IN THE COURT OF APPEALS OF IOWA

No. 4-002 / 92-1570

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CLERK SUPREME COURT

RICHARD D. WINEMILLER,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Monroe County, Dan F. Morrison, Judge.

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

Patrick F. Curran of Vinyard & Curran, Ottumwa, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and William S. Owens, County Attorney, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

Richard D. Winemiller appeals from the denial of his application for postconviction relief contending: (1) he was denied effective assistance of postconviction counsel; (2) he was denied due process by the district court's refusal to grant his pro se request to expand the postconviction record; and (3) he was denied effective assistance of appellate counsel on his appeal of his criminal conviction because counsel did not raise all meritorious issues. We affirm.

Winemiller was convicted, following a jury trial, of first-degree murder. On appeal Winemiller, represented by the appellate defender, raised several issues: sufficiency of the evidence; error in allowing a witness to testify using a recorded recollection; error in admitting photographs of the deceased's decomposed body; and error in jury instructions five, seven, eight, eleven, fifteen, and twenty-six. The court of appeals affirmed the conviction and the supreme court denied Winemiller's application for further review.

Winemiller filed a pro se application for postconviction relief. Counsel was appointed and recast the pleadings alleging: error in jury instructions six, eight, nine, fourteen and fifteen; prosecutorial misconduct; ineffective assistance of trial counsel in several respects; and ineffectiveness of appellate counsel for failure to raise all meritorious issues. Winemiller's

request to personally attend the postconviction hearing was denied. His testimony was taken by deposition and admitted into evidence at the hearing, which was held on September 24, 1991. A transcript of the hearing was provided to Winemiller.

On November 22, 1991, Winemiller filed a pro se "request to expand the record" seeking a new hearing, which would include the examination of witnesses already questioned as well as additional witnesses. On December 3, 1991, the request was denied.

On April 16, 1992, Winemiller supplemented the record with his second evidentiary deposition.

On August 18, 1992, the district court filed its findings of fact, conclusions of law, and ruling. The district court found Winemiller had failed to preserve his allegations of error concerning jury instructions six, nine and fourteen, prosecutorial misconduct, and ineffective assistance of trial counsel. The court also found Winemiller had failed to establish appellate counsel was ineffective in not raising these alleged errors. The district court concluded submission of jury instructions eight (first-degree murder marshaling instruction) and fifteen (permissible inference from intentional use of dangerous weapon) was not erroneous. Winemiller's application for postconviction relief was denied. Winemiller appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

With these principles in mind we now turn to appellant's specific claims.

I. Ineffective Assistance of Trial and Appellate Counsel.

In this appeal from his postconviction hearing, Winemiller contends his trial counsel, David Dixon, was ineffective because he did not object when the prosecutor cross-examined Winemiller about his postarrest silence. Winemiller contends his appellate counsel, B. John Burns, was ineffective in not raising this issue on appeal.

At trial, Winemiller took the stand and testified he was not involved in the murder. In an attempt to explain the presence of physical evidence at the scene, Winemiller testified that on the morning the body was found, Daniel McAntire took him to the victim's home to prove to Winemiller he had killed Brown.

On direct examination, Winemiller's trial counsel asked Winemiller if he told the police what he was telling the jury now. Winemiller responded that when he was first questioned by the DCI he did not tell them, because he was afraid something would happen to his wife and son. Winemiller stated he later told correctional service officer Bob Ehmke what he knew about Brown's death. Ehmke told him he should tell the DCI. Winemiller stated that he then wanted to talk to the DCI and make a statement, but the DCI never came back.

Before cross-examination the State alerted the court to its intent to show the DCI did not pursue the questioning of the defendant because, during the interview, the defendant had informed DCI that he did not want to talk to them anymore, and that he wanted an attorney. Winemiller's trial counsel did not object to this testimony because he believed his direct testimony "opened the door" to this inquiry.

At the postconviction hearing, Winemiller's trial counsel testified his trial strategy was to rebut an inference that Winemiller's story was a recent fabrication and to "shore up" Winemiller's story by showing Winemiller had previously told Ehmke the same story and that Winemiller had also tried to tell authorities his version.

Improvident trial strategy, miscalculated tactic, or mistakes in judgment do not necessarily amount to ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). In the postconviction hearing, Winemiller had the burden of showing, not only that his trial counsel was ineffective for not objecting, but also that his appellate counsel was ineffective for not raising this issue on appeal.

We find Winemiller has not established by a preponderance of the evidence that Burns' performance as appellate counsel fell below the range of normal competency. We therefore find Winemiller has not established "sufficient reason" for not having raised the

claim his trial counsel was ineffective on direct appeal. Id.

II. Ineffective Assistance of Postconviction Counsel.

Winemiller also contends his postconviction counsel was ineffective. In his brief, Winemiller claims his postconviction counsel, Marvin Colton, did not call three witnesses which were necessary to prove his postconviction claim.[1] He claims the testimony of attorney Steven Gardner, Sheriff Jack E. Baker, and attorney B. John Burns, would have resulted in the granting of his postconviction application because it would have proven the State acted illegally during his original arrest and during the search of his tent at a campground.

Winemiller testified at the postconviction hearing that his arrest for Brown's murder charge was illegal because of the way it related to his arrest for writing bad checks stolen from Myrtle Boyd. According to Winemiller, while he was in custody on the Boyd matter, the officers had him give them handwriting exemplars, which they later compared

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1. In his brief Winemiller also claims his postconviction counsel should have offered additional evidence. Winemiller does not specify what this additional information is about. With the exception of the the claims of alleged ineffective assistance of postconviction listed above, we find no claim of ineffective assistance of counsel has been presented to this court. See State v. White, 337 N.W.2d 517, 520 (Iowa 1983) (showing made by defendant was inadequate to support a holding that the issue of ineffective assistance should be reserved for determination in postconviction proceedings).

to the handwriting on checks stolen from the murder victim. Winemiller claims his later murder charge was illegal because of this deception. He appears to claim his trial counsel and his appellate counsel were ineffective in not raising this claim. Winemiller claims his postconviction counsel was ineffective in not calling Steven Gardner, his attorney in the Boyd matter, to testify in the postconviction proceeding that the Boyd charges were dismissed at the preliminary hearing for lack of probable cause. Winemiller believes this would support his contention that his original arrest was illegal.

Winemiller also wanted his postconviction counsel to call Sheriff Baker as a witness. Winemiller claims Sheriff Baker's testimony would support his position that the officers used deception to obtain handwriting exemplars.

Winemiller also claims the State's warrant to search his tent was illegal because it was based on information obtained from Daniel McAntire, a convicted felon. Winemiller claims the State used notebooks seized from his tent to prove it was his handwriting on Brown's stolen checks. Winemiller claims Sheriff Baker's testimony was necessary to show the search warrant was improperly based on McAntire's information.

Winemiller claims B. John Burns' testimony was necessary to show why these issues were not raised on appeal.

We find Winemiller has failed to show he was prejudiced by his postconviction counsel's failure to call these three witnesses. The information Winemiller wanted Gardner to testify to was already in the record. With regard to the warrant to search the tent, we find Winemiller has failed to show how Sheriff Baker's testimony would differ from the county attorney's testimony. At the postconviction hearing, the county attorney testified that she knew McAntire was a convicted felon of questionable credibility, but that she relied on his information to obtain a search warrant because the DCI was able to corroborate the information he provided.

With regard to the officers' alleged deception in obtaining handwriting exemplars, we are unable to say that if Sheriff Baker had testified the outcome of the postconviction hearing would have been different. Winemiller's trial counsel stated at the postconviction hearing that Winemiller admitted to writing bad checks, but denied committing the murder. It was trial counsel's strategy "not to attempt to lose credibility with the jury disputing some of the lesser things, because of the volume of proof out there" but to admit Winemiller was a check artist.

In addition, there was ample other evidence linking Winemiller to the murder. On direct appeal we found:

> Various witnesses testified that Winemiller was in possession of the victim's car, checks, and the murder weapon in the time period following the

> murder. Winemiller's palm print was found on a spent shell at the scene of the crime. A pubic hair similar to defendant's pubic hair was found on a t-shirt near the bed where the body was found. Winemiller's fingerprints were found on the checks written on Brown's bank account during the week following the victim's death.

State v. Winemiller, 411 N.W.2d 719, 720 (Iowa App. 1987). We find the defendant has failed to show his postconviction counsel was ineffective in failing to call these three witnesses.

III. Request to Expand the Record.

Winemiller also contends he was denied due process because the district court denied his pro se "Request to Expand the Record."

Although Winemiller was not personally present at the postconviction hearing, he was allowed to testify through deposition. The first deposition was taken just prior to the postconviction hearing. The deposition was then admitted into evidence at the hearing. At the close of the postconviction hearing, the court ordered a copy of the hearing transcript be made available to Winemiller. On April 1, 1992, Winemiller was allowed to supplement the record by means of a second evidentiary deposition. At both depositions Winemiller was asked open-ended questions. He testified freely without interruption or objections by the State.

After receiving the postconviction transcript, but before his posthearing deposition, Winemiller filed his

"Request to Expand the Record." In the request he claimed an adequate record was not being made. He requested a new hearing with at least thirty days notice. He wanted almost all the same witnesses subpoenaed again, as well as two new witnesses, Steven Gardner and Sheriff Baker. He also requested that he be personally present at the new hearing. The district court denied the request.

Hearings on postconviction relief applications are conducted under the rules of civil procedure. Iowa Code § 663A.7 (1991).[2] Rule 192 authorizes the trial court to allow further testimony "to correct an evident oversight or mistake, imposing such terms as it deems just." Iowa R. Civ. P. 192.

We find Winemiller's constitutional rights were not violated by the district court's refusal to allow Winemiller to expand the record. Winemiller had been allowed to testify by deposition before the hearing, he was represented by postconviction counsel at the hearing,[3] and he was allowed to supplement the record by his own rebuttal testimony after the hearing.

We affirm the district court's denial of postconviction relief.

AFFIRMED.

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2. Chapter 663A was transferred to Chapter 822 in the 1993 Code.

3. The postconviction applicant himself, in the discretion of the court, can be denied the right to appear personally. Hahn v. State, 306 N.W.2d 764, 767 (Iowa 1981).