

**IN THE COURT OF APPEALS OF IOWA**

No. 8-1018 / 07-2098  
Filed January 22, 2009

**RICHARD MILLSAP,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Karen A. Romano,  
Judge.

Richard Millsap appeals the judgment of the district court denying  
postconviction relief. **AFFIRMED.**

Paul Rosenberg of Paul Rosenberg & Associates, Des Moines, for  
appellant.

Richard Millsap, Fort Dodge, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, John P. Sarcone, County Attorney, and James Ward, Assistant County  
Attorney, for appellee State.

Considered by Miller, P.J., and Vaitheswaran and Potterfield, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

The facts are not disputed. Both parties agree on the statement of facts set out by the Iowa Supreme Court in affirming Millsap's convictions on direct appeal.

The tragic accident giving rise to this case occurred on September 7, 2002, when [Richard] Millsap enlisted the assistance of his two nephews, Mark, age 10, and Fred, age 9, in removing brush and tree limbs from a property in Des Moines. The boys often helped their uncle in performing handyman jobs, and the record showed the defendant had a history of providing his nephews with guidance and assistance.

On the day in question, the defendant drove his truck to the job site, notwithstanding the prior revocation of his driving privileges. The defendant's one-ton truck had an open bed equipped with side panels. The boys rode in the back. On the way to the work site, another driver pulled alongside the truck and informed the defendant that one of the boys was hanging his legs over the back end of the truck bed. The defendant yelled through the sliding window in the cab for the boy to "Get up there like I told you and sit down." The other driver noted the boys did as they were told by their uncle. The defendant testified the boys were good kids and always minded him.

The group proceeded to the work site, where they removed brush and tree limbs and loaded them on the bed of the truck. When they were finished, the defendant placed the boys within the brush on the truck bed, and proceeded to drive through the city. Witnesses who saw the truck testified that the tree limbs extended beyond the height of the truck's cab and side panels. They also said the branches were lifted up by the wind when the vehicle accelerated. Some drivers, noting the likelihood that branches might fly off, slowed down to create a greater distance between their vehicle and the defendant's truck. Witnesses also reported they saw the two boys sitting on top of the branches, trying to hold them down.

As the truck proceeded down Southeast 14th Street, a combination of wind and the vehicle's momentum caused the unsecured branches to blow up in the air, taking the defendant's nephews with them. The boys were hurled to the concrete pavement, sustaining fatal head injuries.

The State charged the defendant with two counts of child endangerment in violation of Iowa Code section 726.6(1)(a) [2001],

two counts of homicide by vehicle in violation of Iowa Code section 707.6A(2)(a), and one count of driving while barred in violation of Iowa Code section 321.561. The case was tried to the court. The court granted the defendant's motion for judgment of acquittal on the two homicide-by-vehicle counts, but found the defendant guilty of the remaining charges.

*State v. Millsap*, 704 N.W.2d 426, 429 (Iowa 2005).

The Iowa Supreme Court affirmed the district court's judgment on direct appeal. Millsap filed a postconviction relief action, arguing that his trial and appellate counsel were ineffective in failing to raise due process and sufficiency of evidence claims. The district court dismissed his postconviction relief action on December 3, 2007. Millsap now appeals.

## **II. Standard of Review**

We review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To the extent that Millsap's argument involves the constitutional right to effective assistance of counsel, our review is de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007).

## **III. Ineffective Assistance of Counsel**

To prove ineffective assistance of counsel, Millsap must show that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). In order to prove the first prong, Millsap must show that his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). There is a presumption that counsel acted competently. *Id.* In evaluating the second prong, prejudice will not be found unless there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.” *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). We are encouraged to dispose of an ineffective assistance claim under the second prong when possible. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa Ct. App. 1987).

#### **A. Due Process**

Millsap argues that Iowa Code section 726.6(1)(a) did not provide fair notice that his conduct was illegal, in violation of his rights to due process. The Due Process Clause of the Fifth Amendment requires that a criminal statute give fair warning “of what the law intends to do if a certain line is passed,” the underlying principle being that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *U.S. v. Lanier*, 520 U.S. 259, 265, 117 S. Ct. 1219, 1224-25, 137 L. Ed. 2d 432, 442 (1997). The United States Supreme Court further provided that when a statute is so vague that one must guess at its meaning and its application may differ, the vagueness doctrine bars enforcement of the statute. *Id.* at 266, 117 S. Ct. at 1225, 137 L. Ed. 2d at 442. The rule of lenity “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.” *Id.*

Millsap asserts that because death occurred, the State should have charged him only with crimes containing death as an element. Instead, the State also charged him with felony child endangerment under Iowa Code section 726.6(1)(a) and (3), which required “substantial risk to a child or minor’s physical, mental or emotional health or safety” resulting in “serious injury.” Millsap argues that in so charging him the State injected impermissible vagueness and

arbitrariness into the legal process, allowing the prosecution to choose his punishment. This court considered this very issue in *State v. Rhode*, 503 N.W.2d 27 (Iowa Ct. App. 1993). In *Rhode*, the court of appeals rejected the argument that when death results, the State cannot charge an individual with a crime that requires proof of serious injury. *Rhode*, 503 N.W.2d at 40. The *Rhode* court concluded that death is “the most serious of injuries and [is] in no way to be exclusive of serious injury. The offenses of child endangerment and felony murder are not mutually exclusive.” *Id.* Thus, Millsap was not prejudiced by his attorneys’ failure to make a due process argument that had been rejected ten years earlier.

Millsap also argues that the trial information did not provide notice that he was charged with “felonious child endangerment,” which is a forcible felony. The trial information accused Millsap of child endangerment in violation of Iowa Code section 726.6(1)(a), which it specified was a class C felony.<sup>1</sup> Iowa Code section 702.11 (2001) defines “forcible felony” to include “any felonious child endangerment.” Thus, we find that the State provided adequate notice to Millsap that child endangerment was a felony and would therefore classify as a forcible felony.

### **B. Sufficiency of the Evidence**

Millsap also argues that there is insufficient evidence that he committed an “act” as required to prove child endangerment. Millsap relies on the definition of “act” in Iowa Code section 702.2, which defines “act” to include omissions. That

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<sup>1</sup> The legislature later enacted a section providing that child endangerment resulting in death is a class B felony. Iowa Code § 726.6(4) (2007).

section provides that an “act” includes a “failure to do any act which the law requires one to perform.” Iowa Code § 702.2. Millsap contends that, since driving with children in the back of his truck is not illegal, his failure to put the children in the cab was not an “act.” Millsap’s argument ignores the reality that the court convicted him not of an omission, but of the affirmative action of placing the children in the back of the truck, an action that created “a substantial risk to a child” as prohibited by Iowa Code section 726.6(1)(a). Millsap’s argument that he did not commit an act fails as did his previous argument on his direct appeal that he did not act knowingly. See *Millsap*, 704 N.W.2d at 430.

#### **IV. Conclusion**

Millsap failed to prove that prejudice resulted from his attorneys’ failures to assert a due process claim. Millsap could properly be charged with child endangerment even though death resulted. Millsap was provided with sufficient notice that he was being charged with a felony. Millsap failed to prove prejudice resulted from his attorneys’ failures to argue that he did not act.

**AFFIRMED.**