

**IN THE COURT OF APPEALS OF IOWA**

No. 6-452 / 05-1231  
Filed August 23, 2006

**ERIC MEL THOMPSON,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, Judge.

Eric Mel Thompson appeals the summary disposition of his application for postconviction relief. **AFFIRMED.**

Clemens Erdahl, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, and Matthew Wilber, County Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

**HUITINK, J.**

***I. Background Facts and Proceedings.***

The State originally charged Thompson with first-degree kidnapping, second-degree sexual abuse, and attempted murder. The State filed an amended trial information on January 14, 2000, charging Thompson with count I: kidnapping in the first degree, in violation of Iowa Code sections 710.1(3) and 710.2, and count II: attempt to commit murder, in violation of section 707.11 (1999). Thompson entered a not guilty plea to each count. Based on Thompson's history of substance abuse and mental illness, trial counsel arranged for Thompson's evaluation by a psychiatrist. The resulting report furnished to counsel included the following:

In summary, then, it is my opinion within a reasonable degree of medical certainty Mr. Thompson is competent to stand trial at this time. He was sane at the time of the alleged crime. However, his depression and psychosis with hallucinations and delusions resulted in impaired judgment and diminished capacity to formulate the intent to commit a crime.

All opinions expressed in this report are based upon a reasonable degree of medical certainty.

Counsel did not challenge Thompson's competency to stand trial. Despite the psychiatrist's opinion concerning Thompson's ability to form the requisite intent to commit a crime, counsel elected not to pursue an insanity or diminished capacity defense. Instead, counsel relied on a factual defense to both counts.

Following a pretrial hearing, the trial court granted the State's motion pursuant to Iowa Rule of Criminal Procedure 12 (now 2.13(2)(b)), permitting the victim to testify via videotaped deposition outside the presence of the defendant. A jury found Thompson guilty of first-degree kidnapping and assault causing

bodily injury, a lesser-included offense of attempted murder. The court merged the assault conviction with the kidnapping conviction for purposes of sentencing. On January 27, 2000, the court entered a judgment of conviction and sentenced Thompson to life in prison.

On direct appeal, we rejected Thompson's constitutional challenge to the trial court's ruling permitting the victim to testify via videotaped deposition. *State v. Thompson*, No. 00-0387 (Iowa Ct. App. Dec. 22, 2000). We also rejected Thompson's sufficiency of the evidence challenge to his convictions. *Id.* Thompson did not raise any issues concerning the effectiveness of trial counsel on direct appeal. We affirmed Thompson's conviction. *Id.* The supreme court denied Thompson's application for further review.

On December 17, 2002, Thompson filed a pro se application for postconviction relief. Thompson's application, as subsequently amended on January 18, 2005, included the following allegations:

- 1) that petitioner received ineffective assistance of counsel;
- 2) the conviction or sentence was in violation of the confrontation clause as stated by the United States Constitution and/or the Iowa Constitution;
- 3) the Court was without jurisdiction to impose sentence;
- 4) the conviction was structurally flawed because of the petitioner's incompetence;
- 5) there was a due process violation because there was never a hearing held to determine the petitioner's competency;
- 6) the fact that the petitioner's demeanor at trial was not visually apparent to the court does not overcome the ineffectiveness of trial counsel;
- 7) the failure to raise the issue of incompetence on direct appeal is excused by the ineffectiveness of appellate counsel;
- 8) there exists evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice;
- 9) under the totality of the circumstances, the petitioner should be granted a new trial;
- 10) the conviction is otherwise subject to collateral attack upon ground(s) of alleged error formerly unavailable under any common law, statutory, other writ, motion, proceeding or remedy.

The State's answer denied Thompson's allegations and affirmatively alleged that the issues raised in Thompson's application were either resolved on direct appeal or waived by his failure to raise them on direct appeal.

On April 1, 2005, the State moved for summary disposition of Thompson's application for postconviction relief. The gist of the State's argument was that trial counsel made a reasonable strategic decision to pursue a factual rather than a diminished capacity defense and Thompson therefore failed as a matter of law to establish trial counsel was ineffective. The State also argued Thompson's remaining claims were waived because they were either resolved or not raised on direct appeal.

On April 21, 2005, Thompson, through postconviction relief counsel, filed a resistance and supporting brief. Thompson argued that summary disposition was unjustified, citing appellate counsel's ineffectiveness in failing to raise ineffective assistance of trial counsel on direct appeal. Thompson also argued that the postconviction record included unresolved and genuine issues of fact concerning trial counsel's choice of defenses, and failure to raise an adequate confrontation clause or other constitutional challenge to the video deposition procedure used prior to and at trial. Thompson also claimed there were genuine issues of fact remaining concerning his specific intent to commit kidnapping in the first degree, his competency to stand trial as a result of over medication, blood testing that failed to test for possible illegal substances, and the fact he was unable to hear the testimony of the victim because the sheriff supervising the video deposition was talking on the telephone during the deposition.

In a January 24, 2005 order, the postconviction trial court rejected Thompson's claims related to the video deposition testimony, citing our resolution of Thompson's confrontation clause issue on direct appeal. The court also rejected Thompson's claims concerning trial counsel's choice of defenses, stating "trial counsel conducted a reasonable investigation of Thompson's mental state and made a reasonable decision not to pursue defenses based on incompetence or diminished capacity." The court did not address Thompson's ineffective assistance of appellate counsel claims because the resolution of Thompson's ineffective assistance of trial counsel claims was controlling.

On appeal, Thompson raises the following issues:

- I. Whether the lower court erred by finding that no genuine issues of material fact exist and failing to apply the correct constitutional standard in examining the competency of the defendant to stand trial?
- II. The issue relating to the videotape presentation of the victim's testimony is significantly different from that raised on direct appeal?
- III. Counsel was ineffective for failing to present the theory of defense as defendant asserts he requested.

## ***II. Standard of Review.***

"Dismissal of an application for postconviction relief is reviewed to correct errors of law." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Our review is de novo when there is an alleged denial of constitutional rights. *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995) (citing *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984)).

## ***III. Error Preservation Issues.***

Prior to July 1, 2004, a defendant was required to raise claims of ineffective assistance of counsel on direct appeal in order to preserve those

claims for consideration in a subsequent postconviction proceeding. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). An applicant could escape the preclusive effect of this rule by showing a sufficient reason (such as ineffective assistance of appellate counsel) for not raising the issue on direct appeal. *Id.*

Iowa Code section 814.7 as amended no longer requires a defendant to raise ineffective assistance of counsel issues on direct appeal to preserve them for postconviction relief. *Young v. State*, No. 03-0277 (Iowa Sept. 1, 2004). In that case the court said:

The new statute, however, does not help Young because of the rule which provides that “statutes controlling appeals are those in effect at the time the judgment or order appealed from was rendered.” The district court’s postconviction judgment was entered January 16, 2003, approximately eighteen months before the statute went into effect.

*Id.* (citations omitted). We read *Young* to say the date of the postconviction relief judgment is the date that determines the applicability of 814.7, not the date of the underlying criminal conviction.

Here, Thompson appeals from the trial court’s postconviction judgment entered on June 4, 2005. Because the judgment appealed from was entered after the effective date of section 814.7 as amended, Thompson was not required to raise his ineffective assistance of counsel claims on direct appeal to preserve them for consideration in this postconviction proceeding.

#### ***IV. The Merits.***

Iowa Code section 822.6 states:

The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Summary disposition under this paragraph is analogous to the summary judgment procedure provided for in Iowa Rules of Civil Procedure 1.981 through 1.983. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). Rule 1.981(3) provides that a resistance to a motion for summary judgment shall include a statement of disputed facts. “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials in the pleadings, but the response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Iowa R. Civ. P. 1.981(5).

To prevail on his ineffective assistance of trial counsel claims, Thompson must establish by a preponderance of evidence that (1) counsel’s performance was deficient and (2) counsel’s deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985). If the postconviction petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. *Bear v. State*, 417 N.W.2d 467, 472 (Iowa Ct. App. 1987).

There is a strong presumption that the performance of counsel falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). “Mistakes in judgment are not enough to establish ineffective assistance of counsel.” *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). “Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel.” *Kane*

*v. State*, 436 N.W.2d 624, 627 (Iowa 1989). “Where counsel’s decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel.” *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). We require more than that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. *Bear*, 417 N.W.2d at 472.

With these principles in mind, we consider the merits of Thompson’s arguments on appeal.

**Video Deposition.** Even if we assume without deciding that trial counsel breached an essential duty by failing to raise an adequate constitutional challenge to the victim’s video deposition, Thompson has failed in his burden to set forth specific facts supporting the prejudice prong of his ineffective assistance of counsel claim. Thompson merely argues “the prejudice can easily be seen by watching the depositions.” His conclusory claim falls short of his burden to respond to the State’s motion for summary disposition and is insufficient as a matter of law to generate a fact issue on the prejudice prong of his ineffective assistance of counsel claims. See *State v. Meyer*, 653 N.W.2d 574, 578-79 (Iowa 2002) (claiming defendant was ready to go to trial is not sufficient assertion of prejudice).

**Competency to Stand Trial.** There is a presumption that a defendant is competent to stand trial, and a defendant has the burden of proving incompetence by a preponderance of the evidence. *State v. Rieflin*, 558 N.W.2d 149, 152 (Iowa 1996). A history of mental illness standing alone does not show a

defendant is incompetent. *State v. Edwards*, 507 N.W.2d 393, 395 (Iowa 1993); *State v. Lyon*, 293 N.W.2d 8, 12 (Iowa 1980).

The gist of Thompson's argument is that trial counsel's essential duty included more than the pretrial investigation and psychiatric evaluation cited by the trial court. He argues counsel had a continuing duty to inform the court concerning the side effects of the medication Thompson was prescribed following his psychiatric evaluation, as well as Thompson's bizarre behavior. Even if we assume counsel breached an essential duty in that regard, Thompson has again failed to meet his burden to respond to the State's motion for summary disposition by setting forth specific facts supporting the prejudice prong of his ineffective assistance of counsel claim. The fact that Thompson was prepared to elaborate further on that issue at trial is not sufficient. *Meyers*, 653 N.W.2d at 579. In any event, we, like the trial court, find counsel conducted a reasonable investigation of Thompson's competency to stand trial by securing Thompson's psychiatric evaluation and relying on the resulting opinion of the evaluating physician. We affirm on this issue.

**Choice of Defenses.** As noted earlier, defense counsel is not considered ineffective simply because his or her trial strategy concerning the presentation of a defense was unsuccessful. *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). The real issue is whether counsel's actions were "justifiable." *Johnson v. State*, 495 N.W.2d 528, 533 (Iowa Ct. App. 1992) (citing *Pettes v. State*, 418 N.W.2d 53, 56-57 (Iowa 1988)). When counsel develops a reasonable strategy regarding which defense to present at trial, we will not second guess that decision on appeal. *Fryer v. State*, 325 N.W.2d 400, 413

(Iowa 1992). Counsel may have a reasonable trial strategy not to pursue a psychiatric defense. *State v. Sinclair*, 622 N.W.2d 772, 782 (Iowa Ct. App. 2000).

In the postconviction proceedings before the trial court, Thompson's challenge to trial counsel's choice of defenses was limited to the prospects of a successful diminished capacity defense. Our review of the postconviction record, including Thompson's reply to the State's motion for summary disposition, fails to disclose any analysis or argument concerning the prospective merits of the factual defense trial counsel elected to pursue. In the absence of any such analysis or argument, we find Thompson has again failed in his burden to respond to the State's motion by setting forth specific facts showing there is a genuine issue for trial concerning counsel's choice of a factual defense. Moreover, we decline to consider this issue for the first time on appeal. *State v. Wilkins*, 687 N.W.2d 263, 265 (Iowa 2004).

We have carefully considered all of Thompson's claims raised on appeal and find they are controlled by the foregoing or are without merit. The judgment of the postconviction trial court dismissing Thompson's application for postconviction relief is affirmed.

**AFFIRMED.**