IN THE COURT OF APPEALS OF IOWA

No. 2-597 / 11-1038
Filed October 3, 2012

ROBERT L. HANES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

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

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, until withdrawal, and Kevin Cmelik, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Danilson and Mullins, JJ. Tabor, J., takes no part.

VOGEL, P.J.

This case is before us on appeal of the district court's denial of postconviction relief (PCR). Robert Hanes argues that his PCR counsel provided him ineffective assistance, for failing to challenge the effectiveness of his trial counsel. Hanes claims his trial counsel was ineffective for failing to file the proper appeal, and thereby preventing Hanes from challenging the district court's alleged error in declining to instruct the jury on self-defense. We affirm.

I. Background facts and proceeding

The jury could have found the following: Hanes and Betty were married for approximately twenty years, but divorced in May 2006. On April 1, 2006, Betty and the couple's two teen-aged children went to Hanes's home to deliver some food. The children stayed in the car while Betty went into Hanes's home. When Betty left the house, Hanes followed her. A scuffle followed, the details of which are in dispute. Later that evening, Betty went to the police station and reported that Hanes had grabbed her and punched her in the face. A similar rendition was given by Betty when she was deposed on September 22. On October 6, Betty filed a statement, recanting the details previously given, stating that her injury was self-inflicted: "I bumped my left cheek on the upper right corner of the driver's door." At trial, Betty stayed with her recantation and testified that when she was returning to her car, Hanes "hugged [her] or grabbed [her] after [she] kicked him."

On June 8, 2006, Hanes was charged with assault domestic abuse causing bodily injury in violation of Iowa Code section 708.2A(2)(b) (2005). Following a jury trial, Hanes was found guilty of the lesser included offense of

assault domestic abuse, a simple misdemeanor, on November 29, 2006. Allowing Hanes time to file post-trial motions, the district court did not enter judgment nor sentence Hanes until March 5, 2007. On April 5, 2007, trial counsel filed a notice of appeal with the Iowa Supreme Court as well as a motion to withdraw and application for substitute counsel; the State Appellate Defender's Office was appointed to represent Hanes on April 10, 2007. On May 3, the district court entered an order stating:

> The sentencing order reflects that the court inadvertently failed to state the crime for which the defendant was convicted. The court finds that the sentencing order should be amended to reflect that the defendant was convicted of the crime of Assault Domestic Abuse, a simple misdemeanor, in violation of Iowa Code section 708.2A(2)(a).

On May 7, 2007, the State Appellate Defender's Office filed a motion to withdraw noting that Hanes had been convicted of a simple misdemeanor and citing Iowa Code section 814.6(1)(a),[1] asserted Hanes had no right of direct appeal to the Iowa Supreme Court. On May 14, 2007, the district court ordered the "Appeal of the defendant's conviction shall come before the court" on July 16, 2007. On June 18, 2007, noting its receipt of a notice of appeal from a simple misdemeanor, our supreme court ordered Hanes to file a statement within fourteen days as to why discretionary review should be granted.[2]

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[1] "Right of appeal is granted the defendant from: (a) A final judgment of sentence, except in case of simple misdemeanor and ordinance violation convictions."

[2] *See* Iowa Code § 814.6(2)(d) ("Discretionary review may be available in the following cases: . . . d. Simple misdemeanor and ordinance violation convictions.")

On July 16, 2007, the district count entered an order dismissing Hanes's appeal to the district court because the notice of appeal was not timely filed.[3] Hanes's counsel, complying with the supreme court's June 18 order, filed a statement as to why discretionary review should be granted. The supreme court denied the request on November 7, 2007.

Hanes filed a pro se application for postconviction relief on March 23, 2009, and amended his application on June 3. On September 9, 2009, Hanes filed an application for appointment of postconviction counsel which was granted and counsel was appointed. After withdrawal of this PCR counsel and substitution of counsel,[4] and multiple continuances, the matter went to trial on April 6, 2011. The district court denied Hanes's application finding that even though trial counsel did not properly pursue a direct appeal, Hanes was not prejudiced by counsel's performance. This appeal follows.

II. Ineffective assistance of counsel

Ineffective assistance of counsel claims are reviewed de novo. *State v. Hischke*, 639 N.W.2d 6, 8 (Iowa 2002). When such a claim is made, our supreme court allows an exception to the general rule of error preservation. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Iowa Code section 822.8 (2009) provides that "[a]ll grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental, or amended

[3] "A party takes an appeal [of a conviction for a simple misdemeanor] by . . . filing with the clerk of the district court not later than ten days after judgment is rendered a written notice of appeal." Iowa R. Crim. P. 2.73(1).

[4] It is unclear whether Hanes makes this claim as to both his first PCR attorney (who represented him for eight months before withdrawing) as well as his second PCR attorney who took Hanes's case to hearing. For purposes of this appeal, we treat them as one and will refer to them jointly as PCR counsel.

application." The ineffectiveness of postconviction relief counsel provides sufficient cause under section 822.8 to excuse an applicant's failure to adequately raise an issue in prior proceedings. *State v*. *Dunbar*, 515 N.W.2d 12, 14 (Iowa 1994).[5]

Trial counsel is ineffective when their performance falls below the normal range of competency, and the inadequate performance prejudices the defendant's case. *Strickland v*. *Washington*, 466 U.S. 668, 687-88 (1984). Prejudice is shown by demonstrating a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v*. *Atwood*, 602 N.W.2d 775, 784 (Iowa 1999).

At the PCR hearing, PCR counsel argued that trial counsel was ineffective for failing to follow required appeal procedures, which caused Hanes prejudice because without a direct appeal he could not challenge the State's use of the contradictory testimony of his estranged wife. The district court entered a ruling denying this PCR claim finding:

> Although trial counsel clearly did not know the rules regarding simple misdemeanor appeals and the defendant's appeal was ultimately dismissed on a request for discretionary review, again, the defendant was not prejudiced. Even excluding all the testimony about the injury and how the injury occurred, the weight of the evidence still supports the jury's verdict of simple misdemeanor domestic assault. Thus, the defendant was not prejudiced and the petitioner is not entitled to the relief sought.

[5] That State urges us to reverse *Dunbar*, and while we generally agree with the State's statement that "the appellate courts of Iowa have more pressing business than to allow postconviction litigants to unilaterally place wholly undeveloped postconviction matters onto an already bustling appellate docket," we decline to do so.

In this appeal, Hanes argues that his PCR counsel was ineffective for failing to amend the pro se PCR application to allege his trial counsel was ineffective for failing to follow appeal procedures, which then precluded him from challenging the district court's refusal to instruct the jury on self-defense.

The PCR ruling acknowledged and we agree, trial counsel did not know the rules regarding the appeal of a simple misdemeanor, which resulted in both attempted appeals to be dismissed. However, Hanes must also show counsel's "deficit performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *See Dunbar*, 515 N.W.2d at 15.

To test for any possible prejudice, we review Hanes's ultimate assertion that trial counsel should have challenged the district court's decision to not give a self-defense instruction. This court reviews challenges to jury instruction for corrections of errors at law. *State v*. *Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). The trial court refused to give a jury instruction on self-defense, finding that there was "insufficient evidence in this record upon which to grant the defendant's request for a self-defense instruction." Iowa Code section 704.3 (2005) provides "[a] person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Substantial evidence of self-defense from any source justifies submission of a self-defense instruction. *State v*. *Rains*, 574 N.W.2d 904, 915 (Iowa 1998). If substantial evidence exists, the district court has a duty to give the requested instruction. *State v*. *Dunson*, 433 N.W.2d 676, 677 (Iowa 1988).

We agree with the trial court, there was no evidence, let alone "substantial evidence" that Hanes had a "reasonable belief" that force was necessary to defend himself. Betty initially claimed Hanes had struck her, but later recanted. But under either rendition of what happened, Betty claimed that she was trying to leave the scene when Hanes pursued her out of his house, grabbed her by the coat, and attempted to prevent her from getting into her vehicle. The alleged "imminent use of unlawful force" Hanes claims he was protecting himself from stems from Betty's testimony that she kicked him in the shin, after she tried to get away from him but before he placed her in an offensive, restraining hug. The parties' daughter, who was sitting in the car during the incident, testified Hanes struck Betty; Hanes did not testify nor offer any contrary evidence that would support giving the self-defense instruction. We find the trial court was correct in determining that Hanes failed to satisfy the burden of going forward with sufficient evidence to show that the defense applies. *See State v*. *Lawler*, 320 N.W.2d 831, 834 (Iowa 1982). Therefore, the trial court did not err in refusing to give this instruction and Hanes suffered no prejudice when PCR counsel failed to make this claim against trial counsel. *See Dunbar*, 515 N.W.2d at 15 (rejecting an ineffective assistance of counsel claim when a petitioner has failed to "identify how competent representation probably would have changed the outcome.").

Because we reject Hanes's claim on this ground, we do not need to reach the issue as to whether postconviction counsel rendered ineffective assistance of counsel. *See Osborn v*. *State*, 573 N.W.2d 917, 922 (Iowa 1998).

III. Pro se claims

Hanes generally alleges some form of prosecutorial misconduct in "traumatizing" the children by having police pick them up at school to take them to court. This was argued at the PCR hearing, but it was not addressed by the district court's June 29, 2011 ruling; therefore we have nothing to review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Moreover, Hanes fails to provide any authority for his argument. Where a party fails to comply with the rules of appellate procedure, we must not "assume a partisan role and undertake the [party's] research and advocacy" and we must dismiss the appeal as to those issues. *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999).

AFFIRMED.