clerk they were there to rob the store. The men took a bag of money and left in their car.

There is some dispute about what happened next. The State contends that with Palmer driving and Grear in the passenger's seat, the car sped through Des Moines with Grear shooting a gun out of the car.

Grear does not dispute in the 1700 block of Madison Street the car hit a retaining wall and was not capable of being driven. Grear was stopped by the police while walking in the 1800 block of East 14th Street.

After his conviction, Grear's appellate counsel moved to withdraw under Rule of Criminal Appeals 104.

Then an application for postconviction relief was filed and denied.

Grear first contends that his trial counsel failed to act as an advocate.

The State contends Grear has the burden to prove by a preponderance of the evidence his trial counsel failed to perform an essential duty and that prejudice resulted. The State, citing Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066, 2067, 80 L. Ed. 2d 674, 696 (1984), contends to succeed Grear must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefor.

Grear contends his trial counsel failed to subject the prosecution's case to meaningful adversarial testing, thus prejudice must be presumed. He relied on United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), to support this argument.

Grear does not claim to show prejudice. We do not agree with the interpretation Grear attempts to put on Cronic and we do not find it relieves him on the facts of this case from showing prejudice. In Cronic, the court

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recognized prior cases where it had concluded a trial is not fair if the accused is denied an attorney at a critical stage of his or her trial or if trial counsel entirely fails to subject the prosecution's case to what the court refers to as meaningful adversarial testing. In either such case no showing of prejudice was required. Cronic, 466 U.S. at 659, 104 S. Ct. at 2047, 80 L. Ed. 2d at 668. However, Grear has failed to show such a denial of counsel that he should not be required to show prejudice. His attorney was with the Polk County Public Defender's office. He had been in practice since 1973 and had been an attorney with the Public Defender's office since January 1978. He tried from 18 to 40 criminal matters a year. He testified at the postconviction hearing and gave reasons for the strategy he employed. Grear has failed to show he was denied counsel at a critical stage of his trial or that his counsel failed to subject the prosecutor's case to an adversarial test to the degree that he need not show prejudice to prevail. Grear having failed to show any required prejudice, we affirm.

AFFIRMED.