

IN THE COURT OF APPEALS OF IOWA

No. 7-641 / 06-1780
Filed December 28, 2007

JUAN DUNIGAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Juan Dunigan appeals from the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Colo, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County
Attorney, for appellee.

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

EISENHAUER, J.

Juan Dunigan appeals from the district court's denial of his application for postconviction relief. He contends he was denied effective assistance of counsel in several respects. We review his claims de novo. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to prevail, Dunigan must prove by a preponderance of the evidence deficient performance by his attorneys and resulting prejudice. See *id.* at 142. However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Id.*

Dunigan was convicted of first-degree robbery stemming from an incident occurring on April 15, 2002. David Buehrer was beaten with a pistol before surrendering the \$46 he had in his pocket to his assailant. His conviction was based on his identification by Buehrer, the testimony of another eye witness, Jade Lewis, and his arrest three miles from the scene of the robbery in a vehicle matching the description given by Behrer with \$46 in his pocket. His conviction was affirmed by this court in June 2003. *State v. Dunigan*, No. 02-0956 (Iowa Ct. App. June 13, 2003).

On January 16, 2004, Dunigan filed an application for postconviction relief alleging his appellate counsel was ineffective in failing to raise the issue of trial counsel's ineffective assistance. He alleged trial counsel was ineffective in giving him false information regarding the severity of the penalty he faced if convicted of the charge, and in failing to make inquiry regarding an unknown person who informed him during trial that Lewis was a liar. The district court denied the application in an October 26, 2006 order.

The postconviction court found Dunigan's claims that his attorney misled him to be "buyer's remorse" and found the trial attorney's testimony credible when he said he had informed Dunigan of the potential sentence. Even assuming arguendo any deficient performance on the part of both trial and appellate counsel, we conclude Dunigan cannot establish prejudice. He argues his trial counsel did not properly advise him of the penalties he faced if convicted and therefore he rejected a plea offer that he otherwise would have accepted. However, on April 15, 2002, Dunigan was informed by the trial court specifically that if convicted of first-degree robbery he would be incarcerated "until you're 40 years old," whereas "[a] Robbery Second conviction would require incarceration until you were about 26 1/2" When asked by the judge if understood he responded, "Yes, sir." Dunigan was sufficiently apprised of the penalty he faced if convicted of first-degree robbery and therefore he cannot prove he was prejudiced.

Likewise, Dunigan cannot show he was prejudiced even had trial counsel procured testimony that Lewis had a reputation for lying. There is substantial evidence of his guilt. The victim of the robbery identified Dunigan as his assailant both the night of the robbery and at trial. He followed the car in which his assailant fled in and memorized the license plate. Dunigan was arrested within three miles of the scene of the crime in a vehicle matching the description and with the same license plate the victim provided. Furthermore, he had \$46 in his pocket, the same amount of money as was taken.

Finally, we reject Dunigan's claim on appeal that the postconviction court erred in denying hearsay evidence at the hearing. If the evidence had been

allowed, the outcome of the postconviction proceeding would not have differed for the above-stated reasons. Accordingly, we affirm.

AFFIRMED.