

IN THE COURT OF APPEALS OF IOWA

No. 6-489 / 05-1221
Filed August 9, 2006

DAVID LEE TOMLINSON, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Tama County, Kristin L. Hibbs,
Judge.

Applicant-appellant, David Lee Tomlinson, Jr., appeals from the district
court's denial of postconviction relief. **AFFIRMED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, and Brent D. Heeren, County Attorney.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Applicant-appellant, David Lee Tomlinson, Jr., appeals from the district court's denial of postconviction relief. Tomlinson contends he showed that his trial counsel, appellate counsel, and postconviction relief counsel provided him ineffective assistance. We affirm.

Tomlinson was tried and convicted of first-degree murder, second-degree murder, and flight from the state to avoid prosecution. His trial counsel filed a motion for change of venue which was denied. Trial counsel also sought a four-week continuance and was granted a one-week continuance. Appellate counsel did not raise either issue on direct appeal. Tomlinson contends his postconviction counsel was ineffective in failing to assert that his appellate counsel was ineffective for failing to raise the issues on direct appeal.

The State contends appellate counsel and postconviction counsel had no duty to pursue a challenge to the district court's ruling on the venue or continuance issues. The State argues the district court did not abuse its discretion on either issue and that Tomlinson is unable to show prejudice as there is no evidence showing a different ruling on either motion would have yielded a different result.

Claims of ineffective assistance of counsel are derived from the Sixth Amendment to the United States Constitution, and are afforded a de novo review. *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). Such claims are generally preserved for postconviction proceedings unless a satisfactory record exists upon which to base a conclusion. *Id.* at 774.

To sustain his petition, Tomlinson must prove by a preponderance of the evidence that both postconviction counsel and appellate counsel failed in an essential duty and prejudice resulted therefrom. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). There is a strong presumption that counsel's performance meets professional standards. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To rebut this presumption defendant must present an affirmative factual basis establishing inadequate representation. *Id.* Improvident trial strategy or miscalculated tactics do not necessarily constitute ineffective assistance of counsel. *Id.* Moreover, the resultant prejudice must give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred. *Pace*, 602 N.W.2d at 774.

Tomlinson makes the statement that had appellate counsel and postconviction counsel raised these issues there is a reasonable probability that the result of the appeal and postconviction proceeding would have been different. Yet, he points to nothing in the record that supports this argument. We need not consider whether counsel did in fact abrogate a duty as no prejudice is evident. *See State v. Oetken*, 613 N.W.2d 679, 684 (Iowa 2000). We affirm.

AFFIRMED.