

IN THE COURT OF APPEALS OF IOWA

No. 7-239 / 06-1284
Filed July 12, 2007

DOUGLAS KINNEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Leo Oxberger, Judge.

Douglas Kinney appeals the district court's denial of his request for postconviction relief from his conviction on two counts of willful injury and one count of criminal mischief. **AFFIRMED.**

Kerri Keyte of Marks Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee State.

Considered by Zimmer, P.J., and Baker, J. and Beeghly S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts and Proceedings**

On October 5, 2002, Douglas Kinney and his wife went to Prairie Meadows Racetrack and Casino. They arrived at about 3:30 in the afternoon. Kinney drank beer while he was gambling. He brought \$600, lost that, got more money from an ATM, and lost that money as well.

At about 10:00 p.m. Kinney left the casino without his wife and went to his vehicle. Kinney drove his Chevrolet Tahoe through a metal security gate, and struck and destroyed a concrete planter. Kinney did not stop or slow down, but continued traveling at forty-four miles per hour through two sets of glass doors and into the casino. The vehicle did not stop until it struck the base of an escalator. Two people, Ardeth Klobnack and Sandra Veach, were seriously injured by Kinney's actions. After the crash, Kinney's blood alcohol limit was .141.

Kinney was charged with several crimes. Kinney's defense was that it was an accident and he did not mean to harm anyone. Kinney did not file a defense of intoxication, but still presented evidence to show he was intoxicated at the time of the incident. After a bench trial, the district court found Kinney guilty of two counts of willful injury and one count of criminal mischief. He was sentenced to three consecutive ten-year terms of imprisonment. Kinney's convictions were affirmed on appeal. *State v. Kinney*, No. 03-1149 (Iowa Ct. App. Feb. 9, 2005).

Kinney filed an application seeking postconviction relief. He claimed he received ineffective assistance because his defense counsel failed to diligently

pursue a defense of intoxication. At the postconviction hearing Kinney testified he drank nineteen to twenty-one beers at Prairie Meadows. He stated, “[A]bout an hour prior to the accident I started feeling a little funny . . . I was starting to feel the effects of the alcohol.” Kinney stated he had urinated on himself while still inside the casino, and had vomited once he got out to his vehicle. Kinney presented the testimony of Ronnette Gannon and Jolynne Farron, who had seen Kinney in the parking lot and testified he appeared intoxicated. Kinney also presented written reports from M.L. Rehberg, a toxicologist, and Dr. Kenneth Moon, Jr., which stated Kinney was more intoxicated at the time of the crash than was shown in his blood test.

Kinney’s defense counsel, F. John Spellman, testified he did not believe the testimony of Gannon or Farron would be necessary or helpful in any way. Spellman stated he had presented what he believed was the most persuasive evidence of Kinney’s intoxication, the blood alcohol test. He stated Kinney was shown on a security videotape while he was walking through the parking lot. He stated the videotape was better evidence than the testimony of the witnesses, who did not know Kinney or know how many drinks he had. Spellman also stated he did not believe an expert witness was necessary to show Kinney was intoxicated. He stated that under Iowa Code section 321J.2(8)(a) (2001), Kinney’s alcohol level at the time of the incident was presumed to be the amount determined at the time of the test.

The district court denied Kinney’s postconviction relief. The court noted Kinney “made dramatically inconsistent statements to others, including his trial attorney, regarding the number of drinks he consumed.” The court concluded:

The Court finds counsel did present a defense which included intoxication. The defense was unsuccessful because the Court rejected the defense, not because of trial counsel's performance. The evidence was overwhelming Mr. Kinney committed the crimes. The trial record clearly showed the Petitioner's actions were intentional. Petitioner failed to prove an expert witness if retained by trial counsel would have changed the outcome of the case. The Petitioner failed to prove counsel was ineffective and/or prejudice resulted

Kinney appeals the district court's denial of his postconviction relief claims.

II. Standard of Review

Our scope of review in postconviction proceedings is for the corrections of errors at law. Iowa R. App. P. 6.4; *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We review constitutional claims, such as ineffective assistance of counsel, de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984); *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). The petitioner must overcome a strong presumption of counsel's competence, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Merits

Kinney asserts his defense counsel did not adequately plead or argue a defense of intoxication. He believes Gannon and Farron should have been called to testify at his criminal trial. He claims defense counsel should have called experts, such as Rehberg and Dr. Moon, to testify to his level of intoxication. Kinney points out that willful injury and criminal mischief are both specific intent crimes. He contends his intoxication rendered him incapable of forming the requisite specific intent to be guilty of the crimes of which he was convicted. There was no testimony, however, that either expert was prepared to testify that Kinney was unable to form specific intent.

We first note that although Kinney did not file a formal defense of intoxication, the district court in his criminal trial clearly considered Kinney's intoxication as it pertained to specific intent. The court stated:

[E]ven if the alcohol consumed by the Defendant may have contributed to the defendant's actions, it did not prevent him from forming the specific intent to seriously injure Ms. Klobnack and Ms. Veach nor did it prevent him from forming the intent to purposely damage, alter, deface, or destroy the property belonging to Prairie Meadows.

In order to prevail on his claim of ineffective assistance of counsel, Kinney would need to show that if counsel had presented the additional evidence he proposes, the result of the proceeding would have been different. See *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994) (noting a postconviction applicant must show a reasonable probability that but for counsel's conduct, the result of the proceeding would have been different). The district court found, and we agree, Kinney has not shown there is a reasonable probability the result of his

criminal trial would have been different if the additional evidence had been presented. Kinney presented the most pertinent evidence of intoxication, the results of his blood test and the videotape. The evidence he now proposes would not be more persuasive than that evidence, it would not lead the district court to come to a different result.

Kinney has failed to show he was prejudiced by counsel's performance. If an applicant fails to show prejudice, we do not need to consider whether defense counsel failed to perform an essential duty. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). We determine Kinney has failed to show he received ineffective assistance. We affirm the decision of the district court.

AFFIRMED.