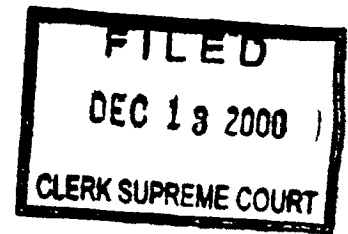


IN THE COURT OF APPEALS OF IOWA

No. 0-574 / 98-2171
Filed December 13, 2000



JOHN ANTHONY BOGDAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, G.C. Abel,
Judge.

Applicant appeals from the denial of his postconviction relief application.

AFFIRMED.

John Anthony Bogdan, Council Bluffs, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Richard Crowl, County Attorney, and Troyce Wheeler, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

PER CURIAM.

John Bogdan appeals from the denial of his postconviction relief application. He contends he was denied due process by the State's loss of allegedly exculpatory evidence. He also maintains he was denied effective assistance of counsel in a number of respects. We affirm.

Background Facts and Proceedings. John Bogdan repaired and salvaged old vehicles. On July 12, 1994, a friend informed him some "Mexican kids" had taken items from a fenced lot where he kept his vehicles. The friend further informed Bogdan the kids had run to the residence of the Davila family.

Bogdan and his friend drove to the Davila residence in Bogdan's truck. They encountered Roger Davila, Jr. and Dusty Rhodes and Bogdan accused them of having been in his car lot. He and his friend then left.

Bogdan later returned to the residence where he confronted Roger Davila, Sr. and Pete Vidales and accused their children of breaking into his lot. Bogdan then took from his truck a large plastic bag, which was blown up like a balloon. He placed the bag on the pavement, took a gas can from his truck and poured a trail of gas up to the bag. Bogdan lit the gasoline and a violent explosion occurred. The explosion broke a window in the Davila house and set off an alarm in a car parked nearby. Roger Davila, Sr. suffered loss of hearing for a brief time.

Investigators later found a black streak on the street and the remains of the plastic bag. Following tests it was their conclusion the explosion was caused by the ignition of a large plastic garbage bag filled with a mixture of oxygen and

acetylene. Bogdan's residence was searched and investigators found tanks of oxygen and acetylene. They also discovered three gas cans, rolls of plastic trash bags, and several individual bags. Laboratory technicians from the Federal Bureau of Alcohol, Tobacco and Firearms determined the plastic bag used in the explosion had been produced on the same machine which had made one of the rolls of bags and one of the individual bags found at Bogdan's residence.

On April 13, 1995, a jury convicted Bogdan of possession of an explosive or incendiary device, a class "C" felony, in violation of Iowa Code section 712.6 (1995). Bogdan filed a pro se appeal in which he raised the following four claims:

1. The court should grant a limited remand for the receipt of additional evidence concerning Bogdan's allegations of ineffective assistance of trial counsel.
2. Bogdan's trial counsel had not effectively presented the defense Pete Vidales was the perpetrator of the crime.
3. Bogdan's right to a fair trial had been prejudiced by the introduction of evidence of Bogdan's prior conviction.
4. The court had abused its discretion in sentencing Bogdan.

This court affirmed his convictions but preserved allegations of ineffective assistance of counsel for postconviction proceedings. *State v. Bogdan*, No. 95-1064, slip op. at 3 (Iowa App. Nov. 27, 1996). Bogdan's subsequent pro se postconviction relief application was denied. Bogdan now appeals from that denial.

Loss of Alleged Exculpatory Evidence. On July 13, 1994, three officers from the Pottawattamie County Sheriff's Office interviewed Bogdan about the incident. The interview was tape-recorded. Bogdan's trial counsel later made a pretrial request for the tape but was informed it could not be found. Bogdan

raised the claim at his postconviction relief proceeding he was denied his right to due process by the loss of the tape.

The State argues Bogdan has failed to preserve error on this issue because he did not raise it on direct appeal. We agree. Bogdan raised four issues in his pro se direct appeal. Loss of the tape was not one of them. In order to assert a claim in a postconviction proceeding, an applicant must show it was raised on direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). Postconviction proceedings are not an alternative means for litigating issues not properly presented on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). We recognize this rule is not absolute. *Id.* However, Bogdan represented himself on direct appeal. We conclude he has not shown sufficient reason for failing to raise this issue at that time. His claim on this issue is barred.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *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). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove

either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Bogdan's postconviction proceedings based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999) (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699).

Bogdan argues trial counsel was ineffective in several ways. Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Id.* Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *Id.* Bogdan's trial counsel used a legal defense claiming the evidence was not sufficient to show beyond a reasonable doubt the bag which exploded was, in fact, an explosive or incendiary device. He did not pursue the defense requested by Bogdan that Pete Vidales and "the Mexicans" were responsible for the explosion. We conclude trial counsel used reasonable trial strategy in this case and was not ineffective in any of the particulars set out by Bogdan. In addition, we conclude Bogdan has failed to establish prejudice. The evidence in this case, including the laboratory tests and items found in the search of Bogdan's residence, was overwhelming. We affirm the district court on this issue.

AFFIRMED.