

IN THE COURT OF APPEALS OF IOWA

No. 9-760 / 09-0233
Filed October 21, 2009

JAMES MICHAEL GREENE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

James Michael Greene appeals the district court decision denying his
application for postconviction relief. **AFFIRMED.**

Lynn Poschner of Borseth Law Office, Altoona, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant
County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MANSFIELD, J.

James Michael Greene appeals the district court decision denying his application for postconviction relief. Greene was convicted of first-degree robbery for forcing a contractor to pay him money at gunpoint. One of Greene's trial defenses was that the contractor owed him the money—a so-called “claim of right” defense. Greene argues his trial counsel was ineffective for failing to object to a jury instruction that stated “a rebuttable presumption exists that those in possession of property are rightly in possession.” Greene contends this instruction improperly shifted the burden of proof to him, and thereby violated his due process rights. Because we agree with the district court that a “claim of right” defense should not have been available to Greene under Iowa law, we affirm the judgment below.

I. Background Facts and Prior Proceedings

This court set forth the facts of this case on direct appeal as follows:

James Greene was a subcontractor for Cover Up Industries, an exterior home improvement business. In September 2000, he contracted to hang siding on a home. Believing the work to be complete, Greene asked Cover Up Industries owner James Ayres for payment of his services. Ayres informed Greene the work was incomplete and corrections needed to be made. Later the same day, Ayres told Greene they would “settle up” when the repairs were complete.

Upset, Greene left and retrieved a handgun. Greene returned to Ayres's office and asked him for payment. When Ayres again refused, Greene pulled out the semiautomatic handgun and demanded payment. Ayres gave Greene money from his billfold and employee John Winchell gave him money from the petty cash drawer. Greene then ordered the men to lie down in the corner of the room. Upon leaving and getting into his car, Greene accidentally shot himself in the leg. He drove himself to the hospital where he was treated and then arrested.

State v. Greene, No. 01-1918 (Iowa Ct. App. Sept. 11, 2002).

Greene was charged with first-degree robbery in violation of Iowa Code section 711.2 (1999). The case proceeded to trial on October 23, 2001. During trial, Greene asserted a defense of diminished responsibility while trying also to maintain an alternative defense of claim of right. The claim of right defense was clearly expressed in Greene's motion for a judgment of acquittal, when defense counsel stated, "Mr. Greene was not there to steal money. He was there to collect money that was owed to him, that he had a good faith based claim."

After the close of evidence, a conference was held to discuss the jury instructions. Consistent with Iowa Code sections 711.1 and 711.2, for Greene to be convicted of first degree robbery, the State had to prove that Greene had a specific intent to commit a theft. At that time, the State, in response to Greene's claim of right arguments, requested the following language be added to the jury instruction defining theft: "Ownership is not necessary to the crime of theft; it is committed by an unauthorized taking from one who is in rightful possession. In addition, a rebuttable presumption exists that those in possession of property are rightly in possession." Greene's counsel objected to the proposed jury instruction on the ground that it included language not found in the Iowa Code, but his objection was overruled. The jury found Greene guilty and he was sentenced to a term of twenty-five years in prison.

On direct appeal, Greene asserted the additional language in the instruction defining theft violated his due process rights by shifting the burden of proof and relieving the State of its burden to prove every element of the offense beyond a reasonable doubt. *Id.* However, this court found that Greene had failed to preserve error because Greene's counsel "made no reference to due

process, the constitution, or improper burden shifting” when objecting to the theft jury instruction. *Id.* Therefore, we affirmed Greene’s conviction without addressing the constitutionality of the instruction. *Id.*

Greene filed an application for postconviction relief on July 1, 2003. Greene’s initial application was dismissed by the district court based on an oral motion made by Greene’s counsel outside of Greene’s presence. Greene appealed, and we reversed and remanded, finding that Greene had not been afforded a meaningful opportunity to present his position. *See Greene v. State*, No. 04-1764 (Iowa Ct. App. July 27, 2005).

On remand, a hearing was held on Greene’s claim that his trial counsel was ineffective for failing to object to the jury instruction regarding theft on the ground that it violated his due process rights. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S. Ct. 2450, 2459, 61 L. Ed. 2d 39, 51 (1979) (holding that a presumption in the jury instructions violated the defendant’s due process rights under the Fourteenth Amendment). The district court determined that Greene’s trial counsel was not ineffective because Greene invited the error and any error was harmless beyond a reasonable doubt. Greene now appeals.

II. Scope of Review

Generally, we review postconviction relief proceedings for correction of errors at law. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). However, ineffective assistance of counsel claims are constitutional in nature; therefore, our review is de novo. *Id.*

III. Analysis

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. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish the first prong, the defendant “must overcome the presumption that counsel was competent and show that counsel’s performance was not within the range of normal competency.” *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the second prong, a defendant must show a counsel’s failure worked to the defendant’s actual and substantial disadvantage so that a reasonable probability exists that but for counsel’s error the result of the proceeding would have differed. *Id.* Failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Therefore, we do not have to determine whether counsel’s performance was deficient before examining the prejudice element. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). If sufficient prejudice is not shown, we need not address whether counsel breached an essential duty. *Id.*

In this case, Greene is unable to show prejudice because the jury instruction related to a defense that he was not entitled to in the first place. In Iowa, the statutory claim of right defense is unavailable to a defendant in offenses involving violent reclamations of property, such as robbery or burglary. We decided this point in *State v. Miller*, 622 N.W.2d 782, 785-87 (Iowa Ct. App. 2000), prior to Greene’s trial. As we noted in *Miller*, there is a “modern distaste for violent self-help” and “vigilante” action. *Id.* at 786. Allowing a burglar or robber to argue that he had a “right” to the property anyway would promote

socially undesirable conduct. *Id.* As we put it, “basic public policy dictates that even rightful owners should not be permitted to perpetrate break-ins or use force to regain their property, once it has been taken.” *Id.* We also held that in Iowa Code section 714.4 the legislature recognized a claim of right defense to *theft*, but not burglary and robbery. *Id.* at 785-87.

This case clearly falls within the holding of *Miller*. Greene took the money from Ayers and Winchell at gunpoint and was charged with first-degree robbery. Therefore, whether Greene had a reasonable belief he had a right to the money was legally irrelevant. Such a claim of right could not have negated his intent to commit a theft under Iowa law. *See id.* at 784-87.

Since a claim of right was not a defense available to Greene, it makes no difference whether the challenged instruction established a “presumption” that Greene did not have a claim of right. In reality, Greene received more than he was entitled to under Iowa law when his trial counsel was permitted to argue to the jury that Greene was merely retrieving his own money. Because the State had no obligation to prove that the contractor was “rightly” in possession of the money, it could not have prejudiced Greene for the jury to have been told “a rebuttable presumption exists that those in possession of property are rightly in possession.”

We find Greene’s counsel was not ineffective for failing to object to the theft jury instruction on the basis of due process. Accordingly, we affirm the denial of his application for postconviction relief.

AFFIRMED.