

IN THE COURT OF APPEALS OF IOWA

No. 2-533 / 10-0896
Filed July 25, 2012

HEROLD D. SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Herold Smith appeals from a ruling denying his petition for postconviction relief finding his trial counsel provided effective assistance. **AFFIRMED.**

Webb L. Wassmer of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Herold Smith appeals from the district court's order denying his application for postconviction relief. He asserts his counsel was ineffective in failing to pursue a defense of diminished capacity at his trial where he was convicted of third-offense domestic abuse assault. We affirm the district court, finding the decision not to pursue the defense was one of trial strategy, resulting in no prejudice.

I. Facts and Proceedings

Herold Smith was convicted of domestic abuse assault, third offense, as a habitual offender in September of 2005. Judgment was entered against him after a bench trial on the minutes. Prior to trial, Smith's counsel had submitted a notice of diminished capacity, but abandoned that theory after a colloquy with the district court and a conference with Smith. Smith filed an application for postconviction relief asserting his counsel was ineffective in failing to pursue the diminished capacity defense. A hearing took place in April 2010, after which the district court issued an order finding trial counsel was not ineffective.

II. Analysis

We review claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). In order to prove his counsel was ineffective, appellant must show both that (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). The first prong requires that 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 show prejudice under the second prong, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Utter*, 803 N.W.2d at 654. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*

The record shows trial counsel initially filed notice of a defense of diminished capacity,¹ and then obtained and reviewed Smith's medical and family history records. After this review, trial counsel discussed with Smith the option to instead proceed with a bench trial on the minutes, abandoning the diminished-capacity defense and preserving for appeal a constitutional challenge to the mandatory sentence. At the hearing for postconviction relief, Smith's trial counsel testified that he spoke with Smith multiple times regarding the diminished-capacity defense—including during an almost hour-long break on the day of trial—and that Smith understood and consented. The district court found trial counsel's testimony to be credible. *See State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007) (stating we give deference to credibility determinations by the trial court but are not bound by them). Such informed strategic decisions are not the proper subjects of an ineffective-assistance-of-counsel determination. *Fountain*, 786 N.W.2d at 266–67.

¹ Neither party raised the issue of whether diminished capacity remains an available defense to the specific intent element of assault after *State v. Fountain* (decided after the district court entered its order denying Smith's application for postconviction relief), nor do we reach that question here. 786 N.W.2d 260, 265 (Iowa 2010) (stating the amendment to the assault statute was "simply an attempt to prevent a defendant charged with assault from relying on the defenses of intoxication and diminished capacity").

Further, Smith has shown no grounds for actual prejudice in this case. On the contrary, the district court noted that the evidence against Smith was overwhelming and his medical records showed he was stable and competent; he had been receiving treatment as an outpatient and taking his medications before the event that led to the charges against him. A defendant's counsel is not required to raise a meritless claim in order to protect against allegations of ineffectiveness. See *Luke v. State*, 465 N.W.2d 898, 903–04 (Iowa Ct. App. 1990) (finding appellate counsel breached no essential duty by failing to raise meritless claim). Therefore, we cannot find Smith's counsel was ineffective in failing to pursue a diminished-capacity defense.

AFFIRMED.