

IN THE COURT OF APPEALS OF IOWA

No. 6-598 / 95-1587

000222

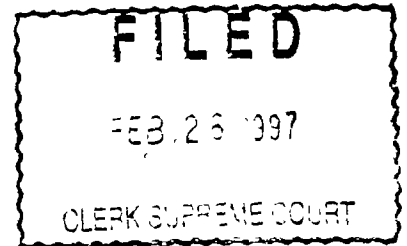
DONALD THANE KING,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Lee County, D.B. Hendrickson, Judge.

On appeal from denial of application for postconviction relief, applicant argues his trial counsel were ineffective and he was entitled to a new trial due to newly discovered evidence. **AFFIRMED.**

Mary K. Hoefer of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Michael Short, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., Cady, and Huitink, JJ.

CADY, J. 000223

Applicant, Donald Thane King, was convicted of first-degree murder. His conviction was affirmed on appeal. *State v. King*, 492 N.W.2d 211 (Iowa App. 1992). We preserved his claims of ineffective assistance of trial counsel for postconviction proceedings. King subsequently filed an application for postconviction relief.

The factual background leading to King's conviction was recounted in our decision on the direct appeal. *See State v. King*, 492 N.W.2d 211, 212-14 (Iowa App. 1992). The district court denied postconviction relief following a hearing. It also denied King's motion for new trial based on newly discovered evidence.

On appeal, King argues his trial counsel were ineffective: 1) in failing to object to the introduction of the State's evidence "humanizing" the victim; 2) in failing to object to hearsay testimony; 3) in failing to object to improper cross-examination of defendant and a defense expert; 4) in failing to object to the State's cross-examination of King at the suppression hearing; 5) in allowing King's prior criminal record to be admitted at trial; and 6) in failing to properly investigate the case. King also argues he is entitled to a new trial because of newly discovered evidence involving another person's alleged admission to the murder.

The State admits King has preserved error on the first two claims of ineffective assistance ("humanizing" the victim and hearsay), since they were raised on direct appeal. However, the State claims King failed to preserve error on the other claims

of ineffective assistance because his postconviction application did not allege “sufficient reason” for appellate counsel’s failure to raise them on direct appeal. Iowa Code § 822.8. (King’s brief alleges his appellate counsel was ineffective in not raising the other grounds on direct appeal.) The State also resists King’s claims of ineffective assistance on the basis of no breach of duty and/or no prejudice. It claims the alleged “newly discovered evidence” probably would not have changed the result of the trial, and no new trial was warranted.

I. Ineffective Assistance

A. Preservation of Error

The State contends King did not preserve error on the four claims of ineffective assistance of counsel not specifically preserved on direct appeal. If a defendant fails to raise an issue of ineffective assistance of trial counsel on direct appeal, he has the burden of showing sufficient reason for that failure or is barred from asserting the claim in postconviction proceedings. *Collins v. State*, 477 N.W.2d 374, 377 (Iowa 1991). King raised the four additional issues for the first time in his application for postconviction relief. Ineffective assistance of appellate counsel may provide “sufficient reason” or “cause” to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. However, King did not assert ineffective assistance of appellate counsel in his postconviction application and did not otherwise show sufficient reasons for failing

to raise the issues earlier. Thus, King failed to preserve error on the four new issues of ineffective assistance.

The postconviction court did not rely on King's failure to preserve error in dismissing the claim of ineffective assistance of trial counsel in his postconviction application. Nevertheless, we can affirm on appeal where any proper basis appears for the district court's ruling even though it is not the one upon which the court based its ruling. *Id.* Moreover, even if the four issues had been properly preserved, we agree they were properly dismissed by the district court.

B. Scope of Review

Postconviction proceedings are civil proceedings and ordinarily reviewed on error. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991). But where, as here, the postconviction applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review. *Id.*

C. Humanizing the Victim

King bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *See State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that, but for trial attorney's unprofessional errors, the resulting

conviction and sentence would have been different. *Id.* A reasonable probability exists if it is sufficient to undermine confidence in the outcome. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

The State's first witness at the trial was Henry Branch, the father of the victim, Ed Branch. Branch testified he was raising the victim's two children. Through this witness the State introduced a photograph showing the victim with his son, Jacob. Henry testified Branch "was happy. He always got along. The kids loved him, and he loved all the kids."

At the postconviction hearing both King's counsel testified they made no objection to Henry's testimony for tactical reasons. They did not want to make objections they expected would be overruled, especially during the testimony of the State's first witness. Although counsel could have objected to the testimony, see *State v. Broughton*, 450 N.W.2d 874, 876-77 (Iowa 1990)(testimony humanizing the victim should be received sparingly), this does not establish counsel failed to perform a duty. We will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

Further, King has failed to demonstrate prejudice resulted from counsel's failure to object to Henry's testimony. The evidence against King was overwhelming. King made oral admissions stating or implying he killed Branch. He gave a written

confession stating in part: "I caught up with him [Branch] in the alley and after he had me on the ground I stabbed him several times with the knife." The wounds on Branch's body were consistent with having been inflicted as King described. Two witnesses saw King chasing the victim with the knife and threatening to kill him. One witness actually saw the fatal fight, although he did not realize at the time a knife was involved, and gave a description of it which was generally consistent with King's own statement.

Additionally, a day or two before the murder, a bartender overheard King express his intention to kill Branch. A babysitter heard King tell Branch, "I'm going to slit your neck open." She then saw King take a knife out of the kitchen, point it at Branch, and pursue him. King chased Branch over a thousand feet, knife in hand. When police officers found King at the scene, he tried to toss the knife out of the officers' sight.

Based on this evidence we find King has not shown a reasonable probability, but for his trial counsel's failure to object to the testimony humanizing Branch, the resulting conviction and sentence would have been different. King has failed to prove prejudice.

D. Failure to Object to Hearsay

King next argues his counsel were ineffective for failing to object to the hearsay testimony of Police Sergeant Gary Frost. Frost testified to statements the

babysitter made to him concerning King's actions and statements just prior to the stabbing.

We agree with the trial court that King's counsel failed to perform an essential duty owed to King by not objecting to the hearsay testimony of Frost. *See State v. Mount*, 422 N.W.2d 497, 501-02 (Iowa 1988)(investigating officer's testimony, recounting in detail victim's description of the incident, approached line of inadmissibility, because it went beyond point of merely explaining why certain responsive actions were taken by the investigator; better practice would have been for prosecution to rely on victim's firsthand description.) However, we also agree King failed to establish prejudice.

II. New Evidence

A. Scope of Review

When a postconviction applicant raises newly discovered evidence as a ground for postconviction relief, we review for errors of law, not de novo. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994).

B. Testimony of Tabatha Smalley

The newly discovered evidence presented by King was the testimony of Tabatha Smalley. Smalley was a friend of Steve Chaney, the witness who observed the stabbing. Smalley testified Chaney came to her apartment in the middle of the night, visibly upset and told her he had been involved in a fight with Branch and

King. King had a knife and was fighting with Branch. Chaney told Smalley he took the knife from King, jumped on top of Branch, and stabbed him.

Smalley further testified she had not told this to anyone before because she was afraid of Chaney. Chaney had threatened her and warned her to keep her mouth shut.

To support a motion for new trial on the basis of newly discovered evidence, the proponent of the newly discovered evidence must show:

- (1) the evidence was discovered after the verdict;
- (2) it could not have been discovered earlier in the exercise of due diligence;
- (3) the evidence is material to the issue in the case and not merely cumulative or impeaching; and
- (4) the evidence probably would have changed the result of the trial.

Whitsel v. State, 525 N.W.2d 860, 863 (Iowa 1994).

In denying King's motion for new trial, the trial court found:

[T]he inconsistencies in the witness's testimony between her deposition and the hearing before the court, and the inconsistencies between her direct testimony and her testimony on cross and redirect, as well as her demeanor on the witness stand, raises serious questions about the credibility of this 'new evidence' presented by Ms. Smalley.

On our review we find no error in the trial court's denial of King's motion for new trial. There was overwhelming evidence that King, not Chaney, killed Branch. Moreover, Smalley could not keep her story straight and told three different versions of the story: one in her deposition, one on direct examination at the postconviction hearing, and one on cross examination.

We affirm the trial court's dismissal of King's application for postconviction relief.

AFFIRMED.