

IN THE COURT OF APPEALS OF IOWA

No. 9-759 / 09-0226
Filed November 12, 2009

ALBERT CHARLES ELLIOTT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, David H. Sivright,
Judge.

Albert Elliott appeals from the denial of his application for postconviction
relief. **AFFIRMED.**

James Wozniak, Moline, Illinois, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Mikael L. Wolf, County Attorney, and Elizabeth Srp, Assistant County
Attorney, for appellee State.

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

DOYLE, J.

Albert Elliott appeals from the denial of his application for postconviction relief. He contends his trial counsel was ineffective, alleging his counsel (1) offered otherwise inadmissible evidence of Elliott's criminal history during direct examination and (2) was under the influence of alcohol during trial. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

On the evening of September 27, 2000, Elliott had a heated confrontation with three men at a convenience store. Elliott backed his car out of a parking spot, put on his high beams, pointed his car at the three men, hit the accelerator, and closed his eyes. The car crossed the parking lot, jumped a concrete barrier, crossed part of an adjoining lawn, and ended up in the street. Two of the men got out of Elliott's way, but one was run over by the car and dragged for a distance. Following a jury trial, Elliott was convicted of attempted murder and willful injury. He was sentenced to concurrent terms of imprisonment of twenty-five and ten years, respectively. On direct appeal, this court affirmed Elliott's conviction and sentence. See *State v. Elliott*, No. 01-0714 (Iowa Ct. App. May 31, 2002).

On May 12, 2005, Elliott filed an application for postconviction relief. Following a hearing, the district court denied relief on all grounds. Elliott now appeals the denial on two of those grounds.

To establish a claim of ineffective assistance of counsel, Elliott must show by a preponderance of the evidence that (1) counsel's performance fell outside the normal range of competency and (2) the deficient performance so prejudiced the defense as to deprive the criminal defendant of a fair trial. *Thompson v.*

State, 492 N.W.2d 410, 413 (Iowa 1992). We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984). In order to show prejudice, Elliott must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Elliott's Prior Convictions. During direct examination by his attorney, Elliott was asked about his "bumps with the law" over his lifetime. Elliott stated he had been convicted of possession with intent to deliver marijuana, a drug stamp violation, and felon in possession of a firearm. Both the postconviction court, and the State on appeal, assumed for the sake of analysis that Elliott's counsel breached an essential duty by asking his client to disclose the inadmissible criminal record. The postconviction court, after carefully considering Elliott's claim, concluded that "evidence of Elliott's criminal history was not prejudicial in light of the other evidence supporting his conviction." After a de novo review of the record, we agree and adopt the postconviction court's findings and conclusions as our own. Iowa Ct. R. 21.29(1)(d).

Counsel's Alleged Use of Alcohol. At the postconviction relief hearing, Elliott testified his trial counsel smelled of alcohol during two days of the trial and that he noticed a couple of times when handling papers his counsel's hands were shaking. Elliott also introduced evidence that his trial counsel had plead guilty to operating while intoxicated (OWI) in 2002, was publicly reprimanded in 2003 for the OWI and for appearing in court with a strong odor of alcohol, and had his law

license suspended in 2005 due to alcoholism. It is Elliott's burden to establish the facts he asserts by a preponderance of the evidence. See *Cleesen v. State*, 258 N.W.2d 330, 332 (Iowa 1977). The postconviction court concluded:

Had he smelled of alcohol during the trial, such fact would have been apparent to the trial judge and the prosecutor, both of whom met with [defense counsel] at the bench and in chambers numerous times during the trial to discuss various objections or evidentiary rulings. Had the trial judge noted an odor of alcohol, the matter would have been immediately discussed on the record outside the presence of the jury. That did not happen.

In any event, Elliott has not shown by a preponderance of the evidence that he was prejudiced in some way by his counsel's alleged intoxication. The postconviction court made a detailed analysis of Elliott's counsel's trial performance and concluded: "In summary, [defense counsel] was well-prepared for trial and performed his duties competently and zealously. He fulfilled the adversarial role mandated by the Sixth Amendment." After our de novo review of the record, we agree and adopt the postconviction court's findings and conclusions as our own. Iowa Ct. R. 21.29(1)(d).

Disposition. Because Elliott has failed in his burden of proving prejudice, we affirm the district court's denial of his application for postconviction relief.

Postscript. In reviewing the parties' appendix, we note several rules violations, the most serious of which is the failure to place the name of each witness at the top of each page where the witness's testimony appears. Iowa R. App. P. 6.905(7)(c). Transcript testimony of seventeen witnesses covers 115 pages of the appendix, and without constantly referring back to the table of contents, the reader has not a clue as to whose testimony is being read. Lesser infractions include the violation of rules 6.905(4)(c), 6.905(7)(d), and 6.905(7)(e).

Although these violations may seem inconsequential, compliance with the rules facilitates efficient navigation of an appendix, thus fostering our duty to achieve maximum productivity in deciding a high volume of cases. See Iowa Ct. R. 23.30(1).

AFFIRMED.