IN THE COURT OF APPEALS OF IOWA

No. 8-412 / 97-1482
Filed October 29, 1998

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CLERK SUPREME COURT

ALLAN JACKSON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

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

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, and Shawn S. Wehde, Assistant County Attorney, for appellee.

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

HUITINK, J.

This is an appeal by an applicant claiming the district court should have granted his request for postconviction relief. Applicant claims he received ineffective assistance of counsel at his postconviction hearing. We affirm on appeal.

Allan Jackson was charged with delivery of a controlled substance (cocaine), in violation of Iowa Code section 204.401(1)(c)(3). The State alleged that on July 17, 1990, Jackson sold crack cocaine to A. L. Carter, who was cooperating with police officers. The transaction between Jackson and Carter was taped by means of an electronic transmitting device. The tape reveals two instances where Carter called the man from whom he purchased drugs, "Al." Also, another man came by, and Carter stated, "Come here Durrel[l]. What's happening man."

In March 1993, Jackson pled guilty to the charge of delivery of a controlled substance. As part of a plea bargain, he was given a suspended sentence and placed on probation.

While Jackson's case was pending, his cousin, Durrell Jackson, pled guilty in federal court to selling crack cocaine to Carter on July 31, 1990. During a sentencing hearing in Durrell's case, Carter admitted he often got applicant and Durrell confused. He testified he had purchased crack cocaine from both men. Evidence was also presented to show a police officer had once arrested Durrell, thinking he was Allan Jackson.

In March 1996, Jackson filed an application for postconviction relief, claiming he received ineffective assistance of counsel at the guilty plea proceedings. He also claimed there was new evidence (Durrell's admission of guilt) which showed he was not guilty. The district court denied the application for postconviction relief. Jackson appeals.

I. Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, an applicant must show: (1) the attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it denied applicant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

II. Jackson contends his postconviction counsel was ineffective because he did not raise the issue that his trial counsel was ineffective for failing to file a motion in arrest of judgment. Jackson asserts such a motion would have been successful because the district court failed to inform him he was waiving his right to confront and cross-examine witnesses, as required by Iowa Rule of Criminal Procedure 8(2)(b)(3).

We find there is no evidence to show Jackson was prejudiced by his counsel's failure to file a motion in arrest of judgment. Jackson has not shown he would have withdrawn his guilty plea if informed of his right to confront witnesses. Jackson repeatedly stated he did not want to go to prison. The plea bargain was very favorable to Jackson—he was given a suspended sentence and placed on probation. We

conclude Jackson has failed to show he received ineffective assistance of postconviction counsel for failing to raise this issue.

III. Jackson claims his postconviction counsel was ineffective because he failed to adequately question Durrell. At the postconviction hearing, Durrell was not specifically asked whether he had sold drugs to Carter on July 17, 1990. Jackson asserts if Durrell had been asked this crucial question, the outcome of the postconviction decision would likely have been different.

We determine Jackson's claim on this issue must also fail. There is no evidence to suggest what Durrell's testimony on this issue would be. A reviewing court cannot predicate error on speculation. *State v. Douglas,* 485 N.W.2d 619, 625 (Iowa 1992). We conclude Jackson has failed to show the result of his postconviction hearing would have been different if Durrell had been questioned about July 17, 1990. Jackson has failed to show he received ineffective assistance of counsel on this ground.

We affirm the decision of the district court denying the application for postconviction relief. Costs of this appeal are assessed to Jackson.

AFFIRMED.