IN THE COURT OF APPEALS OF IOWA

No. 3-1087 / 12-1718
Filed January 9, 2014

JOSEPH SCHROCK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Washington County, James Q. Blomgren, Judge.

Joseph Schrock appeals the district court's denial of his consolidated applications for postconviction relief. **AFFIRMED.**

Christopher J. Foster of Foster Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Larry Brock, County Attorney, and Jacob Marshall, Student Legal Intern, for appellee State.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Joseph Schrock appeals the district court's denial of his consolidated applications for postconviction relief. He raises several ineffective-assistance-of-counsel claims.

I. Background Facts and Proceedings

Schrock took his four-year-old son for a ride on an all-terrain vehicle in rural Washington County. The ATV was affixed with several warning stickers admonishing users not to carry any passengers, not to allow anyone "under 18" to ride it, and not to combine its use with drugs or alcohol. Schrock consumed several beers before driving the ATV with his young son. He crashed the vehicle and his son sustained severe injuries.

Schrock was found guilty of child endangerment causing serious injury, as a habitual offender and two misdemeanor traffic offenses: (1) Iowa Code section 321I.14(1)(b) (2007) (operating an ATV in a careless or negligent manner) and (2) section 321I.14(3) (operating an ATV with too many passengers). The jury acquitted him on a charge of operating a motor vehicle while intoxicated.

For reasons not relevant here, the trial court granted Schrock a new trial on the child endangerment count and a jury again found him guilty. This court affirmed his judgment and sentence on that charge. *See State v. Schrock*, No. 09-0631, 2010 WL 624911, at *1 (Iowa Ct. App. Feb. 24, 2010).

Schrock was separately tried and found guilty of domestic abuse assault arising out of an incident that occurred after the ATV crash. He did not testify at that trial.

Schrock filed multiple applications for postconviction relief. Following a consolidated hearing, the district court denied the applications. Schrock appealed.

II. Ineffective Assistance of Counsel

Schrock contends his trial attorney was ineffective in: (A) failing to produce an expert to testify he "was not intoxicated" at the time of the crash; (B) failing to produce an expert to testify "the all-terrain vehicle had been defective such that any crash was a result of the defect, rather than as a result of [his] manner of operating the vehicle," and "despite the presence of a sticker indicating only one person may ride the [all-terrain] vehicle, it was designed for multiple passengers"; (C) advising him not to testify at his domestic abuse trial; and (D) failing to object to evidence of his intoxication. To prove an ineffective-assistance-of-counsel claim, Schrock must establish the breach of an essential duty and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. Expert witness testimony regarding Schrock's level of intoxication

Schrock asserts that "[h]ad an expert witness opined that he was not intoxicated, there is a reasonable likelihood that the outcome [of the trial on the child endangerment charge] would have been different." His argument implicates the prejudice prong of the *Strickland* test. *See State v. Utter*, 803 N.W.2d 647, 654 (Iowa 2011) (stating "[t]o prove prejudice resulted from trial counsel's failure to perform an essential duty, an accused must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (quoting *Strickland*, 466 U.S. at 694)). We need not reach that element because, on our de novo review, we are persuaded that Schrock

cannot satisfy the breach-of-an-essential duty element. *See Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (stating a claim of ineffective assistance of counsel fails if either element is lacking).

Schrock's attorney was so cognizant of the intoxication evidence and its bearing on the child endangerment charge that he filed a pre-trial motion in limine requesting exclusion of any opinion on intoxication or impairment. In response to the motion, the prosecutor argued this type of evidence was relevant and admissible on the child endangerment charge to prove "Mr. Schrock knowingly acted in a manner that created a substantial risk to a child's physical, mental or emotional health." The district court accepted the argument and overruled Schrock's motion. At trial, Schrock's attorney again objected to evidence of Schrock's intoxication or impairment, and the district court reaffirmed its prior ruling.

After this vigorous but unsuccessful attempt to keep out evidence of Schrock's intoxication, Schrock's attorney took a different approach. He elicited testimony from Schrock that, although Schrock had consumed three beers on the day of the crash, he was not impaired. An intoxication expert would have added little if anything to this first-hand account, which generated a fact issue on the "substantial risk" element of the child endangerment charge. *See* Iowa Code § 726.6(1)(a).

Schrock's attorney said as much at the postconviction relief hearing, testifying that while the question of impairment was "a very central issue," he did not recall a lengthy discussion "of what an intoxication expert would have said that would have helped us in that trial." His stated his hope was simply to

convince the jury through Schrock's testimony that Schrock "wasn't drunk." The postconviction court rightly did not second-guess this reasonable strategic decision. *See Fullenwider v. State*, 674 N.W.2d 73, 75 (Iowa 2004).

B. Expert witness testimony regarding the ATV

Schrock claims his attorney should have called an expert to testify about defects in the ATV that might have caused the accident and the ATV's capacity for more than one passenger.

Schrock's attorney did not breach an essential duty in failing to call an expert on these matters because he elicited the pertinent testimony on cross-examination of the ATV's owner. Specifically, he obtained admissions that the electronic gear start was the only inoperable mechanism on the ATV and the vehicle was not otherwise defective. He also elicited an admission that the owner carried passengers in the ATV notwithstanding the warning.

At the postconviction relief hearing, Schrock's attorney explained his strategy as follows: "There was no indication that there was a design defect or that the machine inherently did something—you know, as in being defective—that would have caused this accident." On the ATV's passenger capacity, the attorney noted that he "argued in trial that the seat—regardless of the stickers on the bike, the seat seemed to accommodate more than one person." He characterized this approach "as more of a common sense angle." We conclude the attorney made a reasonable tactical decision in declining to call an expert on these subjects and the decision did not amount to the breach an essential duty.

C. Schrock's decision not to testify at his domestic abuse trial

Schrock claims his attorney prohobited him from taking "the stand in order to tell his side of the story," and "his testimony would have rebutted the testimony of the alleged victim." At the postconviction relief hearing, Schrock's trial attorney testified that he advised Schrock against testifying at the domestic abuse trial because he believed "he had a better chance of winning the case or of getting acquitted if he did not take the stand." The attorney further explained:

> I was concerned as to what exactly [Schrock] was going to testify, given that he, by all accounts, was intoxicated that evening [when the alleged domestic abuse incident took place]. You know, that his potential bias and/or recollection of the events would be called into question and the judge would, you know, have doubts as to that. Part of it was also, after hearing the State's case and hearing what [the complaining witness] said, which at the time I felt was not as damning to our case as perhaps the police report indicated; meaning that as a witness, [the complaining witness] came in better for us than I expected, and therefore that was an additional reason that our best chance is to rest and have [Schrock] not take the stand.

The attorney also said he "generally" considered the fact that Schrock was prohibited from consuming alcohol on pretrial release and had other pending court matters that could be affected by his testimony. The attorney discussed his recommendation with Schrock and, together, they "decided that that was the way to go."

On our de novo review, we are persuaded that Schrock's attorney made a strategic decision in declining to call Schrock as a witness in the domestic abuse trial. *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) ("Generally, the decision not to call a particular witness *or the defendant* to testify implicates a reasonable tactical decision." (emphasis added)); *State v. Heuser*, 661 N.W.2d

157, 166-67 (Iowa 2003) (same). We will not second-guess that decision. *See Polly*, 657 N.W.2d at 468.

D. Admission of evidence relating to Schrock's level of intoxication

Schrock claims his trial attorney was ineffective in failing to object to evidence relating to his level of intoxication at the time of the ATV crash. This court addressed the issue on direct appeal. *Schrock*, 2010 WL 624911, at *3-4. Postconviction is not a forum for re-litigating issues that have already been decided. *See Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009).

III. Disposition

We affirm the denial of Schrock's consolidated applications for postconviction relief.

AFFIRMED.