

IN THE COURT OF APPEALS OF IOWA

No. 9-850 / 09-0180
Filed November 12, 2009

CHARLES ROSS III,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Charles Ross III appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Laura Chipman of Pargulski Law Office, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Charles Ross III appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of both trial and postconviction counsel, and argues the sentence imposed by the trial court was improper. We affirm.

I. Background Facts and Proceedings.

Ross pled guilty as a habitual offender to two counts of robbery in the second degree.¹ Ross admitted to two prior felony convictions. The district court found Ross guilty and imposed concurrent terms of fifteen years, with a seventy-percent mandatory minimum pursuant to Iowa Code section 902.12 (2007),² along with a \$5000 fine for each offense.

On direct appeal in *State v. Ross*, No. 05-0364 (Iowa Ct. App. Apr. 26, 2006), this court found the fines illegal, but declined to address Ross's pro se claim challenging the application of section 902.12 to his sentence, holding error had not been preserved.³ The supreme court granted further review and addressed the issue of the section 902.12's applicability to Ross's sentence on its merits. The court relied on *State v. Burgs*, 479 N.W.2d 323, 323-24 (Iowa 1992), to determine that the mandatory minimum enhancement under section

¹ These convictions arose out of two separate incidents: In FECR186873, the record indicates that Ross entered a Des Moines Git-N-Go on August 26, 2004, with the intent to commit a theft. He pushed the store clerk away from the cash register, took money that was on the counter, and left the store. In FECR186810, the record indicates that Ross broke into the Drake Liquor Store on September 2, 2004, with the intent to commit a theft. Ross encountered the store owner, and pushed him in an attempt to get away. He then took some beer and left the store.

² Section 902.12(5) directs the court to impose the seventy-percent mandatory minimum sentence before parole. Under section 902.9(3), the maximum sentence for habitual offenders is fifteen years for each offense.

³ Ross also raised additional related constitutional claims in his pro se brief that the court declined to address, determining error was not preserved.

902.12(5) applies to the habitual offender term of fifteen years under section 902.9(3). *State v. Ross*, 729 N.W.2d 806, 810-12 (Iowa 2007).

Ross filed a postconviction relief application in June 2007. Following a hearing, the district court denied Ross's application in a sixteen-page opinion. Ross now appeals the district court's ruling. Through counsel's brief, Ross again raises several of the claims he alleged in his postconviction application and brief: (1) that his trial counsel was ineffective in failing to explain that justification was a viable defense to assault and (2) that the trial court's application of section 902.12 to his sentence was improper. He also contends his postconviction counsel was ineffective in failing to subpoena his trial counsel to testify at the postconviction hearing. Ross supplements these arguments through a pro se brief.

II. Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.907 (2009); *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. *State v. Decker*, 744 N.W.2d 346 (Iowa 2008); *Harrington*, 659 N.W.2d at 520. We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Ineffective Assistance of Counsel.

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. Counsel must exercise reasonable diligence in deciding whether an issue is worth raising. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009).

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 v. State*, 626 N.W.2d 134, 143 (Iowa 2001). A reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722.

A. Trial Counsel.

Ross contends the district court erred in finding Ross's trial counsel was not ineffective in failing to explain to Ross that justification was a viable defense

to assault. Ross raises this argument specifically with regard to his conviction for his robbery of the Drake Liquor Store (FECR186810). Ross argues the defense of justification was available to him because “an assault” is a required element to a charge of robbery. See Iowa Code § 711.1(1). He further alleges he was only participating in a forcible felony of robbery *after* the justification defense attached; prior to that point, he was participating in the non-forcible felony of burglary. For the following reasons, we find Ross’s argument to be without merit.

Pursuant to Iowa Code section 704.3, “A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend one’s self or another from any imminent use of unlawful force.” Section 704.6 further provides:

The defense of justification is not available to the following:

1. One who is participating in a forcible felony, or riot, or a duel.
2. One who initially provokes the use of force against oneself, with the intent to use such force as an excuse to inflict injury on the assailant.
3. One who initially provokes the use of force against oneself by one’s unlawful acts, unless:
 - a. Such force is grossly disproportionate to the provocation, and is so great that the person reasonably believes that the person is in imminent danger of death or serious injury or
 - b. The person withdraws from physical contact with the other and indicates clearly to the other that the person desires to terminate the conflict but the other continues or resumes the use of force.

In this case, Ross is unable to show that trial counsel breached an essential duty because a justification defense was not available to Ross for several reasons. First, as the district court noted, Ross could not use “the justification defense because he initiated the incident and he had an alternative course of action to take.” Iowa Criminal Jury Instruction 400.2 states:

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force. If the State has proved any one of the following elements, the defendant was not justified:

1. The defendant started or continued the incident which resulted in injury.
2. An alternative course of action was available to the defendant.
3. The defendant did not believe he was in imminent danger of injury and the use of force was not necessary to save him.
4. The defendant did not have reasonable grounds for the belief.
5. The force used by the defendant was unreasonable.

Here, Ross broke into the Drake Liquor Store at approximately 2:30 a.m., after the store was closed. He banged his fists on the glass door for nearly a minute until the glass broke and he was able to reach through and let himself into the store. He walked straight to the counter (liquor bottles were behind the counter) and jumped over it. Ross was startled to encounter the owner of the store behind the counter, pointing a shotgun at him.

At that point, upon discovering the owner's presence, Ross could have exited the store and avoided any physical contact with the owner. Instead, Ross lunged toward the owner and repeatedly stated, "Don't shoot, don't shoot." The video is not clear as to what happened during the owner's struggle with Ross, but the record indicates Ross pushed the owner and wrestled with him for the shotgun. During the scuffle, the owner informed Ross the gun was not loaded and told him to get out. Ross said, "okay," and walked out through a door at the end of the counter, near the exit of the store. Ross was obviously not too afraid of the owner, because instead of leaving, he walked back up to the counter area and grabbed two cases of beer from the cooler. The owner then loaded the shotgun with rock salt and shot Ross in the right buttock and upper leg. Ross took the beer and left the store.

Ross's use of force against the owner was not justified. It is undisputed that Ross initiated the incident. Ross's breaking into the store was the impetus for the events that followed. Ross was in the store unlawfully and provoked the owner to use reasonable force to protect his property. See Iowa Code §§ 704.4, 704.6(3). Furthermore, once Ross saw the owner of the store, he could have left immediately and avoided any physical altercation.

We further find that Ross's use of force was not justified because he was not defending himself against the "imminent use of unlawful force." Iowa Code section 704.4 provides that "[a] person is justified in the use of reasonable force to prevent or terminate criminal interference with the person's possession or other right in property."

"Reasonable force" is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat. Reasonable force, including deadly force, may be used even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party, or requires one to abandon or retreat from one's dwelling or place of business or employment.

Id. at § 704.1.

In this case, Ross broke into the liquor store in the middle of the night, after business hours. It was dark, the lights in the store were off, and the store was closed. The video suggests that the owner was there by himself, and did not have time to call police before Ross got into the store. The owner heard Ross banging on the door before he broke the glass and retrieved an unloaded shotgun. Clearly, the owner was frightened by Ross's actions in breaking into his

store. The owner did not know whether Ross was alone, whether Ross was carrying weapons, or whether Ross planned to be violent. The owner's action of pointing the shotgun at Ross when Ross jumped over the counter was not unreasonable or "grossly disproportionate" to Ross's actions under these circumstances. See *id.* at §§ 704.4, 704.6; see generally *State v. Peck*, 539 N.W.2d 170, 174 (Iowa 1995); *State v. Metcalfe*, 203 Iowa 155, 163, 212 N.W. 382, 386 (1927); *State v. Sipes*, 202 Iowa 173, 176-85, 209 N.W. 458, 460-63 (1926). The owner was using nothing more than reasonable force to prevent or terminate criminal interference with his place of business, and therefore, any force used by Ross against the owner was not justified. See Iowa Code § 704.3.

For these reasons, we conclude Ross is unable to show sufficient evidence to support a defense of justification. See *State v. Ceasar*, 585 N.W.2d 192, 194 (Iowa 1998) (noting that the defendant bears the burden of demonstrating that the record contains sufficient evidence to support an instruction on the issue of justification), *overruled on other grounds by State v. Bruegger*, ___ N.W.2d ___, ___ (Iowa 2009). Because the defense was unavailable to Ross, his trial counsel did not breach an essential duty by failing to explain it to him. Any attempt by trial counsel to raise the issue of the defense of justification would have been meritless, and therefore, Ross cannot show that counsel was ineffective. See *Dudley*, 766 N.W.2d at 620 (noting that counsel has no duty to raise a meritless issue). Because we have determined the issue of justification is not meritorious in this case, we need not determine whether Ross was prejudiced by his counsel's alleged failure. See *Polly*, 657 N.W.2d at 465. We affirm as to this issue.

B. Postconviction Counsel.

Ross contends his postconviction counsel was ineffective in failing to present trial counsel as a witness during his postconviction relief hearing. Ross points out that the State presented no evidence to show that trial counsel was, in fact, effective.

We conclude the record is adequate to address Ross's claim of ineffective assistance of postconviction counsel. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (noting that we ordinarily preserve ineffective assistance of counsel claims for further postconviction proceedings unless the record is adequate to review the claim on direct appeal). We have already determined the defense of justification was unavailable to Ross, and therefore, his trial counsel had no duty to raise the issue. As such, prejudice did not result by postconviction counsel's failure to present trial counsel as a witness to testify with regard to this issue. We find this claim to be without merit.

IV. Mandatory Minimum Sentence.

Ross contends the district court erred in finding the trial court properly sentenced Ross to fifteen years as a habitual offender with a seventy-percent mandatory minimum pursuant to section 902.12.⁴ This claim has already been

⁴ Ross further alleges the habitual offender statute (section 902.12(5)) is void for vagueness under the Due Process Clause. The Due Process Clauses of the United States and Iowa Constitutions prohibit the enforcement of vague statutes. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). However, on direct appeal, our supreme court determined this issue (raised for the first time on appeal) was untimely and declined to address it.

The supreme court proceeded to conclude however, that section 902.12(5) is "clear and unambiguous." *Ross*, 729 N.W.2d at 811 (determining that the lengthier sentence of section 902.12 "merely subsumes" the three-year minimum of section 902.8, and therefore avoiding the illogical result that a recidivist would serve less time than a first-time offender). Ross's argument to the contrary is without merit.

decided on direct appeal in *Ross*, 729 N.W.2d at 809-12, and we therefore do not address it again. See Iowa Code § 822.8 (barring relitigation of claims previously decided on direct appeal).

V. Pro Se Claims.

Reed alleges four pro se claims on appeal. These claims either overlap his appellate counsel's claims, or do not add anything discernibly different to those claims. We have already addressed those claims and found them to be without merit.

VI. Conclusion.

For the reasons set forth above, we conclude Ross has not met his burden to show his trial or postconviction counsel rendered ineffective assistance, and has not established any other postconviction claim. The ruling of the district court is affirmed.

AFFIRMED.