

IN THE COURT OF APPEALS OF IOWA

No. 2-164 / 11-0165
Filed March 14, 2012

VINCENT ALLEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Vincent Allen appeals the denial of his application for postconviction relief.

AFFIRMED.

Eric D. Tindal of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Williamsburg, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Janet M. Lyness, County Attorney, and Andrew Chappell, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Vincent Allen was convicted of first-degree robbery after a jury determined a plywood board he used in the course of a robbery constituted a dangerous weapon. Allen argued on direct appeal that the evidence was insufficient to prove the board was a dangerous weapon. This court affirmed Allen's conviction, and Allen filed an application for postconviction relief. He now appeals the denial of that application. He claims the district court erred in finding the State presented sufficient evidence to prove the plywood board was a dangerous weapon. He also claims the district court erred in its interpretation of the statutory definition of "dangerous weapon." Finally, he claims the district court failed to properly analyze the impact expert testimony given at his postconviction hearing had on his ineffective-assistance claim.

I. Background Facts and Proceedings

On direct appeal, this court stated the facts as follows:

On May 28, 2003, at approximately 5:45 a.m. Ken Heck was dropping off some items for charitable contribution outside a resale shop in Iowa City. After he unloaded the donations from his truck, Heck heard someone approach him from behind and say "Give me your money." As Heck turned to see who was speaking to him he was hit in the back of the head with a board. Heck described the board as about six inches wide and twenty-four inches long. The assailant was later identified by a witness as the defendant Allen.

A struggle ensued between Heck and Allen and the board ended up on the ground. The two fell to the ground and wrestled around while Allen repeated his demand for money several times, at one point threatening, "Or I'll kill ya." As Heck lay on the ground trying to get his wallet out of his pocket Allen straddled him and continued the assault. Heck eventually got the wallet out of his pocket and it went flying through the air. Allen then got off of Heck, grabbed the wallet, and ran. Heck testified that during the incident he heard someone yell something and Allen responded, "He won't give me his money." Heck suffered a four-inch welt on the back of

his head and several scrapes on his body from the asphalt as a result of the attack.

The State charged Allen, by trial information, with robbery in the first degree, in violation of Iowa Code sections 711.1, 711.2, 702.11 and 902.12(5) (2003), for the robbery of Heck. The trial information also charged him with two other robberies, ongoing criminal conduct, and two counts of drug possession. The robbery and ongoing criminal conduct charges proceeded together to jury trial after the district court severed the two counts of drug possession.

State v. Allen, No. 05-0284 (Iowa Ct. App. July 26, 2006). The jury found Allen guilty of robbery in the first degree for the robbery of Heck. It found him not guilty of the other counts of robbery and ongoing criminal conduct.

II. Dangerous Weapon

In his application for postconviction relief, Allen asserted trial counsel was ineffective for failing to conduct an investigation and retain an expert to determine whether the plywood he used as a weapon during the robbery was capable of inflicting death when used in the manner Allen used it. He also asserted trial counsel was ineffective for failing to argue to the jury that the board was not capable of causing death. In addressing Allen's postconviction claims, the district court included a discussion of the law relating to dangerous weapons in Iowa. Allen appeals from this part of the district court's decision, asserting the court erred in its interpretation of "dangerous weapon" as provided in Iowa Code section 702.7. Allen also asserts the court erred in finding the State presented sufficient evidence at trial to prove the plywood board was a dangerous weapon.

We find both of these arguments are barred by the doctrine of res judicata. A postconviction proceeding is not a means to relitigate, on the same factual basis, the issues previously adjudicated, and the principle of res judicata bars

such additional litigation. See Iowa Code § 822.8 (“Any ground finally adjudicated . . . may not be the basis for a subsequent application”); *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971). Allen makes the same argument on appeal from the denial of his application for postconviction relief that he made on direct appeal. In his direct appeal, this court determined the evidence was sufficient to support the jury’s conclusion that the plywood board was a dangerous weapon. *State v. Allen*, No. 05-0284 (Iowa Ct. App. July 26, 2006). Because this issue was decided on direct appeal, Allen cannot now relitigate the sufficiency of the evidence.

III. Ineffective Assistance of Trial Counsel

Allen asserts trial counsel was ineffective in failing to investigate a viable defense at trial. In order to prove his counsel was ineffective, Allen must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In order to establish the first prong of the test, Allen must show that his counsel did not act as a “reasonably competent practitioner” would have. *Id.* We presume the attorney performed competently and avoid second-guessing and hindsight. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). To satisfy the second prong, Allen must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *State v. Utter*, 803 N.W.2d 647, 654 (Iowa 2011). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.*

Allen asserts the district court failed to examine how the evidence presented by his expert at the postconviction hearing bolstered his claim that trial counsel was ineffective for not investigating a viable defense. We disagree.

At the postconviction hearing, Richard McLay, a professor in biomedical engineering, testified on behalf of Allen regarding forensic engineering work he had completed at Allen's request for purposes of the postconviction application. McLay testified he performed a dynamic analysis of the impact of the board on a body and determined the board was not capable of inflicting death when used in the manner Allen had used it. He therefore concluded the "plywood when handled in the fashion described by the testimony was not a dangerous weapon." McLay clarified that he believed there was a better than fifty-percent chance the board, when used in a swatting motion (striking with the broad side of the board), would not kill someone, though he acknowledged death was possible. McLay acknowledged the force from the board would be greater if the blow were delivered using the narrow side of the board.

The district court noted trial counsel's testimony at the postconviction trial that his decision not to dispute the dangerous weapon element had been strategic. Allen's trial counsel testified he did not believe the State had presented sufficient evidence to prove the plywood was capable of inflicting death and he did not want to alert the State to that issue. Further, the district court noted trial counsel's strategy was to present a defense of mistaken identity and given that strategy, "it was not unreasonable for Allen's counsel not to investigate the engineering data that might have been available to Allen, such as testimony like the postconviction trial testimony of Dr. McLay." "Miscalculated trial strategies

and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel.” *Brubaker*, 805 N.W.2d at 174. The district court noted that counsel’s strategy to argue mistaken identity was somewhat successful, as the jury acquitted Allen on two other robberies and the crime of ongoing criminal conduct.

The district court also ruled Allen could not show he was prejudiced by trial counsel’s failure to investigate a witness such as McLay, finding McLay’s testimony “would only have offered more evidence upon which the State could rely as to the capacity of the board as a dangerous weapon.”

We find the district court carefully analyzed Allen’s claim of ineffective assistance based on trial counsel’s failure to investigate whether the plywood was capable of inflicting death. The district court included the applicable law and, after analyzing the impact McLay’s testimony could have had, properly decided not to second-guess counsel’s reasonable trial strategy. We agree with the district court’s reasoning and conclude that trial counsel did not breach his duty of effective representation.

AFFIRMED.