

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHARLES D. NELSON,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

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9-71
88-533

Appeal from the Iowa District Court for Des Moines
County (CL1740-0883), William S. Cahill, Judge.

Appellant appeals district court's denial of
postconviction relief. **AFFIRMED.**

Michael J. Schilling, Burlington, for petitioner-
appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann
M. Ryan, Assistant Attorney General, for respondent-
appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

HAYDEN, J.

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Applicant, Charles D. Nelson, challenged his 1981 first-degree murder conviction by applying for postconviction relief. The district court denied postconviction relief, and Nelson has appealed. He contends the State withheld exculpatory evidence and he received ineffective assistance of counsel at trial and on direct appeal.

I. In 1981, Nelson was convicted of first-degree murder. Upon direct appeal, the Iowa Supreme Court affirmed this conviction. State v. Nelson, 325 N.W.2d 118 (Iowa 1983).

Nelson later challenged the conviction by applying for postconviction relief. The district court denied postconviction relief, and Nelson has appealed. Nelson contends the State withheld material and exculpatory evidence before and during his trial. He alleged exculpatory evidence concerned (1) reports an unidentified, suspicious individual (not Nelson) was observed near the crime scene, and (2) reports shortly before the crime Nelson had been acting in a bizarre manner consistent with insanity or diminished capacity. Nelson argues he has sufficient reason for not raising this issue on direct appeal because he had not discovered the evidence in question until after the direct appeal. Nelson also contends he received ineffective assistance of counsel

during the trial and on direct appeal. He contends his appellate attorney rendered ineffective assistance by failing to raise the issue whether probable cause had existed for a search of Nelson's home and for the seizure of a gun and ammunition from the house. He also contends his trial attorney rendered ineffective assistance, and infringed his right to confront and cross-examine his accusers, by failing to have Nelson personally present during pretrial depositions.

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.

II. First, Nelson argues he was denied effective assistance of counsel because his appellate counsel failed to raise the issue of whether probable cause existed for a search of Nelson's home. The search of which Nelson complains, unearthed a gun which further testimony indicated was the murder weapon, ammunition, and some additional items. On appeal, Nelson's counsel chose to pass on a search and seizure argument and concentrate on

the admissibility of admissions which Nelson made to a cellmate who later became a police agent. State v. Nelson, 325 N.W.2d 118, 119 (Iowa 1982).

Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). We presume counsel is competent and a postconviction petitioner has the burden of establishing by a preponderance of the evidence that trial counsel was ineffective. Id. To establish an ineffectiveness claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performing [sic] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of fair trial, a trial whose result is reliable.

Cuevas, 415 N.W.2d at 632 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980). The litmus test for determining whether the specified errors of counsel have resulted in required prejudice, is the defendant must show there is reasonable probability that, but for the errors, the result of the proceedings would have been different. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). In light

of these principles, we now address each of petitioner's assignments of errors.

Nelson argues the fruits of the search warrant should have been suppressed for three reasons: (1) no finding of probable cause was made on the face of the warrant; (2) there is no sufficient showing of the reliability or credibility of the informants upon whose information the magistrate relied to issue the warrant; and (3) the search warrant contained double hearsay and no sufficient information existed in the search warrant application to establish the trustworthiness of the hearsay and probable cause.

In this case the magistrate made its determination of reliability of the informant under the Aguilar v. Spinelli test, which has since been replaced by the standard articulated in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983).

Nelson argues the magistrate's finding of reliability was inadequate under the Spinelli test. We find Nelson's assertion to be without merit. The informants used by officers included a friend of Nelson's, the victim's roommate, and a minister, who was a friend of the victim's family. Clearly, all of these individuals were unpaid citizen informants. We can ascertain no motivation for these informants to lie. As the State asserts, the informants' only motivation was to help law enforcement

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officers in the investigation of the crime. See Munz v. State, 382 N.W.2d 693, 700 (Iowa App. 1985). We determine there is nothing in the record to suggest the informants were unreliable.

Nelson also contends the evidence proffered by the victim's roommate was stale and thus, should not have been considered by the magistrate. This assertion is meritless. According to the warrant, the informant stated the victim was afraid of Nelson and had moved in with the informant because of safety concerns. The informant did not specify dates which the victim expressed her fear. However, the other informants provided the issuing judge with information about the recent breakup between Nelson and the victim, as well as subsequent problems which had continued until the time of the crime. Viewing the facts here, we determine the informants' statements cannot be considered stale and were therefore properly relied on by the issuing judge.

Nelson also argues the search warrant was defective on its face because the issuing judge failed to cross-out the words which would indicate probable cause had been established. However, the warrant contained the following statement from the judge:

I am satisfied that there is probable cause to believe that the property so described is at the above-described place . . . and that the foregoing grounds for application for issuance of the search warrant exist.

Search warrants are to be viewed in the common sense fashion, not in an overly technical manner. See State v. Liesche, 228 N.W.2d 44, 48 (Iowa 1975). We determine the technical defect about which Nelson now complains is not fatal and was cured by the warrant itself.

Finally, we determine the warrant supplied sufficient showing of probable cause to believe Nelson was the person who shot and killed his ex-girlfriend. We find Nelson has failed to carry his burden of demonstrating ineffective assistance of counsel. Clearly, Nelson has not shown the disposition of his case would have been different had the search warrant claim been raised on appeal.

III. Nelson next claims the State withheld certain exculpatory evidence from him. Without this evidence Nelson contends the fairness and outcome of his trial was substantially undermined. We determine the postconviction court properly denied relief on this ground. In Cornell v. State, 430 N.W.2d 384 (Iowa 1988), the supreme court set forth the principles governing this suppression of exculpatory evidence:

[The applicant] must prove by a preponderance of evidence that:

1. The prosecution suppressed the evidence;
2. The evidence was favorable to the accused; and
3. The evidence was material to the issue of guilt.

On the issue of suppression, the Brady rule applies when information is discovered after trial "which had been known to the prosecution

but unknown to the defense. . . . Exculpatory evidence is not "suppressed" if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence." (Citations omitted.)

Id. at 385.

Nelson has clearly failed to carry his burden of proof. There is no showing in this record the evidence was actually withheld by the State.

During postconviction proceedings, Nelson's trial counsel acknowledged the prosecutor may have indeed made available the allegedly exculpatory evidence to him before trial. Nelson's counsel further stated his understanding that discovery in the county was usually done informally with defense counsel often having access to the Iowa Department of Criminal Investigation file. Counsel apparently could not recall whether he had seen the prosecution's file in this case. The "possibility" defense counsel may or may not have seen the prosecution's file is not sufficient to sustain Nelson's burden of proof that the prosecution suppressed exculpatory evidence. Thus, because Nelson could not carry his burden on this essential element, we need not look further. Consequently, we hold the preponderance of the evidence in this record does not indicate the State suppressed any exculpatory evidence from Nelson.

IV. Finally, Nelson argues he was denied his sixth amendment right to confront witnesses against him at

trial. Nelson's confrontation claim is grounded on the failure to have Nelson present during depositions. In State v. Turner, 345 N.W.2d 552 (Iowa App. 1983), we concluded that where depositions were taken prior to the trial for the purpose of introducing them during the trial, this was a "stage of the trial" which required the defendant's presence. We stated as follows:

The deposition taken out of the presence of the defendant without his consent was presented as evidence before the trier of fact. Although the supreme court has indicated that rule 25(1) includes matters beyond mere representation of evidence before the trier of fact, we believe one of the more important purposes of that rule is to protect the defendant's constitutional right of confrontation in presenting evidence from which the trier of fact determines guilt.

Id. at 554.

This court continues to stand behind its determination in Turner that a deposition is a "stage of the trial" which requires the defendant's presence. However, we hold here defendant has not shown he was prejudiced by not being present at the deposition. The depositions in this case were not introduced at trial, and there is no assertion by the information adduced during the deposition to generally prejudice his cause. Consequently, we find Nelson's final assignment of error to be without merit.

AFFIRMED.