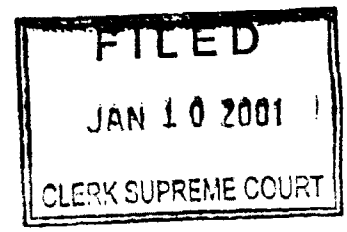
IN THE COURT OF APPEALS OF IOWA

No. 0-584 / 99-0939
Filed January 10, 2001



DOUGLAS ALLEN BAKER,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Polk County, Gregory E. Hulse, Judge.

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

Christopher A. Kragnes, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

VOGEL, J.

Douglas Baker appeals the district court's denial of his application for postconviction relief. He claims his trial counsel should have objected to a jury instruction that he alleges was given in violation of ex post facto laws under both the United States and Iowa constitutions. We find Baker was not prejudiced by the contested jury instruction and affirm.

Background facts. On July 24, 1995, Dawn Tallman returned to her home with her three children and, upon opening the automatic garage door, found an unfamiliar vehicle parked in the garage. She parked her minivan behind the vehicle and observed two men leaving her home carrying a television. When she yelled at them, the men returned into the home with the item and three men then exited into the garage. When Tallman refused to move her vehicle so the men could extract their own car from the garage, they rammed the minivan, attempting to push it out of their way. When this tactic was unsuccessful, Baker ordered Tallman out of the car. She refused. Angered, Baker opened Tallman's car door and attempted to forcibly remove her from the minivan. Tallman began kicking and jabbing at him. She was injured in the ensuing scuffle. Baker then yelled to his accomplices to get the gun. Rather than obey the order, the other men fled on foot. Baker quickly followed.

Baker was convicted in a jury trial of Robbery in the Second Degree in violation of Iowa Code sections 711.1 and 711.3 (1995) and Burglary in the First Degree in violation of Iowa Code sections 713.1 and 713.3 (1995). He was sentenced to consecutive ten-year and twenty-five year indeterminate terms.

Baker's conviction was affirmed on appeal. *State v. Baker*, 560 N.W.2d 10 (Iowa 1997). His application for post conviction relief was later denied and he now appeals alleging ineffective assistance of both trial and appellate counsel.

Scope of review. To prevail on his claim of ineffective assistance of counsel, the defendant must ultimately show that his attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992); *see Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985). The same standards for competency apply to trial counsel and any subsequent counsel. *Id.* Representation is presumed competent and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *McKettrick*, 480 N.W.2d at 55.

In alleging ineffective assistance of counsel, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See McKettrick*, 480 N.W.2d at 56; *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Ineffective assistance of counsel. Baker alleges an ineffective assistance of counsel claim on two separate grounds. First, he argues his trial counsel was ineffective in failing to properly object to the relevant jury instruction

based on ex post facto grounds. Second, Baker maintains his appellate counsel was ineffective in failing to raise this claim on direct appeal.

Baker maintains the trial court improperly instructed the jury on the definition of an "occupied structure," which caused him to be punished for activity that was not criminal at the time of commission. Baker was convicted under Iowa Code sections 713.1 and 713.3. Iowa Code section 713.1 states:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code section 713.3 states:

> A person commits burglary in the first degree if, while perpetrating a burglary in or upon an *occupied structure in which one or more persons are present,* the person has possession of an explosive or incendiary device or material, or a dangerous weapon, or intentionally or recklessly inflicts bodily injury on any person. . . . (emphasis added)

Baker's main contention is that Tallman's presence in the driveway of her home did not constitute the presence of a person within the "occupied structure" as defined by statute at the time of the commission of the crime.

The jury instruction given by the trial court maintained, "An 'occupied structure' is any home and the grounds surrounding it. Such structure is an 'occupied structure' whether or not a person is actually present." Baker's trial attorney objected to this instruction at trial, stating:

> Your Honor, I object to proposed Instruction No. 23. I don't believe that is the law, and I don't believe that that's the stock instruction. I

> don't think that's the definition of an occupied structure. And so I object and take exception to that instruction.

On direct appeal, Baker's appellate counsel argued the above instruction incorrectly defined an "occupied structure." While not attacking the instruction on constitutional grounds, appellate counsel did assert the definition of an occupied structure should not include surrounding land, based on the language in *State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989). This is the same definition and the same case Baker argues in his post conviction application should have been given at trial. The supreme court affirmed the conviction. It found the driveway was an appurtenance to the home and, therefore, fell within the definition of an "occupied structure" provided in Iowa Code section 702.12 (1995) as follows:

> [a]ny building, structure, *appurtenances to buildings* and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. . . . (emphasis added)

In addition to this finding, the supreme court stated in dicta that, because the trial attorney did not adequately preserve error on jury instruction no. 23, this claim could only be pursued under an ineffective assistance of counsel claim. It continued, stating:

> In light of our holding as to the meaning of "appurtenance," we are convinced that if the court had submitted a proper instruction defining "occupied structure" and "appurtenance," there is no reasonable probability the jury would have reached a different result.

Baker, 560 N.W.2d at 14. We agree with the supposition of the supreme court and find even though his counsel at trial failed to properly object and appellate counsel failed to raise this as a constitutional claim on direct appeal, Baker has

not met his burden of showing, in light of the finding on direct appeal, that the result would have been different if an alternate jury instruction were used. Therefore, Baker has not shown he was prejudiced by the actions of his attorneys.

Further, Baker alleges his trial counsel was ineffective in that he improperly counseled Baker on the definition of an "occupied structure," causing him to reject a pre-trial plea offer. He contends if counsel had properly advised him, he would not have rejected such an offer. This argument, however, was not raised in his application for postconviction relief. Therefore, we cannot now consider it on appeal for the first time. *Williams v. State,* 421 N.W.2d 890, 893 (Iowa 1988).

We find Baker's trial and appellate counsel were not ineffective. Accordingly, we affirm the trial court's denial of his application for postconviction relief.

AFFIRMED.