IN THE COURT OF APPEALS OF IOWA

No. 1999-578 (9-839) / 99-331
Filed January 26, 2000

CURTIS K. COLLINS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
JAN 26 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Curtis Collins appeals the district court's denial of his application for post-conviction relief. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown and Chris Odell, Assistant Attorneys General, Thomas S. Mullin, County Attorney, and Paul Kittredge, Jr., Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Curtis Collins appeals the district court's denial of his application for post-conviction relief which alleged ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings. Curtis Collins was accused of shooting cab driver, Rudolph Jovanovic, in the face with a nine-millimeter handgun. After a bench trial in August of 1994, the district court found Collins guilty of attempted murder, willful injury, and going armed with intent. Collins' direct appeal from his convictions was dismissed by the Iowa Supreme Court as frivolous, pursuant to Iowa Rule of Appellate Procedure 104.

On May 11, 1998, Collins applied for postconviction relief. He claimed his trial counsel was ineffective for failing to discover exculpatory evidence and call certain impeachment witnesses. The district court denied the application, concluding Collins did not establish his trial counsel was ineffective or show prejudice.

Collins appeals. He contends his trial counsel was ineffective for not calling two "impeachment" witnesses or adequately investigating a police incident report allegedly referring to another suspect.

II. Scope of Review. Generally, an appeal from the denial of an application for post-conviction relief is reviewed for errors of law. *Harpster v. State,* 569 N.W.2d 594, 596 (Iowa 1997) (citations omitted). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances of the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v. State,* 511 N.W.2d 622, 627 (Iowa 1994)). This is equivalent to a de novo review.

Id. (citing *Hinkel v. State,* 290 N.W.2d 28, 30 (Iowa 1980)). Our review is de novo because Collins alleges a denial of his constitutional right to effective assistance of counsel. *See Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1995) (citations omitted).

III. Ineffective Assistance of Counsel. To establish an ineffective assistance of counsel claim the applicant must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *Irving,* 533 N.W.2d at 540. In proving the first prong, the post-conviction applicant faces a strong presumption that the performance of counsel falls within the wide range of reasonable professional assistance. *See State v. Hepperle,* 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland v. Washington,* 466 U.S. 668, 689-90, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-94) (1994)). We will not second guess reasonable trial strategy. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995). The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davis v. State,* 520 N.W.2d 319, 321 (Iowa App. 1994).

IV. The Merits. Collins first complains his trial counsel was ineffective for not interviewing and failing to call two "impeachment" witnesses, Crystal Jorgensen and John Goulette. Jorgensen is a friend of Collins and the mother of his former sister-in-law. At the postconviction hearing, Jorgensen testified she had been a passenger in the victim's taxi not long after the shooting occurred. According to Jorgensen, Jovanovic stated he had been shot while on the job and although he did not know if Collins was the perpetrator, "somebody was going to pay." Jorgensen claimed she relayed this information to Collins, his father and sister-in-law, all prior

to trial. John Goulette knows Collins through Jorgensen. He testified he was with Jorgensen when Jovanovic allegedly made the statement regarding the shooting. Goulette admitted he never relayed this information to anyone. During the postconviction hearing, petitioner's father, Terry Collins, also claimed he had provided the names of several potential witnesses to defense counsel prior to trial, including Jorgensen and Goulette.

Collins was represented at trial by attorney Randy Hisey. Hisey has practiced criminal law in state and federal court for more than twenty years. He testified he utilized witnesses suggested by Collins and his family, including Karri Collins, Greg Collins, Mona Foster, and Pastor Laura Neddau-Owen. The trial record confirms these individuals served as defense witnesses. Hisey testified it was only *after* the verdict that Collins and his family came forward with additional names. Hisey did not recall ever having received the names of Jorgensen and Goulette and emphasized he would have contacted any persons whom Collins indicated could serve as potential defense witnesses. We note neither Jorgensen nor Goulette ever claimed to have provided their information directly to Hisey. We conclude the record falls short of demonstrating any breach of any essential duty by trial counsel.

The State contends the outcome of Collins' trial would not have been different even if the trial court had been aware of the information Jorgensen and Goulette would have provided. We agree. The evidence against Collins was compelling. The facts, as found by the trial court, established that Jovanovic picked up a fare who fit Collins' description on July 20, 1993, at approximately 11:44 p.m.

near a Taco Bell restaurant in Sioux City. A Cub Foods grocery store is located nearby. Collins was a Cub Foods employee at that time and had clocked out of work that night at 11:36 p.m. A Sioux City police officer happened to be in the area and independently observed a young man sitting in the Taco Bell parking lot at approximately 11:40 p.m. on July 20, 1993. The officer identified Collins as the individual whom he saw get into a cab at Taco Bell. The passenger instructed Jovanovic to take him to the corner of 24th and Court Streets. Jovanovic stopped the cab at that location and was about to ask for the fare when the passenger shot him in the face with a nine-millimeter handgun. Jovanovic watched the passenger exit the cab out the left rear door and proceed in a northerly direction. Collins' residence was about one block from the scene in that direction. Jovanovic described his assailant to police officers on the evening of the incident.

Collins' own version of events was not credible. Several weeks after the shooting, Jovanovic and his wife were shopping in the Cub Foods near the Taco Bell. Jovanovic noticed someone familiar following him around the store and realized this individual was his assailant. When Collins was questioned by police, he indicated another Cub Foods employee had given him a ride home the night of the shooting, information that was later established as false. After admitting his story was untrue, Collins was given an opportunity to provide the name of any other person who transported him that evening; he was unable to do so. However, at trial, defense witness Mona Foster testified she had given Collins a ride home on the night of July 20, 1993. The trial court found her testimony was not credible. Finally, Collins made a number of incriminating statements to co-workers strongly

indicative of his own guilt. Given the strength of the State's case against Collins, it is not probable that the proposed impeachment testimony would have changed the outcome of the trial.

Collins second complaint is that his trial counsel rendered ineffective assistance by failing to investigate a police incident report that referred to a photo of another Cub Foods employee, Robert Nash. The incident report was introduced into evidence at the postconviction trial. The second page of the report contains a list of evidence including a nine-millimeter shell casing, a shirt, and a photo of Nash. Hisey did not recall ever seeing the report. Collins fails to explain what the investigation would have revealed or how he was prejudiced by the alleged failure to investigate. A reasonable reading of the record suggests the photo of Nash may have been obtained by police in order to conduct a photo lineup for the victim. Nash was apparently among the initial suspects in the case, however, the victim did not select Nash's photo from the lineup. Collins has failed to demonstrate either a breach of an essential duty or prejudice with regard to this claim.

V. Conclusion. We have considered all claims raised by Collins in support of his application for postconviction relief and find them meritless. We affirm the district court's denial of postconviction relief.

AFFIRMED.