IN THE COURT OF APPEALS OF IOWA

No. 6-535 / 95-1850

DWIGHT MURRAY,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
NOV 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

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

Anna Wirt O'Flaherty of the O'Flaherty Law Firm, Swisher, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Denver D. Dillard, County Attorney, and Scott C. Peterson, Assistant County Attorney, for appellee.

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

STREIT, J.

Defendant appeals the district court's denial of his application for postconviction relief. He argues the district court erred in finding his trial counsel was not ineffective. We affirm the district court.

In July 1991, Dwight Murray was found guilty by a jury of first-degree robbery and second-degree burglary. At trial, Murray was represented by Gary L. Robinson. The robbery victim, an 81 year old woman, died from injuries sustained during the robbery. Murray was tried by a jury and convicted of first-degree murder. Robinson also represented Murray at the murder trial. All of Murray's convictions were affirmed on appeal. (*See State v. Murray*, 512 N.W.2d 547 (Iowa 1994)).

Murray filed an application for postconviction relief alleging several instances of ineffective assistance of counsel. Following a hearing, the district court denied the application.

Murray appeals. He argues his trial counsel, Robinson, was ineffective for failing to: (1) obtain a shoeprint and handwriting expert; (2) be present when Murray provided handwriting exemplars; (3) suppress the handwriting exemplars that were incriminating because of Murray's misspelling of a name; (4) conduct an adequate pretrial investigation, or, in the alternative, hire an investigator that would have helped to impeach a State's witness; and (5) request that a record be made of jury selection and

opening and closing arguments. Murray maintains his appellate counsel did not raise these issues on direct appeal because they did not appear in the record.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When, however, a postconviction petitioner asserts violation 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.*

When a postconviction applicant claims ineffective assistance of criminal trial counsel, the applicant assumes the burden to establish by a preponderance of evidence two particulars. *Schertz v. State,* 380 N.W.2d 404, 408 (Iowa 1985). First, the applicant must show that sufficient reason exists for not having raised the issue on direct appeal. *Hinkle v. State,* 290 N.W.2d 28, 31 (Iowa 1980). Secondly, by an examination of the circumstances the applicant must demonstrate counsel's inadequacy of representation. *Id.* at 30-31.

Appellant has made the proper showing that ineffective assistance of counsel was not raised on the criminal convictions appeal because evidence of that issue was not contained in the trial records. Thus, Appellant has met the first requirement.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696,

104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

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. at 697, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700).

In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131. Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *See Hinkle*, 290 N.W.2d at 34.

Murray's counsel acted within the bounds of a defense counsel's essential duties. Murray has failed to present argument or authority to support his first four

contentions on appeal under Iowa Rule of Appellate Procedure 14(a)(5). The only issue that needs to be addressed is Murray's contention regarding an inadequate record because Robinson failed to assure that voir dire, opening statements, and closing arguments were recorded.

Murray argues Robinson was ineffective for failing to request that jury selection, opening statements and closing arguments be recorded to preserve a complete record. Iowa Rule of Criminal Procedure 18(4) provides that such stages of the proceedings may be reported upon request of any party. Iowa R. Crim. P. 18(4). The failure to report the jury selection process, opening statements and closing arguments does not in and of itself constitute ineffective assistance of counsel. Failure to make such a request would fall within improvident trial strategy, miscalculated tactics, and mistakes in judgment which do not necessarily constitute ineffective assistance of counsel. *See Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Murray must show he has been prejudiced by the failure to report these proceedings. Since no reasonable probability of a different outcome exists in this case, we hold the district court was not in error for denying appellant's petition for postconviction relief. We do not preserve issues concerning ineffectiveness of counsel for further postconviction proceedings.

AFFIRMED.