

IN THE COURT OF APPEALS OF IOWA

No. 8-672 / 07-2088
Filed September 17, 2008

RODERICK D. CHISLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Roderick Chisley appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Shelley Goff, Ruston, Louisiana, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, and Patrick Jennings, County Attorney, for appellee State.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

Roderick Chisley appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of trial counsel. We affirm.

I. Background Facts and Proceedings.

Chisley was arrested for an incident that occurred on August 1, 2004, at the residence of his former girlfriend, Jennifer Hansen. The State charged him with burglary in the first degree and assault while participating in a felony, based on allegations he entered Hansen's residence without permission, possessed a dangerous weapon, and assaulted her. At the time of the incident, Chisley, the victim and a third party, Christopher Johnson, were present at Hansen's residence and were the only "eyewitnesses" to the incident.¹ Chisley and Hansen testified at trial and had conflicting testimony about the incident. Johnson did not testify.² The jury found Chisley guilty on both counts, and he was sentenced to an indeterminate term of twenty-five years on the burglary charge and five years on the assault charge to run concurrently.

Chisley's convictions were affirmed on direct appeal in *State v. Chisley*, No. 05-0019 (Iowa Ct. App. Dec. 7, 2005). On April 4, 2006, Chisley filed an application for postconviction relief, alleging ineffective assistance of counsel and lack of a fair trial. Following a hearing on September 6, 2007, the district court denied Chisley's application. Chisley now appeals.

¹ Hansen began dating Johnson after she and Chisley had broken up.

² In a police interview shortly after the incident, the third party attempted to conceal his identity. Police later arrested and returned him to Louisiana on an outstanding warrant.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.4; *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Those claims concerning alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Id.*; *State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Ineffective Assistance of Trial Counsel.

Chisley contends his trial counsel was ineffective by failing to interview or depose Johnson, the third party present during the incident leading to the charged crimes. He further argues he suffered prejudice caused by his counsel's alleged errors.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam*, 745 N.W.2d at 721. We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64

(Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721. Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *Id.* However, “strategic decisions made after a ‘less than complete investigation’ must be based on reasonable professional judgments which support the particular level of investigation conducted.” *Id.*; *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984)).

Ineffective assistance of counsel claims

involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma, 626 N.W.2d at 143.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel’s errors, the outcome of the proceedings would have been different. *Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143. A reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722. To establish prejudice, the defendant must “state the specific ways in which counsel’s performance was inadequate and how competent representation would have changed the outcome.” *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000) (quoting *Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999)).

Chisley claims that because Johnson was only other party present during the incident, he was a tie-breaker witness whose testimony could have helped Chisley's defense. He alleges his counsel was ineffective for failing to investigate to determine whether Johnson's testimony would help his defense. The record shows that a major part of Chisley's defense was the argument that he did not enter Hansen's residence without her consent. If successful, this defense would have avoided Chisley's felony burglary conviction. As the district court noted in its postconviction order:

A major part of the applicant's defense was that he was allowed in by Hansen and did not enter the residence without consent. Because there was a conflict in the testimony of Hansen and the applicant, the case turned on the credibility of the witnesses. [Counsel] wanted to stress the nature of the entry as consented to by Hansen because the physical evidence (actually, the lack of physical evidence that would support an assertion of forceful entry) favored the applicant's position of a consent entry. With that approach, [counsel] hoped to avoid a burglary conviction.

....
The applicant argues that [counsel] should have called Johnson as a witness. However, [counsel's] review of the police reports showed that Johnson, through an interview with the police, collaborated Hansen's version of the incident, not the applicant's version. [Counsel] did not want to take the deposition of Johnson because he did not want to take the chance that Johnson's deposition might be used at trial if it was adverse to Chisley.

[Counsel] was aware from his investigation and review of the potential evidence that Johnson was in the residence in the bedroom with Hansen. Because Hansen was going to testify that the applicant "suddenly appeared" in the bedroom and Johnson was already in the bedroom, [counsel] believed that Johnson's testimony would not likely affect the issue of whether or not there was a forced entry into the residence since Johnson was not in a position to see the applicant enter the residence. Also, [counsel] did not want to take the risk that Johnson would support Hansen's testimony that she did not let the applicant into the residence.

The record further shows that counsel was concerned with Johnson's credibility as a witness. In a police interview after the incident, Johnson's

statements corroborated Hansen's statements. He lied about his identity and was evasive. Soon after the police interview, he was arrested on an outstanding warrant from Louisiana and returned to that state. As the district court noted:

Johnson was called by Chisley and did testify at the postconviction hearing. He testified about the incident and what he observed. On cross, Johnson testified that he never gave an interview to the police about the incident and never gave a false name to the police at the interview.

[Counsel's] fear about the credibility of Johnson if called at the criminal trial is supported by Johnson's complete lack of credibility at this postconviction hearing.

Although Johnson denied, under oath, that he was interviewed by the police, Exhibit 1 is a DVD recording of Johnson actually being interviewed by the police about the subject criminal incident and shows Johnson giving a false name to the police (presumably because there was an active warrant for Johnson's arrest, and he was arrested as shown on the DVD). Johnson admits he is the person in the DVD recording. The DVD shows Johnson advising the police that the applicant suddenly showed up in the bedroom (consistent with Hansen's testimony) leading to the deduction that Hansen did not consent to the applicant entering into her residence. In describing the incident to the police shortly after the occurrence, Johnson also stated he asked Chisley how Chisley got into the house and grabbed Chisley at one point (the inference being to protect Hansen). [Counsel] could reasonably determine from his evaluation of the police reports that it would not help Chisley's position if Johnson were called as a witness at trial.

We agree with the district court that counsel's fears about Johnson's credibility were reasonable. Furthermore, we find it reasonable to believe that Johnson may have been unavailable for trial and therefore any statements made during his deposition would be entered into evidence at trial.

In light of the totality of his case's circumstances, an authorized entry into Hansen's residence was one of the only defense strategies available to Chisley. We cannot say this strategic decision amounted to ineffectiveness of his trial counsel. Furthermore, the record clearly evidences Johnson's questionable

credibility. We cannot say counsel's decision to refrain from interviewing and deposing Johnson amounted to ineffective assistance.

Furthermore, even if we were to assume Chisley's counsel could have successfully interviewed and deposed Johnson, we do not find that Chisley was prejudiced by this alleged omission. Police reports and a DVD show Johnson evasively answered questions, lied to the police about his identity, and corroborated Hansen's testimony. The jury convicted Chisley after hearing contradicting testimony from two eyewitnesses—Chisley and Hansen. Chisley has not proved by a reasonable probability that, without counsel's alleged errors, the outcome of the proceedings would have been different. We therefore affirm the district court's denial of Chisley's postconviction relief application.

AFFIRMED.