

IN THE COURT OF APPEALS OF IOWA

No. 9-787 / 08-0937
Filed November 12, 2009

MARK LEON KEMP,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

Applicant Mark Leon Kemp appeals from the denial of his application for
postconviction relief. **AFFIRMED.**

Angela Y. Gruber-Gardner, Johnston, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SACKETT, C.J.

Appellant, Mark Leon Kemp, was convicted, following a jury trial, of criminal mischief in the third degree in violation of Iowa Code sections 716.1 and 716.5 (2005); burglary in the third degree as an habitual offender in violation of sections 713.1, 713.6A, 902.9(3), and 902.8; and theft in the second degree as an habitual offender in violation of sections 714.1(4), 714.2(2), 902.9(3), and 902.8.¹ In this postconviction proceeding, Kemp contended that his trial and initial appellate attorneys were ineffective. The district court denied all claims and this appeal follows. We affirm.

SCOPE OF REVIEW. Ineffective assistance of counsel claims involve a constitutional challenge and we therefore review them de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

BACKGROUND. The facts are not seriously disputed. On May 31, 2005, Kristina Jackson came from work to find there had been a break-in at her home. A lock on a window had been broken and a couch under the window had been damaged where the intruder apparently had sought to break his fall. Jackson also noticed a computer and monitor were taken. A neighbor of Jackson's was home over the noon hour and saw a person near the Jackson residence carrying a garbage bag. She also saw the person pick up something that resembled a small television set. She became suspicious, called the police, and went outside to investigate. She saw a man from a distance of twenty to twenty-five feet whom she later identified as the defendant. Investigating officers came to the

¹ He appealed to this court and we affirmed the convictions but remanded for resentencing.

area, located Kemp, and put him in a police car with the window down. A bag of women's jewelry landed at the feet of an officer standing outside the car from the general direction of where Kemp waited in the car. Officers also found jewelry underneath the back seat where the officers had put Kemp. Jackson identified the jewelry as hers.

In Kemp's initial appeal to this court he contended that the district court erred in failing to suppress certain evidence. We affirmed on this issue. He also claimed the district court erred in imposing a \$750 fine on each of his two convictions as a habitual offender. The State conceded that the trial court erred in imposing the two fines of \$750 each; we vacated them and remanded the case for resentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS. Kemp next filed for postconviction relief, contending that his counsel was ineffective. The district court in a well-written and extensive opinion denied all of his claims. Kemp's attorney on appeal contends that his trial counsel was not effective when he failed argue there was not substantial evidence to prove beyond a reasonable doubt that Kemp had the required intent to convict him of criminal mischief. Kemp in a pro-se brief makes two additional claims of ineffective assistance.

To prevail on ineffective assistance of counsel claims, Kemp has the burden of proving by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, Kemp "must overcome the presumption that counsel was competent and show that counsel's

performance was not within the range of normal competency.” *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, Kemp must show “a reasonable probability exists that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). We may dispose of ineffective assistance of counsel claims if an applicant fails to prove either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

INTENT TO COMMIT CRIMINAL MISCHIEF. Kemp’s attorney contends that the district court erred in not finding Kemp’s trial counsel ineffective for failing to challenge the State’s alleged failure to establish the required intent to support a conviction of criminal mischief. She argues that criminal mischief requires proof of specific intent to damage, deface, alter, or destroy property. She further argues that there was no evidence Kemp intended to do damage and the evidence did not show the damage he did to be \$500 dollars or more.

There is evidence that Kemp did the following to Jackson’s property: (1) broke a window lock, (2) tore a couch, and (3) dropped a computer monitor and tower breaking them. There also was evidence establishing the damage caused by Kemp was more than \$2000.

Criminal mischief is defined under Iowa Code section 716.1 as:

Any damage, defacing, alteration, or destruction of property is criminal mischief when done intentionally by one who has not right to so act.

The evidence was sufficient to support a finding beyond a reasonable doubt that Kemp intentionally and with malicious intent broke a window lock to enter Jackson's house, used the couch to break his fall on entering the house and dropped the computer, and he did damage well in excess of \$500.² Kemp's trial counsel did not render ineffective assistance of counsel.

Kemp raises two issues in his pro-se brief. He first contends that the district court erred in not finding his trial counsel ineffective in failing to argue that "the State did not establish principles rooted in nunc pro tunc common law and Constitutional jurisprudence." His argument seems to be that he could not be punished for three separate offenses and that the three offenses are lesser-included offenses of the other. The three offenses are not lesser-included offenses of the other as each of the three contains an element not required of the other offenses. Burglary in the third degree, section 713.2, requires entering an occupied structure. Criminal mischief in the third degree, section 716.1, requires damaging, alteration, defacing, or destruction of property. Theft in the second degree, section 714.1, requires taking possession of property. Consequently, Kemp's trial counsel had no duty to ask that the sentences be merged.

Kemp's second argument appears to address his attorney's failure to challenge our earlier decision denying his motion to suppress.

Issues that have been raised, litigated, and adjudicated on direct appeal cannot be relitigated in postconviction proceedings. See *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986).

² Kemp was convicted of criminal mischief in the third degree, which requires the cost of replacing, repairing, or restoring the property to exceed \$500 but not \$1000.

We have considered the other arguments in Kemp's pro-se brief and find them to be without merit.

AFFIRMED.