

IN THE COURT OF APPEALS OF IOWA

No. 6-966 / 06-0620
Filed February 14, 2007

THOMAS CLARK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell,
Judge.

Thomas Clark appeals following the district court's denial of his application
for postconviction relief. **AFFIRMED.**

Ronald L. Ricklefs, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Harold Denton, County Attorney, and Todd Tripp, Assistant County
Attorney, for appellee State.

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

ZIMMER, J.

Thomas Clark appeals following the district court's dismissal of his application for postconviction relief. The district court concluded Clark was attempting to reassert an ineffective assistance of counsel claim that had been raised and decided on direct appeal. Clark contends he may reassert the claim in his postconviction relief application because he "has not, either in the trial court or on direct appeal, had a legally viable means or opportunity to make a record on [t]his claim" We affirm the district court.

Clark was charged with robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1997), for an incident that took place at a convenience store the night of October 23, 1998. The evidence presented at trial included the following.

According to Kim Bannister, the clerk on duty, Clark entered the store three times that night. He was wearing a dark jacket. The first time Clark entered the store he was alone and purchased a cold, quart bottle of Miller High Life beer. Bannister placed the bottle in a paper sack, and Clark left the store. Two or three minutes later, Clark returned with a second man, who was wearing a striped top. After a few minutes, Clark purchased a package of Big Red chewing gum, and the two men left the store. Approximately ten minutes later, Clark and the second man returned. Clark stopped in front the counter and told Bannister, "[W]e're not here to hurt you, we just want your money." The second man stepped around the counter. Keeping his right hand in his pocket, the second man pushed into Bannister, and removed money from the register. The two men then left the store.

All three occurrences were captured on videotape by the store's surveillance system. The videotapes were played for the jury. Bannister identified the man in the dark jacket as Clark. The jury was also informed that approximately two weeks after the incident Bannister was presented with a photographic lineup and identified Clark as the man in the dark jacket who had stopped in front of the counter. Finally, police discovered a cold, open bottle of Miller High Life beer, in a plastic sack, approximately forty or fifty yards from the store. A Big Red chewing gum wrapper was found in the same area. Police retrieved one latent fingerprint from the bottle and two latent fingerprints from the plastic sack. All three fingerprints matched those of Clark.

Following trial, the jury convicted Clark of robbery in the second degree. On appeal, Clark asserted trial counsel was ineffective for failing to "put on any evidence Kim Bannister was mistaken in identifying Clark as one of the robbers." See *State v. Clark*, No. 00-0604 (Iowa Ct. App. March 14, 2001) (*Clark I*). We affirmed Clark's conviction, concluding he had not demonstrated prejudice "because of the prosecution's overwhelming evidence against him." *Id.* Clark filed an application for further review, which our supreme court denied.

In March 2003 Clark filed an application for postconviction relief asserting that during a pretrial deposition conducted more than one year after the incident Bannister had misidentified him in still photographs taken from the surveillance tapes. He contended trial counsel was ineffective for failing to use the misidentification to impeach Bannister's testimony. The district court determined the same claim had been adequately raised and finally adjudicated on direct appeal and thus, pursuant to Iowa Code section 822.8 (2003), Clark was

precluded from reasserting the claim in a subsequent postconviction relief proceeding. The court accordingly dismissed Clark's application. This appeal followed.

In general, we review postconviction proceedings for errors of law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, to the extent Clark raises constitutional issues, our review is de novo. *Id.* Upon such review, we affirm the district court.

Pursuant to section 822.8,

Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

This section has long been interpreted as providing "that postconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal." *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Thus, when an issue has been considered and adjudicated in a prior proceeding, the principle of res judicata bars additional litigation of the issue. *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971).

A review of *Clark I* and the postconviction record indicates that Clark is attempting to reassert a claim that was raised, considered, and finally adjudicated on direct appeal. Whether rightly or wrongly decided, once procedendo issued, *Clark I* became law of the case and binding on the district court and this court in subsequent appeals. See *State v. Grosvenor*, 402 N.W.2d

402, 405 (Iowa 1987). Clark may not relitigate the claim from *Clark I* in a postconviction relief proceeding. See *Wetzel*, 192 N.W.2d at 764.

Moreover, even if we were to reconsider Clark's claim, we would again find it to be without merit. To establish the ineffective assistance of his trial counsel, Clark must prove that his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To demonstrate prejudice Clark must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999).

Here, Clark criticizes defense counsel for not impeaching Bannister's testimony with the fact that, when presented with two still photographs from the surveillance videotapes, she identified Clark as the man in the striped top. However, as trial counsel explained, she made a conscious decision to ignore the misidentification. Counsel stated she defended on the basis that the man in the dark jacket who stopped in front of the counter and who had no physical contact with Bannister, the man Bannister identified during her trial testimony as Clark, had not committed an assault and thus was not guilty of robbery. Although this strategy proved unsuccessful, it was reasonable and will not be second-guessed on appeal. See *State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000). Clark has failed to show his trial counsel breached a duty.

Moreover, while raising the misidentification might have cast doubts on the reliability of Bannister's testimony, it may well have convinced the jury that Clark was the man who stepped around the counter, made physical contact with

Bannister, and removed the money from the cash register. When the foregoing is considered in light of the other evidence indicative of Clark's guilt, he cannot prove that, if counsel had used the misidentification to impeach Bannister's testimony, the outcome of the proceeding would have been different.

AFFIRMED.