

IN THE COURT OF APPEALS OF IOWA

No. 7-556 / 96-1554

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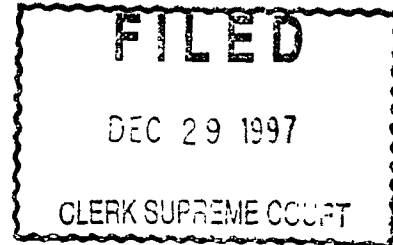
JACK SPENCER EVANS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Van Buren County, Dan F. Morrison,
Judge.

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

Amanda Potterfield of Johnston, Potterfield & Nathanson, P.C., Cedar Rapids,
for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Robert Glaser,
Assistant Attorneys General, and Richard H. Lytle, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Jack Evans appeals the district court's denial of his application for postconviction relief. Evans alleges several instances of ineffective assistance of counsel. We affirm.

The State accused Evans of shooting Della Forbes, an eighty-one year old woman, five times at close range with a .357 using .38 shells. On September 18, 1990, police officers went to the Evans residence to inquire about Evans' gun and obtained possession of it. Ballistics tests showed this gun to be the murder weapon. On September 19, 1990, two DCI agents went to Evans' house and asked him questions. The agents had a search warrant but they did not have an arrest warrant. They read Evans his *Miranda* rights and he signed a waiver form. About one-half hour into the questioning, the agents informed Evans his gun had been identified as the murder weapon and he was a suspect. Evans immediately stopped the interview. The agents discovered the search warrant contained an incorrect legal description. One of the agents left and the other stayed with Evans to ensure no evidence was destroyed.

The remaining agent, Hedlund, and Evans were silent for about one-half hour until Evans asked Hedlund if he could ask him a few questions. Hedlund reminded Evans he had asked to stop the interview and Hedlund could talk to Evans only if Evans waived his *Miranda* rights. No questions about the murder were brought up

until Hedlund redirected the conversation to that subject. Evans then made several incriminating statements.

Evans' trial counsel filed a motion to suppress the statements asserting rights under the Fifth, Sixth, and Fourteenth Amendments. The trial court denied the motion. On appeal, this court reversed the trial court. Upon further review, the supreme court vacated the decision of this court and affirmed the decision of the trial court. The supreme court ruled the interrogation was not custodial and Evans' Sixth Amendment right to counsel had not attached. Evans also alleged ineffective assistance of counsel and the supreme court preserved four areas for postconviction proceedings:

- 1) failing to object to autopsy pictures;
- 2) failing to object to evidence regarding his exercise of his right to remain silent;
- 3) failing to object to hearsay evidence; and
- 4) failing to object to the refusal of the trial court to give an alibi instruction.

At the postconviction hearing, Evans filed a motion to amend the application for postconviction relief to allege ineffective assistance of appellate counsel. The district court allowed the amendment. Evans then enlarged his claims of ineffective assistance of trial counsel outside of those areas approved by the supreme court. Specifically, Evans alleged trial counsel was ineffective in:

- 1) failing to introduce evidence of Evans' intellectual deficiencies to support the motion to suppress Evans' statements to DCI agents;

- 2) ~~failing to introduce exculpatory physical evidence available prior to trial;~~
- 3) ~~failing to properly investigate and present evidence concerning Evans' physical abilities and his ability to commit the crime; and~~
- 4) ~~failing to properly investigate and present evidence on the victim's time of death.~~

Once again, Evans' claims were enlarged beyond those approved by the supreme court because his counsel at the postconviction relief hearing alleged the claims were not preserved because appellate counsel had been ineffective. We note counsel on appeal and counsel at the postconviction relief hearing were one and the same.

I. SCOPE OF REVIEW. Where, as here, the postconviction petitioner asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances. *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980). This is the equivalent of a de novo review. *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL. The State argues Evans has expanded his claims for postconviction relief beyond what the supreme court preserved on direct appeal. Evans alleges these issues were properly before the district court at the postconviction relief hearing and are now properly before this court because his counsel at the postconviction relief hearing claimed ineffective assistance of appellate counsel and made a motion to amend the application for postconviction relief.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show his claim was preserved

for review by being made on direct appeal. *LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995). However, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence sufficient reason or cause for not having raised the issue on direct appeal. *Id.* Ineffective assistance of appellate counsel may provide “sufficient reason” to permit the issue of ineffective assistance of trial counsel to be raised even though Evans did not do so on direct appeal. *Id.*; *Hinkle*, 290 N.W.2d at 31. Thus, prior to determining the merits of the new issues, we must proceed to an examination of the totality of the circumstances under which the postconviction court’s ruling was made to determine if Evans has established by a preponderance of the evidence the inadequacy of his appellate counsel. *Hinkle*, 290 N.W.2d at 31. If Evans was competently represented on appeal he cannot now raise the new claims. *Id.* The same standards applied to trial counsel competency apply in measuring the competency of appellate counsel. *Id.*

The defendant bears the burden of demonstrating ineffective assistance of counsel by a preponderance of the evidence. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). “A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). To prove

counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. The court will generally presume counsel is competent, and we will not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered trial strategy."

Id. (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95).

"The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Kone*, 557 N.W.2d at 102. It is not enough to simply claim counsel should have done a better job. *Dunbar*, 515 N.W.2d at 15. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation would have changed the outcome. *Id.*

The test for prejudice is whether counsel's failure worked to Evans' actual and substantial disadvantage so a reasonable possibility exists that but for the trial attorney's unprofessional errors the resulting conviction would have been different. *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). "A reasonable probability is one sufficient to undermine confidence in the outcome." *Kone*, 557 N.W.2d at 102.

Evans' filed a motion to amend the application for postconviction relief to allege ineffective assistance of appellate counsel and a supporting affidavit by his appellate counsel claiming she did not have sufficient time to prepare an adequate appeal. As Evans points out, the trial court did allow the amendment. But, we see nothing in the record, nor does Evans direct us to any, where Evans proved by a preponderance of the evidence his appellate counsel was ineffective. We find the affidavit by Evans' appellate counsel is a statement she should have done a better job and would have if she had more time. There is no showing this fact would have changed the outcome. We find Evans failed to preserve all of the issues raised in this appeal. Notwithstanding that finding, we note the trial court allowed those issues to be presented and we agree with the trial court's conclusion, "trial counsel's questioning and presentation of evidence did not fall outside the normal range of competency, and there is no reasonable probability that a different approach to the evidence would have resulted in a change in the jury's verdict." Therefore, even though we find failure on the part of Evans to preserve all of the issues raised in this appeal, we have examined those issues and find them to be without merit. The only issue in this case that deserves further discussion is the claim regarding the testimony of Juanita Meyer.

We may examine the prejudice element prior to determining whether counsel's performance is deficient. *Wissing*, 528 N.W.2d at 564. We find there is no reasonable possibility the resulting conviction would have been different had trial counsel

objected to the lack of foundation for Juanita Meyer's testimony. The weight of the evidence against Evans is very strong and we find the absence of Juanita Meyer's testimony would not have changed the verdict. The State presented substantial evidence against Evans including: the police identified Evans' gun as the murder weapon; they found the gun in Evans' home; Evans testified he burned an empty ammunition box on either September 11 or 12, but the police testified the box was not in the burn barrel on September 18 when an officer searched it, but it was in the barrel on the nineteenth; Evans admitted remorse; and witnesses testified about Evans' ability to shoot a gun.

There is overwhelming evidence of Evans' guilt. The outcome of this case would have been the same regardless of the performance of counsel. As such, Evans has failed to satisfy the prejudice component of his ineffective assistance of counsel claim and, therefore, we affirm the decision of the district court.

AFFIRMED.