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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DANIEL LEE WARE,	)	
Applicant-Appellant,	)	278
vs.	)	
STATE OF IOWA,	)	8-534 87-1044
Resister-Appellee.	)	

Appeal from the Iowa District Court for Scott County (No. 70378), John A. Nahra, Judge.

Defendant appeals the denial of postconviction relief. **AFFIRMED.**

Robert E. Weinberg of Munson, Woods & Weinberg, Bettendorf, for applicant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and William E. Davis, Scott County Attorney, for resister-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

The defendant appeals from the district court's denial of postconviction relief after a jury found him guilty of first-degree murder and first-degree robbery. He contends that: (1) the State suppressed exculpatory evidence; (2) various acts and omissions by his trial-appellate counsel and postconviction counsel combined to deny him effective assistance; (3) the State knowingly used perjured testimony; and (4) the aggregate effect of his individual claims establishes a denial of constitutional due process.

In 1982, a jury found Daniel Ware guilty of first-degree murder and first-degree burglary for his role in the robbery and fatal shooting of the proprietor of the Sports Page Lounge in Davenport. This court affirmed his conviction in State v. Daniel Ware, 338 N.W.2d 717 (Iowa 1983). The district court subsequently denied Ware's application for postconviction relief and he now appeals from that denial.

I. The defendant contends the trial court erred in rejecting his claim that he was denied due process, a fair trial, and effective assistance of counsel by the State's suppression of material and exculpatory evidence. The State argues that no error was committed in that the claim was waived by defendant's failure to present it at trial or on direct appeal. In the alternative, the State claims the issue also fails on the merits.

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously, Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981), and actual prejudice resulting from these errors must be shown. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). We use a de novo examination of the record to determine if this burden has been met. See Id.

We find that defendant has not satisfied his burden. Defendant claims that the State withheld exculpatory evidence that would have directed discovery to other evidence that would have enabled trial counsel to show that the murder was the result of a contract executed by a person other than the defendant. The evidence amounted to hearsay "tips" about this other person. Our review of the record reveals that defendant had knowledge of the substance of the evidence before the trial. Therefore, we fail to see how this evidence with reasonable probability would have changed the result of the trial. Defendant has not demonstrated actual prejudice resulting from this alleged error. This issue is deemed waived.

II. Defendant claims the trial court erred in ruling that he failed to show ineffective assistance of counsel on

the grounds raised so as to deny his rights to due process of law, a fair trial, and effective counsel as protected by the sixth and fourteenth amendments to the United States Constitution. The State argues that no error was committed.

Our ultimate concern in claims of ineffective assistance of counsel is with "the fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We review de novo the totality of circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Id. at 132, quoting Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. Prejudice requires proof of a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987).

Defendant's claim of ineffective assistance of counsel rests on six grounds. They are: (1) counsel failed to

discover exculpatory evidence; (2) counsel failed to effectively cross-examine witnesses regarding the bullet evidence; (3) appellate counsel failed to appeal the issue of a denied motion for continuance; (4) counsel failed to effectively pursue a hearsay issue on appeal; (5) defendant failed to present an alibi defense; and (6) counsel failed to present explanatory and character evidence.

As a preliminary matter, the State asserts that defendant's claim of ineffective assistance of counsel is waived for failure to present it on direct appeal. As stated earlier, we will consider this issue if cause is shown for not presenting the issue earlier and if actual prejudice resulted. Polly, 355 N.W.2d at 856. Defendant has claimed ineffective appellate and postconviction counsel. Ineffective assistance of appellate counsel is sufficient reason to permit the issue of ineffective trial counsel to be raised for the first time in postconviction proceedings for relevant issues. State v. White, 337 N.W.2d 517, 520 (Iowa 1983). However, defendant must also show that prejudice resulted from his ineffective assistance of counsel.

Our review of the record and the grounds alleged reveals that defendant cannot show actual prejudice resulting from ineffective assistance of trial counsel. Defendant cannot show but for counsel's errors, there is reasonable probability the outcome of the trial would have

been different or that, but for appellate counsel's errors, there is a reasonable probability that the defendant would have succeeded on appeal.

Each bit of evidence that allegedly was denied defendant was neither strong nor definite enough to have had an effect on the verdict, particularly given the strength of the evidence against defendant from his accomplice. State v. Ware, 338 N.W.2d 707 (Iowa 1983). Even when the alleged errors are combined, the evidence of defendant's guilt is so overwhelming that we find any error that might have resulted was harmless. Therefore, we conclude that defendant failed to show actual prejudice resulting from his failure to raise this claim on direct appeal or at the postconviction proceeding, and this issue is deemed waived.

III. Defendant is also claiming ineffective assistance of postconviction counsel. He claims counsel was ineffective in failing to prepare and present the testimony of Caryl Tappa at the postconviction hearing. We disagree.

First, it should be noted that we prefer to give counsel an opportunity to defend. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). Counsel has a right to present his reasons for his actions or inactions. However, we feel that defendant has not met his burden, so we can dispose of this matter at this time.

As we stated in the previous section, to establish a claim of ineffective assistance, defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). The only evidence presented is defendant's testimony regarding the significance of Caryl Tappa's testimony. This alone does not show by a preponderance of the evidence that counsel failed to perform an essential duty by not presenting this witness nor that it with reasonable probability would have affected the outcome. Therefore, defendant is not entitled to relief on this ground.

IV. Defendant contends the trial court erred in denying his claim that the State offered perjured testimony and this violated his right to a fair trial. This claim is based on the assumption that Dennis Williamson's trial testimony was false and that the State, through Detective Hammes, knew or should have known that it was false.

It is a violation of due process for the prosecution to suppress evidence favorable to the accused if the evidence is material to guilt or punishment where evidence is discovered after trial that the State's case included perjured testimony of which the prosecution was aware or should have been aware. State v. Todden, 364 N.W.2d 195, 198 (Iowa 1985). In order to be entitled to relief, defendant must prove the following:

> (1) that the prosecution either introduced or failed to correct false testimony;

(2) that the false or perjured testimony was given at trial;

(3) that the prosecution knew the perjured testimony was false;

(4) that the testimony was "material" and

(5) defendant has not waived the claim by failing to raise it at trial if he had reason to know the falsity of the subject testimony.

Id. at 198-99.

The evidence relied upon by the defendant amounts to hearsay about an alleged contract killer. The declarant was unknown, the source of information undiscoverable, the supposed contract killer could not be found despite police efforts, and there was no other evidence connecting this other person to the crime. This evidence is to be compared to Williamson's testimony, given under oath on the stand and subject to cross-examination. The jury had the opportunity to evaluate this testimony and to decide whether Williamson was credible or not. Without more evidence, we cannot find that Williamson's testimony was false or that the State knew that it was false. The postconviction court did not err.

V. Finally, defendant argues that the postconviction claims in the aggregate constitute a denial of due process of law. Any errors that we found individually were harmless errors. After a de novo review based on the totality of the circumstances, we find that even in the aggregate, defendant was not denied due process by this trial.

Not all errors in trial, even those of constitutional stature, necessarily dictate a reversal of the decision. State v. King, 256 N.W.2d 1, 12 (Iowa 1977). Defendant is entitled to a fair trial, not a perfect one. Id. For all of the foregoing reasons, the decision of the trial court is affirmed.

AFFIRMED.