IN THE COURT OF APPEALS OF IOWA

No. 7-774 / 06-1824
Filed December 12, 2007

GEORGE E. PITTMAN, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Buena Vista County, Don E. Courtney, Judge.

George E. Pittman, Jr. appeals the district court's denial and dismissal of his application for postconviction relief. **AFFIRMED.**

Jack B. Bjornstad, Bjornstad Law Office, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Dave Patton, County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

George E. Pittman, Jr. appeals the district court's denial and dismissal of his application for postconviction relief. We affirm.

Pittman was convicted of first-degree murder, in violation of Iowa Code sections 707.1 and 707.2 (2001). He appealed his conviction, claiming there was not sufficient evidence to support his conviction and that his trial counsel was ineffective for failing to ensure his waiver of jury trial was valid, failing to object to lay testimony regarding the victim's mental state, and failing to object to evidence of certain bruises on the victim's body that were discovered during an autopsy. This court affirmed Pittman's conviction and concluded his trial counsel was not ineffective in the ways claimed. *State v. Pittman*, No. 02-1318 (Iowa Ct. App. Feb. 27, 2004).

Pittman filed an application for postconviction relief. The State filed a motion to dismiss the application, asserting the grounds raised in the application either had already been finally adjudicated on direct appeal or were waived. The district court reviewed Pittman's claims, notified Pittman of its intent to dismiss the application, and allowed Pittman time to reply to the proposed dismissal in accordance with Iowa Code section 622.6 (2005). Through appointed counsel Pittman filed an amended application claiming in relevant part that his appellate counsel, Mr. Japuntich, provided ineffective assistance in failing to challenge on direct appeal the trial court's denial of Pittman's motion for change of venue.

A hearing was held on Pittman's postconviction application. Pittman participated by telephone. At the start of the proceeding Pittman requested to

have the hearing reset at a time he could be personally present. The postconviction court determined the hearing would proceed because the personal presence of the applicant was not required. After hearing testimony from both sides, including testimony from Pittman and Japuntich, the court entered a written ruling denying and dismissing Pittman's postconviction application. The court concluded, in relevant part, that Pittman had not established that Japuntich had rendered ineffective assistance by not raising as an issue on direct appeal the denial of Pittman's motion for change of venue.

Pittman appeals the postconviction court's denial of his application contending the court erred in concluding Japuntich was not ineffective by failing to challenge the denial of his motion for change of venue. More specifically, he contends Japuntich was ineffective for failing to obtain and review the transcript of jury selection before deciding not to raise the issue on direct appeal. He also claims his postconviction counsel was ineffective for failing to make an application for Pittman to personally appear and participate in the postconviction hearing.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts a claim of constitutional nature, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Id*.

A person claiming he or she received ineffective assistance of counsel must prove by the preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted from the error. *State v.*

Doggett, 687 N.W.2d 97, 100 (Iowa 2004). To prove the first prong, failure of an essential duty, the person must overcome a presumption that counsel was competent and show that under the entire record and totality of circumstances counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove the second prong, resulting prejudice, the person must show that counsel's failure worked to the person's actual and substantial disadvantage so there exists a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Doggett*, 687 N.W.2d at 100; *Ledezma*, 626 N.W.2d at 143-44. On appeal we can affirm a rejection of an ineffective-assistance-of-counsel claim if proof of either element is lacking. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

In finding Pittman's appellate counsel was not ineffective for not challenging on direct appeal the denial of his motion for change of venue, the district court concluded, in part:

> It is true that Japuntich did not challenge the trial court's decision not to grant the change of venue. However, the Court does not find that this decision places his performance below the standard of a reasonably competent attorney. Instead, as he testified at the hearing, Japuntich did not believe, based on the evidence submitted when the motion was made, that there was enough to create a viable issue on appeal. . . .
>
> The Court believes Japuntich's decision is more properly characterized as a tactical one, rather than one that was made due to a lack of diligence. Although he never reviewed the transcript of the voir dire proceeding, this was not for lack of effort, as Pittman suggested. He attempted to secure a copy of the transcript, and was told by the court reporter assigned to Pittman's jury selection and trial that it had not been reported. The Court finds this to be a diligent effort on his part, particularly given the fact that he did not believe the venue issue to be meritorious in the first place.
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> Pittman cannot establish that his appellate counsel failed to perform an essential duty. . . . Japuntich made a tactical decision

> to not challenge the trial court's ruling, and the Court finds that decision was consistent with prevailing professional norms.

We agree with the postconviction court that Pittman did not prove that Japuntich breached an essential duty by not challenging on direct appeal the denial of his motion for change of venue. Not only did someone from Japuntich's office inquire regarding any voir dire transcript and was told voir dire had not been reported, Japuntich himself called the court reporter directly and she also stated she did not believe it had been reported but she would check. Japuntich told her that if she found it had been reported he needed to know and to get the transcript as soon as possible. Japuntich did not hear further from the court reporter and did not learn that voir dire had in fact been reported until the day of the postconviction hearing. Appellate counsel's actions were sufficiently diligent and did not fall below the standard of a reasonably competent attorney. Pittman did not prove Japuntich breached an essential duty.

We further conclude Pittman has not shown he was prejudiced by appellate counsel not raising a change of venue issue on direct appeal. In order to prevail on the prejudice prong, Pittman must show there is a reasonable probability he would have been acquitted if the venue had been changed and he had been tried by a jury selected in a different county. *See Wright v. Nix,* 928 F.2d 270, 273 (8th Cir. 1991).

Pittman does not point out anything in the transcript of the jury selection demonstrating there is a reasonable probability that had Japuntich raised this issue on direct appeal the outcome of the proceeding would have been different. Nor does he cite anything in the transcript demonstrating that a fair jury could not

be selected in the county where he was tried. Furthermore, following jury selection Pittman waived his right to a jury trial and the case was tried to the court. No claim has been made here that he received an unfair trial from the district judge who heard the case. Thus, Pittman has not shown he was prejudiced by the denial of the change of venue or by appellate counsel not challenging that denial on direct appeal.

Pittman next claims he received ineffective assistance of postconviction counsel because counsel failed to make an application for Pittman to personally appear at the postconviction hearing. We review claims of ineffective assistance of postconviction counsel under a de novo standard of review. *Collins v. State,* 588 N.W.2d 399, 401 (Iowa 1998). Defendants have a right to effective counsel in a postconviction proceeding. *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994) (noting that although it is not a constitutional right, the statutory right to postconviction counsel implies a right to effective counsel). Competency standards are the same for any subsequent counsel as they are for trial counsel. *Dunbar*, 515 N.W.2d at 15. We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Because we find evidence of prejudice lacking on Pittman's claim of ineffective assistance of postconviction counsel, we need not address counsel's alleged breach of duty.

Here, Pittman was able to appear and participate by telephone at the postconviction hearing. He was able to testify, supplement the record, and make his own oral arguments in support of his claims. He was represented by counsel at the hearing. Pittman makes no argument as to what more he would have been able to do to further his cause had he been physically present at the hearing. We conclude Pittman has not met his burden to prove, by a preponderance of the evidence, that there exists a reasonable probability that had he been personally present at the postconviction hearing the result of the proceeding would have been different. His claim of ineffective assistance of postconviction counsel therefore also fails.

Based on our de novo review, and for the reasons set forth above, we conclude Pittman has not met his burden to show, by a preponderance of the evidence, he was denied effective assistance of either appellate or postconviction counsel. The district court did not err in denying and dismissing Pittman's application for postconviction relief.

AFFIRMED.