

**IN THE COURT OF APPEALS OF IOWA**

No. 9-424 / 08-1101  
Filed September 2, 2009

**RICHARD EARL ABNEY,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Scott County, Marlita A. Greve,  
Judge.

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

Steven Stickle of Stickle Law Firm, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant  
County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**VAITHESWARAN, P.J.**

Richard Abney pled guilty to four counts of first-degree robbery. After his direct appeal was dismissed as frivolous, Abney filed an application for postconviction relief.

At a hearing on the application, Abney testified that he told the interviewing officer he was under the influence of drugs. He also testified that the officer elicited a confession from him by threatening adverse action against his family. He further stated that a videotape of the interrogation he viewed with one of his attorneys did not include the officer's threat. He stated that a motion to suppress the confession was filed but not pursued.

After Abney testified, the detective who interrogated him was called to the stand. He denied that Abney was under the influence and denied threatening Abney. He stated the videotape was destroyed.

Following the postconviction hearing, the district court found Abney's testimony "not credible," "self-serving," and "contradictory." Specifically, the court found his claim to have been under the influence "not credible." And the court rejected as "unbelievable" Abney's testimony that the videotape did not include the entire conversation with the detective. Based on these findings, the court concluded his attorney acted strategically and competently in declining to pursue the motion to suppress the confession.

On appeal, Abney asserts that his postconviction counsel was ineffective in failing to call one of his trial attorneys as a witness to testify at the postconviction hearing. He maintains that the attorney could have (1) "provided a somewhat independent account of whether [his] demeanor, speech or other

behavior [on the videotape] showed that he appeared to be under the influence of drugs,” (2) testified about “the decision not to pursue the motion to suppress,” and (3) testified about “whether the meaning and implications of a motion in arrest of judgment were explained to him.” To prove ineffective assistance of counsel the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel’s error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review of the record is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

The first issue, relating to Abney’s claimed intoxication during the interrogation, is based entirely on his testimony at the postconviction hearing. The district court found Abney’s testimony not credible. We defer to the court’s credibility finding. *Carroll v. State*, 466 N.W.2d 269, 273 (Iowa Ct. App. 1990) (“We believe the trial court was in a superior position to judge the credibility of the witnesses.”). On our de novo review, we also note that the detective who interrogated Abney contradicted Abney’s testimony, stating that he did not at any time have a sense that Abney was under the influence of any type of intoxicants. Given this record, we conclude postconviction counsel was not ineffective in failing to call Abney’s trial attorney to testify about Abney’s demeanor on the destroyed videotape.

We turn to the second issue concerning trial counsel’s failure to pursue a motion to suppress. The State cites *Speed v. State*, 666 N.W.2d 158, 159 (Iowa 2000), for the proposition that Abney waived this issue by pleading guilty. However, after the State filed its brief, the Iowa Supreme Court overruled *Speed*, stating:

We therefore disavow our decision in *Speed* insofar as it suggests claims of ineffective assistance arising from counsel's failure to investigate or file a meritorious motion to suppress cannot, as a matter of law, survive the entry of a guilty plea.

*State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009). The court continued:

Only through a case-by-case analysis will a court be able to determine whether counsel in a particular case breached a duty in advance of a guilty plea, and whether any such breach rendered the defendant's plea unintelligent or involuntary. As in any other case in which relief is requested as a consequence of alleged ineffective assistance of counsel, the party claiming his counsel provided ineffective assistance in advance of the entry of a guilty plea must prove counsel breached a duty and prejudice resulted.

*Id.* The district court presaged this ruling, by engaging in a fact-specific analysis of Abney's suppression claim. After finding Abney's testimony on this issue not credible, the court concluded:

The Court finds Abney has not met his burden to show that either of his trial counsel failed to perform an essential duty. As a result, the court does not have to reach the second prong-prejudice. Abney's ineffective assistance claim fails.

In light of the district court's implied finding that there was no coercion, the testimony of Abney's trial attorney concerning why the attorney declined to pursue a motion to suppress would have been immaterial. Accordingly, we reject Abney's claim that postconviction counsel was ineffective in failing to call that attorney as a witness at the postconviction hearing.

We are left with Abney's claim that postconviction counsel was ineffective in failing to call his trial attorney to testify about what he told Abney regarding a motion in arrest of judgment. Abney's claim is too general in nature to allow us to address the allegation or preserve it for a second postconviction proceeding.

*Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We affirm the district court's denial of Abney's postconviction relief application.

**AFFIRMED.**