

**IN THE COURT OF APPEALS OF IOWA**

No. 6-344 / 05-1043

Filed June 28, 2006

**TONY AUGUSTUS MALLET,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Black Hawk County, Leonard D. Lybbert, Judge.

Tony Mallett appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Jolie B. Juckette of Juckette Law Office, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

**HECHT, J.**

Tony Mallett appeals from the denial of his application for postconviction relief. We affirm.

**I. Background Facts and Proceedings.**

Mallett was arrested on March 24, 2001 and charged with third-degree burglary and possession of cocaine. The State subsequently amended the trial information to allege a habitual offender enhancement to the burglary charge. The legislature, however, reclassified third-degree burglary from a class D felony to an aggravated misdemeanor effective July 1, 2001, and Mallett moved to strike the trial information as amended because the misdemeanor burglary charge would not support the habitual offender enhancement. The matter was set for hearing on July 30.

On July 19, the State again amended the trial information, charging Mallett with third-degree burglary, possession of cocaine, and second-degree robbery. Because the robbery charge is a class C felony, the State again asserted Mallett should be sentenced, if convicted, as a habitual offender. Mallett did not challenge the addition of the robbery charge in his motion to strike the enhanced burglary charge, and therefore the July 19 amendment was not discussed at the hearing conducted on July 30. Following the hearing, the district court struck the habitual offender enhancement from the burglary charge, and that same day the State amended the trial information to reflect the court's ruling.

Mallett's counsel failed to realize a robbery charge had been added to the trial information until after the July 30 amendment and did not file a resistance to the amended information until August 10. Mallett asserted in his resistance that

the State did not seek prior approval from the court to add the robbery charge, and therefore the amendment to the trial information violated Mallett's due process rights. The district court dismissed Mallett's resistance as untimely because the robbery charge had been alleged in the July 19 amendment and should have been challenged within ten days thereafter.

Mallett pled guilty to the possession charge and following a jury trial, was convicted on both the robbery and burglary counts. He was then sentenced to fifteen years in prison as a habitual offender. Mallett's convictions and sentence were upheld by a panel of this court on direct appeal. *State v. Mallett*, 2002 WL 31757420 (Iowa Ct. App. 2002). Several of Mallett's claims of trial counsel's ineffective assistance, including trial counsel's failure to timely challenge the State's addition of the robbery count to the trial information, were preserved for possible postconviction proceedings.

Trial counsel's failure to timely resist the amended information asserting the robbery charge was alleged as a ground of trial counsel's ineffectiveness in Mallett's application for postconviction relief. Mallett contended the robbery charge was a wholly new and different offense and the manner in which it was included in the trial information violated Mallett's due process rights. Mallett alleged that had trial counsel moved to strike the amendment in a timely manner, the motion would have been successful. Following a hearing, the district court found that while trial counsel may have breached an essential duty by failing to file a timely challenge to the robbery amendment, no prejudice resulted. The court reasoned that had trial counsel successfully challenged the second amendment to the information, the State would have been permitted to file a

separate trial information charging robbery and then successfully move to consolidate the charges for purposes of a single trial.

Mallett appeals, asserting he was prejudiced by trial counsel's alleged breach because his right to a speedy indictment would have precluded the State from filing a separate robbery trial information if the amended information had been successfully challenged.

## **II. Scope of Review.**

We review postconviction relief proceedings on claimed error. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, because of the constitutional implications inherent with claims of ineffective assistance of counsel, our review here is de novo. *State v. Mapp*, 585 N.W.2d 746, 747 (Iowa 1998).

## **III. Discussion.**

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Mallett bears the burden of demonstrating ineffective assistance of counsel, and he must establish both prongs of the claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To prove prejudice from an alleged breach, Mallett must convince us "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If Mallett fails to meet his

burden with respect to either prong, his claim is without merit and must be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

After our de novo review, we agree with the district court that Mallett has failed to prove that but for trial counsel's deficient performance the result of his jury trial would have been different. We note that both prosecutors involved in this case credibly testified that if Mallett had successfully challenged the amendment to the information, the State would have filed a separate trial information on the robbery charge and moved to consolidate the trials. Because the robbery and burglary charges arose out of the same operative facts, it is reasonable to conclude any motion to consolidate the charges would have been granted, and Mallett would have been held to answer for both the second-degree robbery charge and the habitual offender enhancement.

We acknowledge the speedy indictment rule mandates the filing of a trial information within forty-five days of an adult's arrest for a public offense, unless the defendant's waiver is secured or good cause for the delay is shown. See Iowa R. of Crim. P. 2.33(2)(a). Our supreme court has held that this rule "applies only to the 'public offense' for which the defendant was arrested, rather than to all offenses arising from the same incident or episode." *State v. Sunclades*, 305 N.W.2d 491, 494 (Iowa 1981). In *Sunclades*, the defendant was arrested for the crime of attempted murder, and while the court held that the forty-five day time period applied to that charge and its lesser included offenses, it did not begin to run against the subsequently filed charges of going armed with intent and assault while participating in a felony which arose out of the same criminal episode. *Id.*; see also *State v. Eichorn*, 325 N.W.2d 95, 96-97 (Iowa 1982) (concluding that

when a person in custody is subsequently charged with a separate offense, the time of arrest for purposes of the speedy indictment rule is the time the new charge is filed). Because Mallett was not arrested on the robbery charge, we conclude the speedy indictment rule would not have precluded the course of action that the prosecutors claimed they would have taken had a successful challenge to the amended information been undertaken by Mallett's trial counsel.

Accordingly, we find Mallett suffered no prejudice as a consequence of trial counsel's performance. *Ledezma*, 626 N.W.2d at 142. We therefore affirm the district court's dismissal of Mallett's application for postconviction relief.

**AFFIRMED.**