

**IN THE COURT OF APPEALS OF IOWA**

No. 9-376 / 08-0829  
Filed July 2, 2009

**DAVID SMOTHERS,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Des Moines County, Cynthia Danielson, Judge.

Appellant appeals the postconviction court's ruling denying his application for postconviction relief. **AFFIRMED.**

Jeffrey Lipman, Clive, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Amy K. Beavers, Assistant County Attorney for appellee.

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

**VOGEL, J.**

David Smothers appeals the postconviction court's denial of his application for postconviction relief. On our de novo review, we affirm. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

On July 14, 2004, a jury found Smothers guilty of burglary in the third degree as a habitual offender in violation of Iowa Code section 713.6A (2003).<sup>1</sup>

Smothers first asserts his trial counsel was ineffective for failing to request a change of venue after a short newspaper article about the trial was published just days before his re-trial.<sup>2</sup> The postconviction court found that only one small article was published, and it was not particularly inflammatory, such that prejudice would be presumed. *Id.* at 142 (holding a defendant must show prejudice to prevail on an ineffective-assistance-of-counsel claim). It further found trial counsel chose not to move for a change of venue because he considered Des Moines County to be more defense friendly than the neighboring counties. He discussed this strategy with Smothers and received Smothers's approval of the plan. *State v. Couser*, 567 N.W.2d 657, 659 (Iowa 1997) (stating the court "will not indulge in nice distinctions concerning trial tactics when they do not clearly appear to have been misguided"). We agree with the postconviction court's findings of no breach of duty or resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (holding a defendant must prove both (1) counsel failed to perform an

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<sup>1</sup> This court affirmed the conviction on direct appeal. *State v. Smothers*, No. 08-0829 (Iowa Ct. App. August 17, 2005).

<sup>2</sup> His first trial ended in a mistrial on June 10, 2004, with the jury unable to reach a verdict. The news article appeared in the Burlington Hawk Eye on July 6, 2004, with retrial set for July 13, 2004.

essential duty, and (2) prejudice resulted on an ineffective-assistance-of-counsel claim).

Next, the district court considered Smothers's assertion that his trial counsel failed to convey his desire to accept the terms of a plea agreement offered by the assistant county attorney. The terms included: if Smothers would plead guilty to a charge of third-degree burglary with a five-year prison sentence, then the State would not charge him as a habitual offender. Smothers's trial counsel testified that although he discussed these terms in person with Smothers "several times," and had many conversations with the prosecutor, Smothers "never" agreed to the terms. Hence the prosecutor amended the trial information to include the habitual offender status. In addition, the record includes the correspondence between Smothers and trial counsel, supporting Smothers's refusal to accept the agreement. We affirm the district court's rejection of this claim of alleged ineffectiveness.

Having reviewed the record and agreeing with the district court's fact findings, reasoning, and conclusions of law, we affirm pursuant to Iowa Rule 21.29(1)(a), (c), (d), and (e).

**AFFIRMED.**