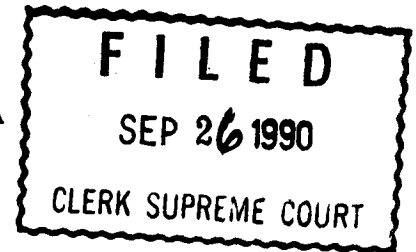


IN THE COURT OF APPEALS OF IOWA

No. 0-304 / 89-467



STEPHEN C. LEONARD,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Cherokee County, Frank B. Nelson, Judge.

Leonard appeals the district court denial of postconviction relief. **AFFIRMED.**

Phillip B. Mears of Mears, Zimmermann & Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, and John Wibe, County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

In 1983 the defendant, Stephen Leonard, was charged with the shooting of an individual who had killed Leonard's dog. The same day as the shooting, the police received a citizen's tip that the gun used in the shooting could be found in a van located on one Ed Linn's property. The police went to Linn's property, walked down a private easement, looked into the windows of the van, and saw the gun. The police contacted Linn and obtained his consent to a search of the van. Leonard was subsequently charged with attempted murder and numerous lesser crimes.

Prior to trial, Leonard's counsel moved to suppress the gun. The district court, however, ruled Leonard had no standing to challenge the search and seizure. The only pretrial deposition taken by Leonard's counsel apparently was that of Dr. Dougherty, the victim's attending physician. The deposition was taken before trial without Leonard's presence or knowledge. The deposition was read into the evidence at trial.

A jury subsequently convicted Leonard of attempted murder and numerous lesser charges. Leonard appealed, but his direct appeal was dismissed after the Iowa Supreme Court granted appellate counsel's motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104.

Leonard subsequently challenged his conviction by filing an application for postconviction relief. The district court denied his application, and Leonard has

appealed. Leonard argues his trial counsel was ineffective in failing to have Leonard testify at the suppression hearing to establish that the owners of the van had permitted him to store objects in the van. Leonard maintains that trial counsel was ineffective because he did not establish Leonard's standing to challenge the search. Leonard contends he had an expectation of privacy in the van's contents grounded in the fourth amendment. Consequently Leonard argues the police violated his right to privacy by trespassing on private property. Leonard insists the district court's reliance on the open fields doctrine established in United States v. Dunn, 480 U.S. 294, 108 S. Ct. 1134, 94 L. Ed. 2d 326 (1987) is misplaced because the search here occurred prior to the Dunn decision.

Leonard additionally claims that trial counsel was ineffective in failing to conduct adequate pretrial discovery. Leonard also claims appellate counsel was ineffective for concluding the appeal was frivolous.

Ordinarily, our review of postconviction relief proceedings is for errors of law only. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction applicant asserts violations of constitutional safeguards, such as ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. Id.

Leonard first argues he is entitled to a new trial because his trial counsel was ineffective in failing to adequately address the issue of Leonard's standing in connection with his fourth amendment claim. Leonard argues that trial counsel should have established he had a right to use the van, thereby providing him with "standing."

Iowa Code section 663A.8 generally bars applicants in postconviction actions from assigning grounds for relief which were not asserted on direct appeal. Section 663A.8 provides:

All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Postconviction proceedings should not be considered a substitute for direct appeal. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). We will ordinarily not allow a defendant to claim in a postconviction proceeding that the trial court erred on issues which were not properly presented for our review on direct appeal. Kane, 436 N.W.2d at 627. Thus, in order for Leonard to assign new error challenging his conviction, he must show not only a "sufficient reason" for failing to raise the issues on direct appeal, but must

also show actual prejudice resulting from these errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984).

In the present case, Leonard does not dispute that he failed to allege ineffective assistance of counsel concerning the issue of standing and insufficient pretrial discovery. Leonard maintains it was a result of the alleged ineffective assistance of trial counsel that prevented him from raising the issues on direct appeal. Under the test articulated in Polly, ineffective assistance of counsel may satisfy the sufficient reason element provided in section 663A.8. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984). In order to establish a claim of ineffective assistance of trial counsel, Leonard must show: (1) counsel's performance was so deficient as not to be functioning as "counsel" guaranteed by the sixth amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Our courts have consistently recognized a defendant in a criminal trial is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1984). Representation by counsel is presumed to be competent, and a postconviction applicant has the burden of proof to establish by a preponderance of the evidence that counsel was ineffective. Snethen v. State, 308 N.W.2d 11,

14 (Iowa 1981). Our courts have also ruled that improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980).

Under Iowa law, an attorney is not required to raise every colorable issue "at the risk of burying good arguments." Foster v. State, 378 N.W.2d 718, 717 (Iowa App. 1985) citing Jones v. Barnes, 463 U.S. 745, 752-54, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987, 994-95 (1983).

Leonard claims trial counsel breached his duty by failing to urge the third prong of the standing test to a fourth amendment challenge. In State v. Bakker, 262 N.W.2d 538 (Iowa 1978), the Iowa Supreme Court set forth three criteria for a fourth amendment challenge based on standing. Pursuant to Bakker, the requisite standing could be claimed by a person who (1) is charged with an offense of possession; (2) is legitimately on the premises when the search occurs; or (3) has a propriety or possessory interest in the property seized. 262 N.W.2d at 545. In the motion to suppress, trial counsel urged Leonard had standing because he was charged with the offense of possession. Leonard, however, now claims that trial counsel should have urged the third prong delineated in Bakker.

We believe Leonard's argument is misplaced, since the "automatic standing" rule set forth in Bakker, and derived

from Jones v. United States, 362 U.S. 257, 264-65, 80 S. Ct. 725, 732-33, 4 L. Ed. 2d 697, 704-05 (1960), was effectively overruled in Unites States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). In Salvucci, the Court ruled that "defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. The automatic standing rule of Jones v. United States, . . . is therefore overruled." 448 U.S. at 85, 100 S. Ct. at 2549, 65 L. Ed. 2d at 623. Salvucci thus repudiated the first and third prongs of the "automatic standing" test. The second prong was repudiated two years prior to Salvucci in Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). The present standard regarding standing is whether the defendant has shown a legitimate expectation of privacy in the particular area searched. State v. Baker, 441 N.W.2d 388, 391 (Iowa App. 1989).

In the present case the shooting took place in November 1982. Therefore, the correct analysis and applicable law regarding Leonard's standing was not grounded in the earlier Jones and Bakker standards, but rather in the Salvucci and Rakas pronouncements concerning a legitimate expectation of privacy in the area searched. Trial counsel cannot now be found to have been ineffective in failing to make a claim based on inapplicable law. We therefore find no breach of an essential duty here.

Nor do we believe Leonard suffered any actual prejudice. It is not sufficient that Leonard demonstrate the errors created a possibility of prejudice, he must show they worked to his substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Polly, 355 N.W.2d at 855. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

In Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 224 (1984), the Supreme Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Thus, under Oliver, only the curtilage, or the area to which is extended the intimacies of family life, is protected under the fourth amendment. In Unites States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326, 334 (1987), the Supreme Court recognized the difficulty of our nation's courts in grappling with the task of defining exactly to what extent curtilage extends. The Dunn court ruled that curtilage questions should be resolved by weighing four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the

area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by 480 U.S. at 301, 107 S. Ct. at 1139-40, 94 L. Ed. 2d 326. The Court recognized this is not an exact formula, but rather is useful to the degree it bears upon the question of whether a particular area is within the penumbra of the fourth amendment.

From the facts of the present case, it is apparent the van was placed on blocks only a few feet from a private alleyway which was often traversed by the police and other neighborhood people. The van itself was not protected from the public in any way. Only one window of the van was covered, that having been earlier broken by vandals. The van was on Linn's property, but was not in an enclosed area. Numerous other people had been given permission by Linn to store items in the van, and they in turn allowed others to use the van as well. We believe the van was so exposed to the public as to negate any reasonable expectation of privacy.

Leonard maintains, however, the police trespassed on private property in order to peer into the van. The government's intrusion upon an "open field" will generally not constitute a search merely because the intrusion is a technical trespass at common law. Oliver, 466 U.S. at 183, 104 S. Ct. at 1743, 80 L. Ed. 2d at 227. Leonard's alleged possessory interest is of little import, since a property

interest in premises is not by itself sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises. Rakas, 439 U.S. at 144, 99 S. Ct. at 430-31, 58 L. Ed. 2d at 402. While the alleyway behind the Linn home is privately owned, Linn and the other homes abutting the alley have permitted the public to use it. As a result, an "officer who walks upon such property so used by the public does not wear a blindfold; the property owner must reasonably expect him to observe all that is visible." State v. Dickerson, 313 N.W.2d 526, 531 (Iowa 1981).

Moreover, we find there was overwhelming independent evidence to convict Leonard. Leonard admitted shooting Gerald Britt to Kevin Weis. Melanie Weir testified she also heard Leonard admit he shot Britt. Terry Burkhart, an owner of a T-shirt store, testified when Leonard asked him to make several shirts that said "I love my dog," Leonard told him he had shot Britt. The record reveals Leonard was greatly distressed at the time his dog died, and told the Cherokee Police Chief James Ebert that if he found out who had shot his dog, "they are going to need an undertaker." We therefore find no evidence that but for trial counsel's alleged errors, the outcome of the trial would have been different. Consequently, we do not believe that appellate counsel breached any essential duty.

Leonard next maintains trial counsel was ineffective in failing to conduct additional pretrial discovery. Leonard

contends trial counsel should have deposed the Linns and Kevin Weir, because he would have discovered Leonard's alleged possessory interest in the van, and might have discovered a deal made between the police and Weir in exchange for Weir's testimony.

We initially note Leonard has offered no explanation as to why this issue was not brought up in direct appeal. Nor do we find any prejudice, even assuming, arguendo, that trial counsel's performance was deficient. Trial counsel performed extensive pretrial discovery. Counsel deposed Gerald Britt and Dr. Dougherty, obtained DCI lab reports, police reports, victim's report, Leonard's arrest record, hospital reports, firearms transaction receipt, and a number of other discoverable items. Leonard merely argues conjecture, alluding that there was a deal between the police and Weir to drop criminal charges against Weir in exchange for his testimony at trial. However, Leonard admitted at the postconviction hearing there was no deal, based on Weir's attorney's testimony. Leonard also claimed that Linns' testimony would have alerted trial counsel to his possessory interest in the van, yet Leonard also testified he had personally told trial counsel of his possessory interest. Thus, if Leonard himself alerted trial counsel, trial counsel's failure to secure that information through other means would not have resulted in a different outcome. We find Leonard has failed to satisfy the prejudice requirement on this issue.

Leonard lastly argues he should be offered a new trial because Dr. Dougherty's deposition testimony was introduced in violation of his sixth amendment right to confrontation. We do not, however, believe Leonard suffered any actual prejudice. Dr. Dougherty's testimony was merely cumulative as to Britt's testimony. Dr. Dougherty merely explained in medical terms the extent and nature of Britt's injuries. The trial court additionally excised portions of the deposition that described Dr. Dougherty's opinion concerning the seriousness and permanency of damage sustained by the shooting. We fail to see the outcome of the trial would have been different had the doctor's deposition been suppressed.

AFFIRMED.