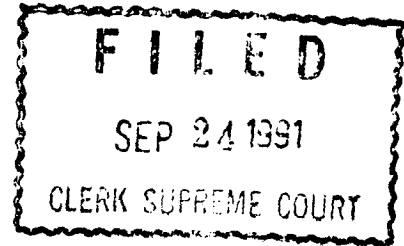


IN THE COURT OF APPEALS OF IOWA

No. 0-697 / 89-1937



ALBERT WAYNE WARE,

Appellant,

471

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County,
Edward B. De Silva, Judge.

Defendant appeals the denial of postconviction relief.

AFFIRMED.

Gary D. McKenrick of Gomez, May, McKenrick & Kelly,
Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden,
Assistant Attorney General, and William E. Davis, County
Attorney, for appellee.

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

SCHLEGEL, J.

The defendant appeals the district court's denial of postconviction relief after a jury found him guilty of first-degree murder and first-degree robbery in 1982. He was convicted of the robbery and the fatal shooting of Eugene Tappa, the proprietor of a Davenport lounge. In 1983 the supreme court affirmed Ware's convictions on direct appeal. State v. Ware, 338 N.W.2d 707 (Iowa 1983). Ware later filed the present application for postconviction relief to challenge his convictions.

Ware contends: (1) the State withheld material and exculpatory evidence; (2) his trial and appellate counsel were ineffective; (3) the State presented perjured testimony; (4) the judge and jury were prejudiced against him; and (5) the cumulative effect of these claims denies him due process and a fair trial.

I.

Ware asserts he is entitled to postconviction relief because the State failed to disclose exculpatory evidence. Suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). "[T]he key to the Brady rule is the word 'material'". State v. Anderson, 410 N.W.2d 231, 233 (Iowa 1987). In Anderson, the supreme court adopted the rule of United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3384, 87 L. Ed.

2d 481, 494 (1985), that "undisclosed evidence is material for Brady purposes only if the defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different." Anderson, 410 N.W.2d at 233 (emphasis added).

The State contends this issue is waived by petitioner because he did not raise it at trial or on direct appeal. A postconviction relief action is not the place for the relitigation of claims that were or should have been presented at trial or on direct appeal. Iowa Code § 663A.2 (1991). "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); see Iowa Code § 663A.8 (1991). In order to obtain review of this claim now, Ware must prove by a preponderance of the evidence sufficient reason for not having raised the issue at trial or on direct appeal.

As sufficient reason for not having raised the issue at trial or on direct appeal, petitioner alleges he had no knowledge of the evidence until his trial and direct appeal had been completed and his codefendant's postconviction relief action had been tried. Petitioner claims the evidence withheld or suppressed tended to show the victim of the murder of which he was found guilty may have been involved in heavy drug trafficking and was killed by a Lester Smith as a contract killing.

As to the State's argument this issue was waived, we cannot, from the claims made by petitioner, hold that the issue was waived. Petitioner claims his first knowledge of the evidence came after his trial and appeal were completed and not until his codefendant's postconviction action was tried. Further, the issue was fully presented and decided by the trial court in petitioner's postconviction proceeding. There was no waiver of the issue.

Turning to the merits of this issue, we find petitioner is not entitled to relief. The record shows both petitioner and his counsel had knowledge of the information that was being furnished to the investigating police officers. Petitioner read all of the newspaper accounts, some of which contained much of the information petitioner now complains was withheld from him. His trial counsel testified he knew about the "rumors" and "speculation" that the murder might have been the result of drug dealings or perhaps a gambling debt. He did not carry out any further investigation of them, because with the time constraints he did not believe them to be credible. The State did not deny petitioner any information it had. There was no interrogatory requesting information on that theory.

The petitioner has the burden of showing the information he seeks was material. Anderson, 410 N.W.2d at 234. It was material only if defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different. Id. at 233. On our de

novo review of the record, we find petitioner has failed to show such information was material.

II.

Ware contends he is entitled to postconviction relief because his attorneys in the 1982 trial and the 1983 direct appeal rendered ineffective assistance in numerous respects. Ware asserts his trial attorney (1) failed to make a proper investigation, (2) failed to introduce evidence on the issue of petitioner's common-law marriage to Sandy Cady, (3) failed to properly cross-examine the State's witnesses, (4) failed to seek a continuance because the attorney was suffering from a cold, and (5) failed to object to inflammatory statements made by the prosecutor in final argument. Ware complains his appellate attorney failed to raise on direct appeal any of these complaints about trial counsel's performance.

Our ultimate concern in claims of ineffective assistance 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 the 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 counsel failed to perform an essential duty and prejudice resulted. Id.

The State asserts defendant's claim for ineffective assistance of counsel is waived for failure to present it on direct appeal. We will consider this issue if cause is shown for not presenting the issue earlier and if actual prejudice resulted. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). The defendant has claimed ineffective trial and appellate 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. State v. White, 337 N.W.2d 517, 520 (Iowa 1983) (citing Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980)). As Stated by the trial court:

Although the petitioner did not raise ineffective counsel in the direct appeal, the testimony of his appellate counsel at the time of the hearing on the postconviction was to the effect that this was an issue the petitioner wished to raise, and appellate counsel indicated that it was not raised because of the fact that his brief was shortened by direction of the Supreme Court which in turn caused him to reduce the number of issues addressed. The Court finds that the testimony of appellate counsel establishes good cause and that the question of ineffectiveness of trial counsel as well as appellate counsel are to be addressed in this ruling.

We hold the issue of ineffective trial counsel has not been waived.

We will discuss each of the claims of ineffective counsel separately. With respect to each of these claims, petitioner is required to show, by a preponderance of the evidence, that trial counsel breached an essential duty and that prejudice resulted therefrom. Prejudice requires

proof of a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

1. Petitioner first claims his trial counsel was ineffective because he failed to make a proper investigation. The record in this case shows counsel conducted an investigation that comported with his theory of defense. Such decisions are peculiarly in the realm of counsel's judgment and cannot be viewed in hindsight as to the propriety of such investigation. In this case counsel pursued an alibi defense. In his judgment it was the best defense for petitioner. Under the entire record and the totality of the circumstances, counsel's performance was within the broad range of normal competency. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). He did not breach an essential duty in the investigation of the case.

2. Petitioner claims counsel was ineffective because he failed to introduce evidence on the issue of petitioner's common-law marriage to Sandy Cady who testified in his trial. Petitioner claims there was evidence available to show he and Cady held themselves out to the public as husband and wife, and that had such testimony been developed, Cady would have been unable to testify for the State.

Evidence was submitted on the issue of the common-law marriage status of the petitioner and Cady; the court ruled it was not proven a common-law marriage existed. Although counsel's efforts were unsuccessful, it does not show ineffective assistance of counsel. There was no violation of an essential duty on the part of counsel.

3. Ware further claims counsel was ineffective in failing to properly cross-examine State's witnesses; in particular, he notes Donald Havekost, an F.B.I. ballistics expert, who testified with respect to the origin of certain bullets. Having examined the record of the cross-examination, we find no lack of proper conduct with respect to that cross-examination. Petitioner has not shown counsel's cross-examination to have been deficient.

4. Petitioner claims counsel was ineffective for failing to move for a continuance because of counsel's health. It is true counsel had a cold at the time of trial. The record does not show the condition of counsel's health caused him to render ineffective assistance. Petitioner has failed to prove by a preponderance of the evidence that counsel's health caused counsel to be deficient in his representation of petitioner.

5. Finally, petitioner claims counsel was ineffective in failing to have final arguments reported and in failing to object to certain inflammatory remarks made in final arguments. The specific matter claimed to be inflammatory was an alleged comment by the prosecutor comparing

petitioner and his codefendant with the "bandits of the prairie" who murdered the pioneer (Colonel Davenport) for whom the City of Davenport is named.

We agree with the trial court that the comment was not improper per se and that it was well within the prerogative of counsel for petitioner to make no more of the statement thereby emphasizing its potentially inflammatory nature. One juror questioned about it could not remember the comment having been made. We find no deficiency here.

We find counsel breached no essential duty in any of the claims discussed above. If such a duty was breached, the defendant must also show prejudice resulted from that breach. Polly, 355 N.W.2d at 856. Prejudice requires proof of a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). Upon a review of the record in this case, we determine Ware has failed to show that even if counsel was deficient in the performance of any of the duties imposed upon him as suggested by petitioner he was prejudiced. Defendant cannot show but for counsel's errors there is a reasonable probability the outcome of the trial would have been different or that but for appellate counsel's errors there is a reasonable probability the defendant would have succeeded on appeal. The evidence appears strong enough to

justify a verdict of guilty even if defense counsel had proceeded as Ware contends he should have.

The evidence Ware asserts his counsel failed to admit is not strong nor reliable enough to affect the verdict. Ware's accomplice, Dennis Williamson, testified as to all the events of the robbery and murder; the weight of the evidence against the defendant is substantial. The evidence of Ware's guilt is so overwhelming that we find any error that might have resulted from any of the above contentions, singly or in combination, would not have changed the result. The postconviction court did not err in denying this ineffective assistance claim.

III.

Ware also contends he is entitled to postconviction relief because the State allegedly presented perjured testimony from an accomplice at Ware's criminal trial. This claim is based on the assumption that Dennis Williamson's trial testimony was false and that the State, through a detective, knew or should have known it was false. In order to be entitled to relief the defendant must prove the prosecution knowingly introduced or did not correct false, material testimony at trial. State v. Todden, 364 N.W.2d 195, 198-99 (Iowa 1985).

The defendant asserts the information allegedly implicating another individual contradicts Williamson's testimony. This evidence amounts to hearsay. The declarant was unknown, the source of the information

undiscoverable, the supposed killer could not be found despite police efforts, and there was no other evidence connecting this other person to the crime. Williamson, on the other hand, took the stand, swore to the truth of his statements, and submitted to cross-examination. The jury had the opportunity to evaluate his testimony and decide whether Williamson was credible or not. There is insufficient evidence to find his testimony was false or that the State knew or should have known it was false.

IV.

Ware contends he is entitled to postconviction relief because the judge and jury were prejudiced against him. In support of his claims of prejudice he notes that the crime received extensive pretrial publicity and the victim's brother was a local attorney. The Iowa Supreme Court has already ruled on the pretrial publicity prejudice claim by upholding the denial of a motion for change of venue on direct appeal. Ware, 338 N.W.2d at 713. Additionally, the fact that the victim's brother was an attorney did not infect the trial. Ware has failed to establish the trial court was prejudiced against him.

V.

Finally, Ware contends that even if no one issue is sufficient to warrant postconviction relief, the cumulative effect of all his complaints denied him due process and a fair trial. 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. We affirm the trial court on all issues.

AFFIRMED.