

IN THE COURT OF APPEALS OF IOWA

No. 9-484 / 08-1542
Filed July 22, 2009

LAWRENCE EDWARD PERDUE II,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh,
Judge.

Lawrence Edward Perdue II appeals the district court decision denying his
application for postconviction relief. **AFFIRMED.**

Mark C. Smith, Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, and James Ellefson, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Jennifer Miller, County Attorney, and Paul Crawford, Assistant County
Attorney, for appellee State.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Lawrence Edward Perdue II appeals the district court decision denying his application for postconviction relief. He alleges the district court erred in ruling that failure to raise ineffective assistance of counsel issues on direct appeal waived the issues for possible postconviction proceedings. He further contends he received ineffective assistance of postconviction counsel. We affirm.

I. Background Facts and Proceedings.

In the early evening of January 20, 2008, nineteen-year-old Perdue, eighteen-year-old Joe Moyer, and fifteen-year-old Patrick Frink encountered James Teer on Third Street in Marshalltown as they were walking to Glick School. Perdue and his friends had been drinking at Perdue's sister's house and had asked a few girls to meet them at the school and then join their party. Teer was a middle aged man weighing 126 pounds who suffered from mental health problems witnesses described as bipolar schizophrenia.

Frink perceived Teer as staring at him and challenged him, "What the fuck are you looking at?" The boys could not understand Teer's response. Perdue crossed the street to confront Teer and struck Teer with a wooden towel rod he had in his pant leg. Teer fell to the ground, and Perdue struck him again with the rod, and then proceeded to stomp and kick Teer several times. Perdue fled on foot when Frink saw the police approaching. Teer was initially taken to Marshalltown Medical & Surgery Center's emergency room, and was then

transferred to Iowa Methodist Medical Center in Des Moines, where he died the following afternoon.¹

Perdue was charged with murder in the first degree (Count I) and willful injury (Count II). A Marshall County jury found Perdue guilty of murder in the second degree, a lesser-included offense under Count I.² He was sentenced to a term of incarceration of up to fifty years. Perdue's convictions were affirmed on direct appeal in *State v. Perdue*, No. 00-1152 (Iowa Ct. App. Oct. 12, 2001). Following a hearing on March 13, 2008, the district court denied Perdue's application for postconviction relief. Perdue now appeals.

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. Preservation of Error.

Perdue contends the district court erred in ruling that failure to raise ineffective assistance of counsel issues on direct appeal waived the issues for

¹ The cause of death was determined to be multiple skull fractures, brain hemorrhages, and edema.

² The jury also found Perdue guilty of willful injury under Count II. However, because willful injury is a lesser-included offense of murder in the second degree, the court convicted and sentenced Perdue only on the murder charge.

possible postconviction proceedings. The State concedes the court's preservation of error finding is mistaken. The State argues, however, there is no basis for reversing and remanding the decision solely on that ground as the court thereafter addressed the merits of each of Perdue's claims.

We agree. Claims of ineffective assistance of trial counsel may be raised in a postconviction proceeding without first being raised in a direct appeal. Iowa Code § 814.7 (2007); *Hannan v. State*, 732 N.W.2d 45, 50-51 (Iowa 2007) (determining Iowa Code section 814.7 applies retroactively to cases that were final before the statute's effective date). Although the court erred in finding otherwise, we will not reverse and remand solely on that ground because the court did continue to address the merits of Perdue's claims. Furthermore, the issues of ineffective assistance of counsel Perdue raises on this appeal are with regard to his postconviction counsel.³ As it may concern this appeal, our review is limited to the court's ruling after its error preservation discussion.

IV. Ineffective Assistance of Counsel.

Perdue contends his postconviction counsel was ineffective by failing to call witnesses regarding Perdue's claims of ineffective assistance of trial counsel. Perdue further claims his postconviction counsel was ineffective by failing to claim prior counsel was ineffective for failing to raise the issue that the district court erred in applying the wrong standard to Perdue's motion for new trial.

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

³ Before the postconviction court, Perdue raised various issues of his trial counsel's alleged ineffectiveness.

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. It is not enough for a postconviction applicant to assert that defense counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). 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 v. State, 626 N.W.2d 134, 143 (Iowa 2001).

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)).

We have reviewed the record, the briefs of the parties, and the district court’s well-written opinion, and we find Perdue’s claims of ineffective assistance of postconviction counsel are without merit. There is no evidence that Perdue’s postconviction counsel failed to present at the postconviction hearing that would have proved Perdue’s trial counsel ineffective with regard to alleged claims of juror misconduct and medical malpractice. Similarly, we cannot find Perdue’s postconviction and/or appellate counsels ineffective for failing to claim the trial court applied an incorrect standard on Perdue’s motion for a new trial, where such motion would have surely failed.

Even assuming Perdue could prove his postconviction counsel failed to perform an essential duty, we do not find Perdue was prejudiced by this alleged omission. See *Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143. Any further discussion of the Perdue’s ineffective assistance of counsel claims by our court would add little to and not change the disposition of this case. Accordingly, we affirm.

V. Conclusion.

Perdue 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 Perdue’s postconviction relief application.

AFFIRMED.