

**IN THE COURT OF APPEALS OF IOWA**

No. 3-334 / 11-0600  
Filed May 15, 2013

**ORLANDO T. PROCTOR,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,  
Judge.

Orlando Proctor appeals the district court's dismissal 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, Bridget A. Chambers, Assistant  
Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher,  
Assistant County Attorney, for appellee State.

Considered by Doyle, P.J., and Danilson and Mullins, JJ. Bower, J., takes  
no part.

**DOYLE, P.J.**

Orlando Proctor appeals the district court's dismissal of his application for postconviction relief (PCR). He claims his trial counsel was ineffective. Upon our de novo review, we affirm.

Proctor was arrested following a traffic stop in February 2005, during which drugs and related paraphernalia were discovered in and around his vehicle. He was charged with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Proctor's first trial ended with a hung jury, and a mistrial was declared. His case was retried, and a jury found Proctor guilty as charged. This court affirmed his convictions on direct appeal. *State v. Proctor*, No. 06-1869, 2008 WL 508460, at \*5 (Iowa Ct. App. Feb. 27, 2008). In that ruling, we summarized the background facts and proceedings of Proctor's case as follows:

On February 8, 2005, police officer Albert Bovy noticed a car with a broken taillight. Officer Bovy followed the car into a gas station, and parked behind it. Before he could get out of the car, the driver of the other car, Orlando Proctor, got out of his car and started walking back towards the police car. Officer Bovy quickly got out of his car and informed Proctor of the broken taillight. In talking to Proctor, officer Bovy noticed a Blistex container on the ground near Proctor's vehicle. Proctor stated the Blistex was his, and it had fallen out of the car when he had gotten out. Proctor appeared to be very nervous. His pants pockets were pulled inside out.

Officer Bovy discovered Proctor's license had been suspended, and he arrested him for driving while suspended. Officer Bovy performed a search incident to arrest. He found a box of sandwich bags in the front pocket of Proctor's sweatshirt. Proctor also had \$140 in cash and a cell phone in his pockets. In the vehicle, officer Bovy saw a razor blade on the center console. About one and one-half feet under the vehicle was a sandwich bag containing a substance later determined to be 21.24 grams of cocaine base. The bag was sitting almost upright and did not look

like it had been out in the elements. The bag was of the same type as those found in Proctor's pocket.

Proctor was charged with possession of a controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(3) (2005), and failure to affix a drug tax stamp, in violation of section 453B.12. During the trial the State presented cell phone records showing Proctor received an average of seventy-six calls a day. Adam Galbraith, a member of the Tri-County Drug Enforcement Task Force, testified this level of calls was consistent with drug dealing. Galbraith testified the amount of crack cocaine found in this case was inconsistent with personal use. He stated generally a dealer would cut small amounts off a larger piece with a razor blade and place them in plastic baggies. Galbraith testified the crack cocaine found in this case contained more than ten dosage units.

Proctor's cell phone showed that just prior to his arrest he received several calls from a person identified as "Terri." Police officers traced the number to the home of Gail Griffin, where Terri Buckallew was living. Buckallew testified she thought she received Proctor's telephone number from his girlfriend. She stated she had no memory of calling his telephone number and did not recognize him. She admitted, however, that she had been a crack cocaine addict, and there would have been no reason for her to call him except to buy crack cocaine. She stated other people had access to the telephone in Griffin's house, but did not know of anyone else named Terri.

The jury found Proctor guilty of possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Proctor admitted to being a habitual offender. The district court denied Proctor's post-trial motions. He was sentenced to a term of imprisonment not to exceed twenty-five years on the delivery charge, and fifteen years on the tax stamp charge, to be served concurrently.

*Id.* at \*1.

In May 2008, Proctor filed a pro se application for PCR, which was later amended. He raised a multitude of claims, including claims of ineffective assistance on the part of his trial and appellate counsel. Following a hearing, the district court dismissed Proctor's application. Proctor appeals.

We normally review postconviction proceedings for errors of law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial

of constitutional rights, such as effective assistance of counsel, we review the claim de novo. *Id.* To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 158. The first prong requires proof that counsel did not act as a “reasonably competent practitioner” would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). We presume the attorney performed competently and avoid second-guessing and hindsight. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). To show prejudice under the second prong, a defendant must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Everett*, 789 N.W.2d at 158. A reasonable probability is one “sufficient to undermine confidence in the outcome.” *Id.* A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* at 159.

Proctor claims his trial counsel was ineffective in failing to call Angela Burford to testify at his second trial. During Proctor’s first trial, Angela Burford testified she and Proctor were engaged to be married and lived together. According to Burford, in the early morning hours of the day he was arrested, Proctor left their home, planned to stop at a store to purchase food, and then go do an odd job. She testified Proctor took a box of sandwich baggies as he planned to make lunch after shopping at the store. She also testified that before he left, she gave Proctor cash for car repairs. The trial resulted in a hung jury. Proctor’s counsel did not call Burford as a witness at the second trial. This trial resulted in Proctor’s conviction.

At the postconviction hearing, Proctor's counsel testified he had called Burford as a witness at the first trial to testify about the source of the \$140 that was found on Proctor at the time of his arrest and to corroborate Proctor's claim that the baggies found in his pocket were for lunch. After the trial ended with a hung jury and a mistrial declared, trial counsel spoke to the jurors. He did not ask about Burford, but "[t]hey told me almost unanimously that they did not believe anything that she said, that she was not a credible witness and if they had one recommendation for me, it was not to call her again." Counsel heeded that advice and stated "that was probably the main reason" he did not call Burford to testify at Proctor's retrial.

As the PCR court observed, trial counsel made a strategic choice not to call Burford as her "testimony was not received well by the jury in the first trial." We agree that in light of the information counsel received from the jury, counsel did not fail to perform an essential duty in declining to call Burford; any reasonably competent attorney would have made the same decision. Moreover, we agree with the PCR court that Proctor's claim fails on the prejudice prong as well. Proctor does not suggest Burford's testimony would have been more favorably received by the jury at Proctor's retrial. Additionally, considering the evidence in the record to support the jury's verdict, we conclude Proctor failed to show the outcome of his trial would have been any different had Burford testified.

Because Proctor failed to establish trial counsel breached an essential duty in his representation and that prejudice resulted, we affirm the denial of his PCR application.

**AFFIRMED.**