IN THE COURT OF APPEALS OF IOWA

No. 3-705 / 12-0933
Filed July 24, 2013

JERREDD ELKEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

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

Thomas P. Graves of Graves Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert DiBlasi, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Jerredd Elken appeals from the district court's denial of his application for postconviction relief (PCR). He claims his trial counsel and appellate counsel were ineffective. We affirm.

***I. Background Facts and Proceedings*.**

Elken's vehicle was stopped on December 6, 2007, after a West Des Moines police officer noted "suspicious activity" surrounding the vehicle. *See State v. Elken*, No. 08-1534, 2010 WL 625218, at *1 (Iowa Ct. App. Feb. 24, 2010). After discovering Elken did not have a valid driver's license, he was arrested for driving while revoked. *Id.* His passenger was arrested for harassment of a public official. *Id.* During an inventory search of the car, various items consistent with manufacturing methamphetamine were found, prompting an investigation by the Mid-Iowa Narcotics Enforcement. *Id.* Elken's passenger eventually pled guilty to conspiracy to manufacture methamphetamine and agreed to testify against Elken. *Id.*

Following a jury trial, Elken was convicted and sentenced. *Id.* Elken appealed. *Id.* On appeal, this court affirmed his convictions, and we preserved for possible PCR proceedings Elken's claim his trial counsel was ineffective for failing to object to a comment regarding his postarrest silence. *Id.* at *4.

In July 2011, Elken filed an application for PCR. He reasserted his preserved ineffective-assistance-of-trial-counsel claim, in addition to other claims not relevant here. Additionally, he asserted his appellate counsel was ineffective in not raising the issue of an illegal search of his vehicle. The State resisted.

Following a trial, the court entered its ruling denying Elken's application for PCR. Elken now appeals.

II. Scope and Standards of Review.

PCR proceedings are reviewed for errors of law. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). When a PCR application raises an issue of constitutional scope, such as ineffective assistance of counsel in violation of the Sixth Amendment, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

III. Discussion.

To prevail on his ineffective-assistance-of-counsel claims, Elken must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). 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). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Id.* 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.

A. Failure to Object to Testimony of Elken's Post-Arrest Silence.

On appeal, Elken asserts his trial counsel should have objected to the following testimony given on direct examination by a detective in the case:

> Q. And you had occasion to attempt an interview with Mr. [Elken]; correct? . . . A. I did.
> Q. And he did not speak to you; correct? A. He did not.

Elken contends the testimony violated his right to remain silent guaranteed by the Fifth Amendment to the United States Constitution. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment"). He contends his attorney should have realized the jury would have naturally and necessarily interpreted the questions and remark as a reference to his silence. *See State v. Hulbert*, 513 N.W.2d 735, 738 (Iowa 1994).

Elken's trial counsel testified his trial strategy was to highlight the differences between the behavior of Elken and Elken's passenger following their arrest and throughout the investigation. His trial counsel testified he sought to emphasize the fact that Elken had consistently denied involvement in any plan to manufacture methamphetamine, whereas Elken's passenger was inconsistent in her story throughout the investigation. The PCR court found Elken's trial counsel was acting with a reasonable—albeit unsuccessful—strategy in mind, and it determined Elken's ineffective-assistance-of-trial-counsel claim was without merit. Upon our de novo review, we agree.

Here, Elken's trial counsel explained that even if the prosecutor's question and the detective's subsequent answer had not occurred, the jury likely would

have assumed that Elken did not talk to the police. Thus the end result was the same and the limited testimony was not harmful. However, his trial counsel testified that an objection after the testimony and a ruling excluding the evidence would have made Elken appear as if he was hiding something and drawn more attention to his silence. We do not find that Elken's trial counsel's strategies and tactics here resulted in a breach of an essential duty.

Additionally, even if a successful objection had been made by counsel, Elken cannot prove the result of the trial would have been different. Here, in addition to Elken's passenger's testimony against him, the evidence established Elken was driving a vehicle filled with numerous supplies used for manufacturing methamphetamine. Given the evidence against him, it is unlikely the outcome of the case would have been any different had trial counsel objected to the limited statement concerning Elken's silence. Accordingly, we find Elken's ineffective-assistance-of trial-counsel claim fails, and we accordingly affirm the PCR court on this issue.

B. Failure to Challenge Legality of Search.

Elken also asserts the PCR court erred in not finding his appellate counsel was ineffective. He contends his appellate counsel should have challenged the legality of the search of the vehicle pursuant to *Arizona v. Gant*, 556 U.S. 332 (2009), a case decided after Elken's trial. We disagree.

"'[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Gant*, 556 U.S. at 338 (citation omitted); *see also State v. Christopher*, 757

N.W.2d 247, 249 (Iowa 2008). One exception is a search incident to a lawful arrest. *Christopher*, 757 N.W.2d at 249. Another well-recognized exception to the warrant clause is a vehicle inventory search. *State v*. *Huisman*, 544 N.W.2d 433, 436 (Iowa 1996) (citing *Colorado v*. *Bertine*, 479 U.S. 367, 371 (1987)).

In *Gant*, a defendant challenged the legality of a search of a vehicle under the search-incident-to-a-lawful arrest exception. 556 U.S. at 336. In that case, the United States Supreme Court found that where "an arrestee has been taken away from the vehicle, restrained, or is otherwise not within reach of the vehicle, a search incident to arrest can no longer be justified by the possibility the arrestee may secure a weapon or destroy evidence." *Vance*, 790 N.W.2d at 788-89 (citing *Gant*, 556 U.S. at 344). Nevertheless, the Court ruled that other exceptions to the warrant requirement authorizing an officer to search a vehicle could still apply to uphold the search. *Id.* at 790 (citing *Gant*, 556 U.S. at 346-47).

In this case, Elken asserts his appellate counsel should have argued his trial counsel was ineffective for failing to file a motion to suppress the evidence seized from the vehicle for the reasons expressed in *Gant*. However, as the State points out, and the PCR court ruled, the vehicle-inventory-search exception to the warrant requirement applies here, regardless of *Gant*'s limitation of the search-incident-to-arrest exception. *See id.* Trial counsel has no duty to raise a meritless argument. *State v*. *Braggs*, 784 N.W.2d 31, 35 (Iowa 2010). Consequently, we agree with the PCR court's determination that Elken failed to demonstrate prejudice.

IV. Conclusion.

For all the above reasons, we affirm the decision of the district court denying Watson's application for postconviction relief.

AFFIRMED.