IN THE COURT OF APPEALS OF IOWA

No. 1-108 / 90-696

FILED
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CLERK SUPREME COURT

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GREGORY JORDAN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

Jordan appeals the denial of postconviction relief challenging his 1986 conviction for second-degree robbery. **AFFIRMED.**

Stephen J. Rapp, Waterloo, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; and Thomas Ferguson, County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

On August 18, 1985, Gregory Jordan pocketed some jewelry from a department store, left the store without paying for the items, and entered another store in the mall. A security investigator from the first store saw Jordan pocket the items and followed him into the second store. She then obtained assistance from a uniformed security guard; the two returned to the second store, where they found Jordan browsing. When confronted by the security employees, Jordan assaulted them.

On the basis of these events, Jordan was charged with second-degree robbery. Following a jury trial, he was convicted of that crime.

On direct appeal Jordan contended the theft and the assault could not be combined to form the crime of robbery because they were separated in time and because the assault did not assist in an escape. He argued the evidence was insufficient to support the conviction. A three-member panel of this court reversed the conviction. We found that Jordan had terminated his escape at the time he was confronted with the security personnel and, consequently, the assault was not committed in order to further Jordan's escape from the scene of the theft.

However, upon further review the supreme court vacated our opinion and reinstated the conviction. State v. Jordan, 409 N.W.2d 184 (Iowa 1987). The supreme court concluded reasonable jurors could have found that Jordan

was in the process of escaping when he was confronted by the security personnel and then attempted to break free. The supreme court found that all the statutory elements of the crime of robbery were sufficiently supported to uphold the conviction.

Jordan later filed the present application for postconviction relief to challenge the 1986 conviction. The district court denied postconviction relief, and Jordan has appealed.

Jordan contends his appellate attorney rendered ineffective assistance. He alleges appellate counsel should have argued the trial court erred in not instructing the jury as requested by Jordan's trial counsel (that the escape stage of a robbery ends when the accused reaches a point of "relative safety"). With such an instruction, Jordan contends the jury could have found (1) that the escape stage of his alleged crime had ended before he was confronted by security personnel, and (2) that his assault therefore could not be combined with his earlier theft to form the crime of robbery.

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

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989); State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131. If it is more efficient to dispose of an ineffective assistance claim by looking to the question of prejudice, we will do so. See State v. Hildebrandt, 405 N.W.2d 839, 841 (Iowa 1987). To demonstrate prejudice, Jordan must prove there is a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed.2d 674, 698 (1984)).

We hold Jordan has failed to show appellate counsel rendered ineffective assistance. On direct appeal, counsel argued the evidence did not establish Jordan committed an assault "to assist or further [his] escape from the scene" of an intended theft. See Iowa Code § 711.1. This assignment of error was rejected. In support of his application for postconviction relief Jordan argues that if the jury had been differently instructed it could have

reached a different verdict: thus, appellate counsel was ineffective for failing to argue the jury instructions that were given were erroneous. Yet Jordan has failed to establish that the jury was improperly instructed. Without such a showing, Jordan has failed to establish that the result of his appeal would have been different. The trial court instructed the jury:

> With respect to the term "to assist or further one's escape from the scene,["] you are instructed that the assault, if any, need not take place inside or adjacent to the place where the theft, if any, occurred. It is sufficient if the assault, if any, was in the course of or during the escape stage. This includes the time, place and circumstances surrounding the theft, if any.
>
> The escape stage includes all steps or events in the process of escape which would fall within the active or continuous pursuit of the criminal actor.

We conclude this instruction gave the jury an adequate measure to determine whether Jordan's assault on the security personnel assisted or furthered an escape from the scene. Consequently, Jordan was not prejudiced by appellate counsel's failure to argue this exact issue. (We are not at all sure this argument was not subsumed in Jordan's direct appeal contention.) Because Jordan failed to establish any prejudice resulted from appellate counsel's alleged ineffectiveness, the district court properly denied the application for postconviction relief. We affirm.

AFFIRMED.