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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LAURENCE KARL BURGIN,	)	
Applicant-Appellant,	)	
vs.	)	82
STATE OF IOWA,	)	8-359
Resister-Appellee.	)	87-1263

Appeal from the Iowa District Court for Linn County (No. LA 12836), Ansel J. Chapman, Senior Judge.

Defendant appeals from the district court's denial of postconviction relief after a jury found him guilty of first-degree burglary. **AFFIRMED.**

Raymond Rogers, Acting Chief Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Mary W. Vavroch, Assistant Linn County Attorney, for resister-appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J. 63

Laurence Burgin was charged with first-degree burglary after the victim identified him through a one-way mirror at the Cedar Rapids Police Station as one of two intruders who had awakened him while burglarizing his home. Burgin's first attorney filed a motion to suppress in which he challenged the suggestiveness of the identification procedures. The district court overruled that motion.

New counsel then replaced Burgin's first attorney and filed a second motion to suppress raising the same issues and also alleging violation of Iowa Code section 801, which deals with non-testimonial identification. The district court overruled this motion as untimely.

A jury returned a guilty verdict and the court of appeals sustained the resulting conviction. In applying for postconviction relief, Burgin alleged ineffective assistance of counsel. That application was overruled and the relief requested was denied. He now appeals from that denial. We have concluded that the circumstances are such to require our reviewing all of appellant's claims.

The issue for our review is whether appellant's first and/or second counsel were ineffective in their representation of appellant before and during his trial. Our supreme court in Taylor v. State summarized the law in regard to an ineffective assistance of counsel claim:

> The person claiming that his trial attorney was ineffective, depriving him of his sixth amendment right to counsel, must show that (1) counsel

failed to perform an essential duty, and (2) prejudice resulted therefrom. Petitioner has the burden to prove both of these elements by a preponderance of the evidence.

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Petitioner must overcome a presumption that counsel is competent. . . . The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency.

In deciding the second component of a claim of ineffectiveness of counsel, prejudice, we have required the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." The United States Supreme Court has recently articulated the following test for determining whether specified errors of counsel have resulted in the required prejudice.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (citations omitted)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

I.

The appellant contends that trial counsel failed to present exculpatory evidence at appellant's trial and to effectively impeach the victim's testimony. He also argues that this exculpatory evidence was outside the record on direct appeal, entitling him not only to apply for, but

also be granted, postconviction relief due to his counsel's failure to present it at trial.

Counsel did not bring up at the time of trial the fact that a Nancy Merrill had told the police that two young men had come to her residence within one and one-half hours before the robbery and made a photographic identification of Ed Burgin, appellant's brother, as one of the two.

The record indicates that throughout the investigation and trial and until this very postconviction proceeding, this was a fact the appellant did not want to reveal even to his attorneys. As the trial court stated:

> . . . they cannot be faulted for failing to pursue the very thing which appellant sought to conceal. Appellant knew of this fact from the beginning and even intimated that to his attorneys, but failed to reveal any names or cooperate on this issue.

From the record before us, we conclude the appellant is not entitled to postconviction relief on the ground that counsel failed to raise at trial Nancy Merrill's interview with police.

Appellant asserts that other exculpatory evidence was not fully investigated or developed at trial. Specificially, this evidence includes an individual by the name of Pategas, who may have borne a resemblance to the perpetrator of the offense, whether or not the knife resembled a stag-handled knife, and whether or not the perpetrator may have looked like someone of a Spanish descent. According to the record, this was all brought out

during the course of the trial. We agree with the trial court when it stated: "They were collateral matters presented to the jury and which did not overcome other overwhelming evidence of guilt."

II.

The appellant contends that the failure of original counsel to raise the applicability of Iowa Code section 810, and to call Thomas Burt as a witness, and the abject failure of successor counsel to comply with the time limits of the Iowa Rules of Criminal Procedure, fell below the objective standard of reasonableness, and was prejudicial to the appellant.

Mr. Bobenhouse, first counsel, did not call the victim, Thomas Burt, to testify at the suppression hearing. We find, as the trial court did, that this was a matter of trial tactics. At that point in time, appellant's main theory of defense was to challenge the arrest and the validity of the search warrant. He had already taken Burt's deposition, in which he had exhibited great certainty concerning his identification of appellant. Mr. Bobenhouse was concerned that positive testimony on that issue might influence the court in its finding on other issues. See Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985) ("Selection of a primary theory of defense is a tactical matter which we will not disturb if it appears to have been a conscientious, principled decision within the normal

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range of competency."); see also State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984) ("When trial counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy does not achieve the desired result.").

Mr. Bobenhouse did not challenge the out-of-court identification procedure on the ground that the State had failed to file an Iowa Code section 810 motion. We do not find this to be outside the normal range of competency. He did not believe that the State was required to do that if Burgin's return to Cedar Rapids was voluntary and the arrest was not made until after the identification was completed. Mr. Bobenhouse made a correct appraisal of the law regarding a section 810 motion. This is confirmed by the ruling of this court, which is a part of this record, and which affirmed Burgin's conviction. The court held:

> The State persuasively argues that Iowa Code Chapter 810 did not apply because defendant voluntarily went to the police station and thus, there was not "seizure" within the scope of the Fourth Amendment. Because the State did not violate defendant's rights by failing to comply with Chapter 810, and because the identification did not cause a substantial likelihood of irreparable misidentification, it was not necessary to suppress the evidence obtained pursuant to defendant's arrest. The trial court did not err in denying defendant's motion to suppress.

In regard to the fact that the second counsel failed to file the second suppression motion within forty days of their appointment, we find that this did not prejudice the

appellant. Judge Horan held the suppression hearing which, basically, raised the very same issues that had been presented to Judge Ford. Both judges ruled adversely to the appellant. Although counsel did raise the Iowa Code section 810 issue in the second motion, it was not a valid defense pursuant to the ruling by the court of appeals, above mentioned.

The appellant is not entitled to postconviction relief because of any alleged incompetency of counsel who represented him at any stage of the proceedings. He received a full and fair trial before a jury and was ably and competently represented by experienced attorneys who performed well within the normal range of competency.

AFFIRMED.