

IN THE COURT OF APPEALS OF IOWA

No. 3-796 / 12-1930
Filed September 5, 2013

JEREMY FRANK JENKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke,
Judge.

Jeremy Frank Jenkins appeals from the dismissal of his application for
postconviction relief. **AFFIRMED.**

Darren J. Robinson of McEnroe, Gotsdiner, Brewer & Steinbach, P.C.,
West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, and Ricki N. Osborn, County Attorney, for appellee State.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Jeremy Frank Jenkins appeals from the dismissal of his application for postconviction relief. He argues his appellate counsel was ineffective in failing to raise on his direct appeal the issue of a late amendment to the trial information. We affirm the dismissal of his application for postconviction relief.

I. Facts and Proceedings.

In February 2007, Jeremy Frank Jenkins was charged by trial information with kidnapping in the first degree, sexual abuse in the second degree, domestic abuse assault, and felon in possession of a firearm. A jury found Jenkins guilty of kidnapping in the third degree and assault with intent to commit sexual abuse—two lesser-included offenses. The State moved to amend the trial information post-trial to include a habitual offender enhancement for the kidnapping count. Jenkins resisted the amendment. The amendment was granted and Jenkins was sentenced with the enhancement. He appealed, but his counsel failed to raise the post-trial amendment issue, believing the issue was meritless in light of our supreme court's case *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985) (holding post-verdict amendment of trial information to include habitual offender enhancement is permissible).

On March 11, 2011, more than a year after Jenkins's direct appeal was completed, our supreme court overruled *Berney*, holding such a late amendment to the trial information is not permissible under our rules of criminal procedure because amendments may only be made during trial, and the trial concludes when a jury renders its verdict. *State v. Bruce*, 795 N.W.2d 1, 4 (Iowa 2011) (interpreting Iowa R. Crim. P. 2.4(8)(a)). Jenkins filed an application for

postconviction relief on March 23, 2011, alleging his appellate counsel was ineffective for failing to argue the amendment was improper. The trial court dismissed his application. He appeals.

II. Analysis.

We review claims of ineffective assistance of counsel de novo. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). To establish this claim, Jenkins must show his appellate counsel failed to perform an essential duty and prejudice resulted. *Id.* In *Liddell*, our supreme court considered a claim of ineffective assistance of counsel, which argued for a change in law. Though our supreme court agreed the law should be changed, it noted:

Our re-examination of our [prior holding] in no way disturbs our decision today to reject Liddell's ineffective assistance of counsel claim. Under the law in effect at the time, it would be patently unfair to adjudge Liddell's counsel ineffective for failing to foresee today's decision, which diverges from precedent. Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel.

Id. at 814 (internal citations and quotation marks omitted). The law in effect at the time of Jenkins's first appeal in 2008 was *Berney*, see 378 N.W.2d at 919. *Bruce*, decided in 2011, diverged from precedent and changed the law. 795 N.W.2d at 5. We cannot hold Jenkins's counsel ineffective for failing to foresee this divergence. See *Liddell*, 672 N.W.2d at 814.

AFFIRMED.