IN THE COURT OF APPEALS OF IOWA

No. 1-338 / 00-0768
Filed October 24, 2001

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CLERK SUPREME COURT

DAVID BRASSFIELD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

Applicant appeals from the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Scott L. Bandstra of The Bandstra Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Miller and Hecht, JJ.

HECHT, J.

David Brassfield contends he received ineffective assistance of counsel in two criminal cases. In 1995, he was convicted of being a felon in possession of two firearms. In 1998, he was convicted of theft of a motor vehicle. Brassfield contends his counsel in the 1995 case were ineffective because they (1) permitted the State to proceed during a suppression hearing and at trial without calling the arresting police officer; (2) failed to challenge the constitutionality of a search incident to a traffic citation; and (3) failed on appeal to preserve error on his confrontation and search and seizure issues. Brassfield contends his trial counsel in the 1998 case was ineffective because he failed to adequately investigate and obtain evidence bearing upon the identity of the owner of the vehicle. Brassfield appeals from the district court's ruling denying postconviction relief. We affirm.

I. 1995 Conviction. On the evening of April 11, 1995, Officer Kamerick, a Des Moines police officer, stopped Brassfield for driving a motor vehicle without a license plate light. Two other officers arrived at the scene and searched the cab of Brassfield's truck. Using a flashlight, they observed a handgun resting in a pouch located on the front of the seat cover. Upon removing that loaded weapon from the pouch, the officers discovered a second handgun inside the enclosure. Brassfield moved to suppress the guns, contending the search violated his rights under the Fourth Amendment. At the hearing on the motion to suppress, the State offered police reports in evidence, but did not present the testimony of the police officers involved in the arrest. Brassfield's counsel made

no objection to the admission of the police reports. The motion to suppress was overruled and the case proceeded to jury trial.

Officer Kamerick, who was out of town on vacation, did not testify during the State's case-in-chief. Brassfield sought, but was denied, a jury instruction permitting the jury to infer Kamerick's testimony would not have been favorable to the State. The district court offered to permit the State to call Kamerick, who was expected to return from vacation the next day, as a rebuttal witness. The record discloses Brassfield considered the offer, but rejected it, preferring to rest and submit the case to the jury the same day. During its deliberations, the jury propounded this question: "Where was the arresting officer during this trial, and why didn't he testify?" Before a response to the question was made, the jury returned a guilty verdict on all charges.

Brassfield contends his trial counsel should have objected on hearsay grounds to the admission of the police reports during the suppression hearing. He further posits counsel was ineffective for two reasons. First, Brassfield contends his trial counsel failed to enforce his rights guaranteed by the Confrontation Clause by failing to force the State to call Officer Kamerick during both the suppression hearing and the jury trial. Second, Brassfield argues his trial counsel failed to challenge the constitutionality of the search of his vehicle incident to a citation. The district court concluded Brassfield's trial and appellate counsels' representation was within the normal range of competency.

Generally, the scope of review in postconviction cases is for correction of errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). However,

because Brassfield challenges the effectiveness of counsel, we perform a de novo review in this case. *Id.*

"A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results." *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2065, 80 L. Ed. 2d at 694-95. The court will generally presume counsel is competent, and we will not second-guess a reasonable trial strategy. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995). "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel." *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The test on the prejudice prong is whether counsel's errors or omissions worked to the defendant's "actual and substantial disadvantage so that a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different." *Martin*, 587 N.W.2d at 609. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Brassfield contends he received ineffective assistance from his trial counsel who failed during the suppression hearing to object on hearsay grounds to the State's evidentiary offer of police reports. We find no breach of duty here, however, because the rules of evidence do not apply to "preliminary questions

concerning . . . the admissibility of evidence." Iowa R. Evid. 104(a); *see also State v. Tangie*, 616 N.W.2d 564, 570 (Iowa 2000) (holding "decisions on admissibility made pursuant to Iowa Rule of Evidence 104(a) may be made by the court without respect to the rules of evidence, including those concerning hearsay"). Counsel had no duty to make a meritless objection. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). Furthermore, we find trial counsel's decision regarding Officer Kamerick's testimony at trial involved strategy. When faced during trial with the alternatives of resting and submitting the case to the jury, or waiting until the next day for rebuttal testimony by Officer Kamerick, Brassfield and his counsel made a reasonable strategy decision to avoid the officer's live testimony.

Brassfield's contention his trial counsel was ineffective because he failed to depose Officer Kamerick is also without merit. We need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *Wissing*, 528 N.W.2d at 564. After a careful review of the record, we find our confidence in the outcome of Brassfield's trial is not undermined by counsel's failure to depose Kamerick who did not conduct the search of Brassfield's truck. We find no reasonable probability the result of the proceeding would have been different if the officer's testimony had been presented. Moreover, Brassfield did not contend in the district court his counsel breached a duty to protect his rights under the Compulsory Process Clause or the Due Process Clause, and such contentions are unavailable to him in this appeal. Issues not raised before the district court are not preserved for appeal. *Tullis v.*

Merrill, 584 N.W.2d 236, 239 (Iowa 1998); *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 203 (Iowa 1994).

Brassfield next contends his trial counsel was ineffective because he failed to challenge the constitutionality of the search incident to the traffic citation. In other words, he asserts counsel should have anticipated the United States Supreme Court's decision in *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (holding the search of Knowles' vehicle after a traffic stop was not constitutionally justified as a search incident to arrest). We reject this contention. It must first be noted the constitutional challenge in question was rejected by the Iowa Supreme Court on multiple occasions even after Brassfield's 1995 trial. *See, e.g.*, *State v. Knowles*, 569 N.W.2d 601, 602-03 (Iowa 1997); *State v. Doran*, 563 N.W.2d 620, 623 (Iowa 1997). Brassfield's counsel had no duty to be clairvoyant. *Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991).

Brassfield contends his appellate counsel were ineffective because they failed to assign as error the district court's ruling on the suppression motion and failed to raise the claims of ineffective assistance of trial counsel discussed above. The district court concluded the search of Brassfield's vehicle was proper under the plain-view doctrine. We agree, and therefore conclude counsel had no duty to raise the meritless Fourth Amendment issue on direct appeal. For the reasons already discussed in this opinion, appellate counsel had no duty to raise the claims of ineffective assistance of counsel asserted by Brassfield.

II. 1998 Conviction. In the Fall of 1997, Kenneth Hastings reported to the police department his brown 1974 pickup truck had been stolen. Several days later, he again phoned the police and reported he had seen someone

driving the truck in question on a Des Moines street. Hastings followed the truck until it stopped in a residential area. He then observed the driver, Mr. Brassfield, unloading items from the truck bed. The police arrived and, after speaking to Hastings and Brassfield, released the vehicle to Hastings. Brassfield was charged with second-degree theft,[1] and was found guilty following a bench trial.

In his postconviction relief action, Brassfield claimed his trial counsel was ineffective because he failed to conduct a proper investigation of the ownership of the pickup truck in question. In particular, he contends if his counsel had inquired, he would have learned Hastings' ownership of the vehicle could not be established by its vehicle identification number. In this regard, Brassfield notes Hastings acknowledged the "serial number" had been scratched off the truck's door. Although Hastings testified the number might have also been located on the truck's dashboard, Brassfield contends his Exhibit 5 established the manufacturer did not put an identification plate in that location on this model. Brassfield generally asserts the police officers should have impounded the vehicle pursuant to Iowa Code section 321.84[2] when it was seized from him because the vehicle identification number had been altered, defaced, or tampered with.

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[1] The theft charge was enhanced pursuant to the habitual offender statute. *See* Iowa Code § 902.8 (1997).

[2] The statute provides:

> It shall be the duty of any peace officer who finds a vehicle or component part, the vehicle identification number or component part number of which has been altered, defaced, or tampered with, and who has reasonable cause to believe that the possessor of the vehicle or component part wrongfully holds it, to forthwith seize it, either with or without warrant, and deliver it to the sheriff of the county in which it is seized.

Iowa Code § 321.84.

After reviewing the record de novo and applying the legal principles set forth above, we conclude Brassfield has failed to prove he was prejudiced by his trial counsel's failure to investigate the location and status of the truck's vehicle identification number. There was ample documentary and testimonial evidence apart from the vehicle identification number tending to prove the truck was owned by Hastings. The district court found "Brassfield did not present any evidence supporting his claim that had his trial counsel taken the steps [he] urges, the result would have been favorable to him." We adopt this finding as our own and conclude no reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different.

AFFIRMED.