IN THE COURT OF APPEALS OF IOWA

No. 7-127 / 05-2137
Filed April 25, 2007

RICKY JOE BLODGETT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, James Q. Blomgren, Judge.

Ricky Joe Blodgett appeals the denial of his postconviction relief application. **AFFIRMED.**

Eric Parrish of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble, and Cook, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, and Rose Anne Mefford, County Attorney, for appellee State.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury found Ricky Joe Blodgett guilty of first-degree robbery and first-degree burglary. Iowa Code §§ 711.1, 711.2, 713.1, and 713.3 (2001). On direct appeal, our court affirmed the judgment and sentences but preserved an ineffective assistance of counsel claim for postconviction relief proceedings. *State v. Blodgett*, No. 03-0229 (Iowa Ct. App. Dec. 10, 2003).

Blodgett filed an application for postconviction relief. Following an evidentiary hearing, the district court denied the application. Blodgett appeals, raising one ineffective assistance of counsel claim through appellate counsel and several other pro se claims.

I. Ineffective Assistance of Counsel

Blodgett argues that his trial attorney did not sufficiently investigate or pursue an intoxication/diminished capacity defense. Subsumed within this argument are assertions that his attorney did not call witnesses who might have supported such a defense, did not hire an investigator to help locate those witnesses, did not hire an expert witness regarding the potential intoxication defense, and did not utilize a mental health evaluation that was obtained early in the proceedings.

Our review of this ineffective assistance of counsel claim is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Blodgett had to show (1) the failure to perform an essential duty, and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984).

We conclude trial counsel did not breach an essential duty in failing to raise an intoxication/diminished capacity defense because counsel was simply following his client's instruction to forgo such a defense. The following testimony of trial counsel is instructive:

> Q. You stated you considered the intox defense but you didn't pursue it?
>
> A. Correct.
>
> Q. And why not?
>
> A. Well, a notice of that defense had been filed by [Blodgett's prior counsel], I believe it was, and Rick specifically told me he did not want to pursue that defense. And I only know that because I did briefly review my file, which is fairly large. I did go over correspondence, and one of the correspondence from Rick was that he was aware [prior counsel], I believe it was, had filed that as a defense. And he specifically did not want me to pursue that. So that was the first reason.

Trial counsel was not obligated to raise an issue that his client told him not to raise. *See State v. Stewart*, 445 N.W.2d 418, 421 (Iowa Ct. App. 1989) ("In assessing the reasonableness of an attorney's action we consider the attorney's action may be determined or substantially influenced by defendant's own statements or actions."). Accordingly, we affirm the district court's rejection of this ineffective assistance of counsel claim. In light of our reliance on this ground, we find it unnecessary to address Blodgett's contention that an intoxication/diminished capacity defense was consistent rather than inconsistent with his assertion that he did not commit the crimes.

II. Pro Se Issues

A. Failure to Recuse

Blodgett argues the judge who presided over the postconviction relief proceedings should have recused himself because he handled portions of the trial. Blodgett did not specifically raise and obtain a ruling on the recusal issue. Therefore, he has not preserved error on this question. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (stating "we will not consider a substantive or procedural issue for the first time on appeal").

Under this subheading, Blodgett also claims the same judge allowed the prosecutor to make "racial comments" during a deposition break. The issue of the prosecutor's comments was raised and addressed by the postconviction court. However, the judge's duty in this context was not raised or addressed. Therefore, this issue also was not preserved.

B. Double Jeopardy/Merger

Blodgett argues his double jeopardy rights were violated. In his view, "1st degree robbery and 1st degree burglary are the same just worded different." He seeks to have the two convictions merged pursuant to Iowa Code section 701.9. The State concedes error was preserved on this issue. Therefore, we will proceed to the merits.

Iowa Code section 701.9 states:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty on the greater of the offenses only.

"This provision is a statutory implementation of, and is coterminous with, the protection against former jeopardy guaranteed by the fifth amendment of the federal Constitution." *State v. Hickman*, 576 N.W.2d 364, 368 (Iowa 1998). "If the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater." *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001).

The jury was instructed that, to prove Blodgett guilty of first-degree robbery, the State would have to establish the following elements:

> 1. On or about March 13, 2002 the defendant had the specific intent to commit a theft.
> 2. To carry out his intention or to assist him in escaping from the scene, with or without stolen property, the defendant threatened Richard Nossaman with, or purposely put Richard Nossaman in fear of immediate serious injury.
> 3. The defendant was armed with a dangerous weapon.

The jury was instructed that to prove Blodgett guilty of first-degree burglary, the State would have to establish the following elements:

> 1. On or about March 13, 2002 the defendant entered the residence of Harvey Nossaman.
> 2. The residence of Harvey Nossaman was an occupied structure as defined in instruction number 20.
> 3. The defendant had no right, privilege or license to so enter the residence of Harvey Nossaman.
> 4. The residence of Harvey Nossaman was not open to the public.
> 5. During the incident a person was present in the occupied structure.
> 6. The defendant did so with the specific intent to commit a theft.
> 7. During the incident the defendant possessed a dangerous weapon.

It is evident that this alternative of first-degree burglary could have been committed without also committing the cited alternative of first-degree robbery. Specifically, burglary required proof of an unlawful entry and robbery required

proof of a threat or the placement of a person in fear of immediate serious injury. As one offense was not included in the other, Blodgett's double jeopardy/merger argument fails.

C. Search Warrant

Prior to his criminal trial, Blodgett filed a motion to suppress the results of the search of his truck on the grounds that the search warrant was invalid. In a detailed ruling, the district court denied the motion to suppress.

Blodgett now argues the evidence obtained in the vehicle search should have been suppressed because the search warrant relied "on information that is inaccurate, uses insufficient [descriptions], is lacking probable cause and . . . [was] improperly executed." The State asserts error was preserved on this issue. Assuming this to be true, we conclude the search of the truck was pursuant to a warrant that was supported by probable cause, as the trial court concluded. Alternately, the search was supported by the information in the officers' possession at the time of the vehicle stop, as the trial court concluded.

III. Disposition

We affirm the dismissal of Blodgett's application for postconviction relief**.**

AFFIRMED.