FILED
MAR 31 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

TIMOTHY HOWARD JOHNSON,	)	
Petitioner-Appellant,	)	Filed March 31, 1987 187
vs.	)	
CALVIN AUGER, Warden, Iowa State Men's Reformatory, and **STATE OF IOWA,**	)	6-466 85-1676
Respondents-Appellees.	)	

Appeal from the Iowa District Court for Black Hawk County (No. 62199) - James L. Beeghly, Judge.

The petitioner appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Craig C. Ament of Olsen, Parsons & Ament, Cedar Falls, for petitioner-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Scott Lemke, Assistant Black Hawk County Attorney, for respondents-appellees.

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

DONIELSON, J. 188

The petitioner, Timothy Howard Johnson, appeals from the district court's denial of his application for postconviction relief. Johnson contends that the district court erred in: (1) denying him the opportunity to subpoena a witness and present a defense; (2) admitting evidence which was improperly seized; and (3) admitting testimony which was irrelevant and prejudicial. Johnson additionally contends that he was denied effective assistance of counsel on various grounds and also claims he was denied effective assistance of appellate counsel. We affirm.

Timothy Howard Johnson was convicted of robbery in the first degree on February 7, 1980. We affirmed his conviction on September 29, 1981. Johnson filed an application for postconviction relief on January 22, 1984, which was amended on March 4, 1985. On November 4, 1985, the trial court ruled that Johnson had failed to prove any grounds to set aside his conviction and ordered that Johnson's application for postconviction relief be dismissed.

I.

Johnson contends that his conviction and sentence were in violation of his sixth and fourteenth amendment rights under the United States Constitution and Article I section 10 of the Iowa Constitution. In support of his argument, Johnson sets forth a three-pronged argument. Johnson first contends that the district court erred in denying his application for postconviction relief where his right to compulsory process was abridged by the original trial court's denial of his motion for continuance. The record reveals that Johnson had requested a continuance in the original trial due to the fact that Detective Gene Thompson did not appear at trial. Johnson contends that Detective Thompson's testimony would have provided information on the certainty of the identification of Johnson and on the alleged getaway vehicle used in the robbery and that the trial court

should have allowed time to subpoena Detective Thompson. Johnson argues that had Detective Thompson testified, a reasonable doubt would have been generated regarding the identification of Johnson as the perpetrator of the robbery.

Johnson also argues that evidence had been seized and admitted into evidence at trial which had been seized by an illegally-served search warrant. Johnson contends that despite the fact that he was the only one named on the search warrant, the police searched other parts of the building not occupied by Johnson and that such evidence seized should not have been admitted.

Johnson next contends that the district court erred in denying postconviction relief where the trial court failed to exclude the testimony of Dr. Gary Phelps. Dr. Phelps had testified at trial concerning the question of whether a certain pair of glasses found near the robbery scene may have come from the defendant's prescription. Johnson argues that Dr. Phelps' testimony merely allowed the jury to speculate as to whether the glasses belonged to him.

We do not reach the merits of the above arguments because we find that Johnson has not properly preserved such issues on appeal. Iowa Code section 663A.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

In accordance with this section, any claim not properly raised at trial or on direct appeal may not be litigated in postconviction proceedings unless the applicant has provided a sufficient reason for not properly raising it previously.

Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). The applicant must additionally show that he or she has suffered actual prejudice resulting from the alleged trial court errors. Polly v. State, 355 N.W.2d 849, 855 (Iowa 1984). "It is not sufficient that the applicant demonstrate the errors created a possibility of prejudice, he or she must shoulder the burden of showing they worked to his or her actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." Id. It is thus clearly the view under Iowa law that a postconviction proceeding is not an avenue for litigating issues that were not properly preserved for our review.

Concerning Johnson's claim that the trial court erred in failing to grant a motion for continuance, we note that Johnson did not at trial object to the denial of the continuance on constitutional grounds, nor were any constitutional grounds raised on the direct appeal to this court. In the present appeal, Johnson has provided us with no reasons whatsoever why such constitutional grounds were not earlier raised, but merely argues that Detective Thompson's testimony may have created a reasonable doubt with the jury regarding his identification as the perpetrator of the robbery. Moreover, the record reveals that a subpoena had been issued for Detective Thompson, but that it had not been served because Thompson left on vacation. Johnson does not allege any lack of diligence on the part of the sheriff's office in serving the subpoena. We therefore do not believe this issue has been properly preserved for our review on appeal.

Concerning Johnson's argument that certain evidence was improperly seized, we initially note that this issue was raised in Johnson's motion to suppress at the original trial. While Johnson's appellate counsel challenged the validity of the search warrant on direct appeal, no issue was raised of whether the evidence was taken from areas of the house which were not under Johnson's control. As we noted earlier, because this issue was not raised on direct appeal, we will

only consider such issue on appeal when the applicant can demonstrate a sufficient reason for failing to raise the claim earlier. Washington, 304 N.W.2d at 234. Because Johnson alleges ineffective assistance of appellate counsel in connection with this issue, we will address this issue in Division III of this opinion.

We next address the issue regarding Johnson's claim that Dr. Phelps' testimony was irrelevant and prejudicial. Upon our examination of the record, it does not appear that Johnson objected to Dr. Phelps' testimony on relevancy grounds at trial. It also does not appear that the issue was raised on direct appeal. Johnson does not argue ineffective assistance of counsel regarding this issue, nor is any other reason alleged as to why such issue was not raised at trial or on direct appeal. Additionally, Johnson has not alleged that he suffered any actual prejudice as a result of the admission of Dr. Phelps' testimony, except to state that Dr. Phelps' testimony "offered the jury the opportunity to speculate as to [Johnson's] whereabouts." Moreover, Johnson has cited to no authority in support of his proposition that Dr. Phelps' testimony was irrelevant. See Iowa R. App. P. 14(a)(3). We therefore hold that Johnson has failed to properly preserve this issue for our review.

II.

We next address Johnson's contention that his sixth and fourteenth amendment rights were violated due to ineffective assistance of trial counsel. Specifically, Johnson argues that trial counsel was ineffective in: (1) failing to challenge the jury panel; (2) failing to make an offer of proof as to the substance of Detective Thompson's testimony; (3) failing to object to a jury instruction; and (4) failing to bring out, on cross-examination, the discrepancies in the identification of Johnson by Bert Medhaug, an identification witness.

When a defendant relies on specific acts or omissions to prove ineffective assistance of counsel, the defendant must demonstrate two conditions: (1) that

counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Munz v. State, 382 N.W.2d 693, 697 (Iowa Ct. App. 1985); State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), set forth the following test for ineffective assistance of counsel claims: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The defendant must satisfy this burden by a preponderance of the evidence and must rebut the presumption of counsel's competence. Munz, 382 N.W.2d at 697; Meier, 337 N.W.2d at 206.

Johnson first contends that the procedure followed in Black Hawk County to choose jury panels during the 1979 court session was in violation of Iowa Code section 609.4. Johnson argues that the procedure used by Black Hawk County is based upon a process which makes the number of jury panelists called proportional to the electors in precincts as shown by election registers, whereas section 609.4 requires the jury panel members to be apportioned according to the population of the respective precincts. The end result, argues Johnson, is that the class of jury panel members selected are disproportionate to the general population of each election district as a whole. Therefore, Johnson argues, had trial counsel raised sixth amendment objections to the jury panel prior to trial, such errors could have been corrected. We disagree.

In Cooper v. State, 379 N.W.2d 917 (Iowa 1986), the Iowa Supreme Court similarly rejected an identical appeal to the Black Hawk County jury selection system. The Cooper court noted that a criminal defendant has a sixth amendment

constitutional right to a jury drawn from a representative cross-section of the community. Cooper, 379 N.W.2d at 918 (citing Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 696, 42 L. Ed. 2d 690, 696 (1975)). If there is a systematic exclusion of an identifiable segment of society preventing a jury from being representative of the community, a defendant's sixth amendment right is violated. Cooper, 379 N.W.2d at 918 (citing Apodaca v. Oregon, 406 U.S. 404, 413, 92 S. Ct. 1628, 1634, 32 L. Ed. 2d 184, 193 (1972)).

The Cooper court cited State v. Lohr, 266 N.W.2d 1 (Iowa 1978), as the controlling precedent. 379 N.W.2d at 918. In Lohr, trial counsel did file a pretrial written jury panel challenge on identical grounds upon which Johnson's claim is based. 266 N.W.2d at 2. The Lohr court rejected such an argument based on the Iowa Supreme Court's previous holding in Taylor v. Department of Transportation, 260 N.W.2d 521, 522-23 (Iowa 1977), wherein the court held that "if a statutory duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown." 266 N.W.2d at 5. The Lohr court, in affirming the defendant's conviction, opined that "[o]bservance of neither basic purpose requires that a penal challenge grounded on failure to supply the jury commission with two of three specified lists be upheld. As previously observed, exclusive reliance on voter registrations, although not the best solution, does not alone offend the sixth amendment." Id. at 6. The Cooper court ultimately held that based on the principle set forth in Lohr, the defendant's challenge to the jury panel must fail where the defendant did not demonstrate his jury panel deprived him of trial by a jury that fairly represented the community. 379 N.W.2d at 919.

Based upon the Iowa Supreme Court's holding in Cooper, we likewise reject Johnson's claim that his trial counsel was ineffective for failing to challenge his jury panel before trial.

Johnson next contends that trial counsel was ineffective in failing to make an offer of proof concerning Detective Thompson's testimony and that trial counsel erred in failing to preserve such issue for appeal. Johnson apparently argues that had trial counsel made an offer of proof, the trial court would likely have granted a continuance, Detective Thompson would have been subpoenaed and forced to testify, and his testimony therefore could have reasonably created a reasonable doubt in the jury's minds as to the identification of Johnson as the perpetrator of the robbery. We find no merit in such contention.

As we noted earlier, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The Strickland court further stated that the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. In making our inquiry, however, we need not determine whether trial counsel's performance was deficient, but may rest our determination on the defendant's failure to demonstrate the requisite prejudice. Id. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

We hold that even assuming that trial counsel had breached an essential duty by failing to make an offer of proof, Johnson has failed to show that but for such failure, the result of the trial would have been different. First, concerning the trial court's denial of Johnson's motion for continuance at trial, we note that a trial court has considerable discretion in granting or denying continuances. State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983). The record reveals that the

trial had already been continued once and that the trial court and defense counsel both had scheduling problems. Detective Thompson had left on vacation before the subpoena had been served on him; however, most of Detective Thompson's sworn pretrial deposition and police reports were read into evidence. There is nothing in the record indicating that the trial court's decision denying the continuance would have changed had trial counsel made an offer of proof.

Nor do we find that but for trial counsel's failure to make an offer of proof, the result of Johnson's trial would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Johnson argues that Detective Thompson's testimony would have created a reasonable doubt as to witness Bert Medhaug's identification of Johnson. Johnson contends that because Medhaug's description of the perpetrator of the robbery was not entirely consistent with Johnson's appearance, Detective Thompson's appearance at trial was vital. We disagree.

We initially note that trial counsel was afforded an opportunity to question Detective Thompson at the taking of the deposition, and Johnson has not provided us with any argument that he had reason to believe that Detective Thompson's testimony would have changed subsequent to the taking of his deposition. Therefore, we find no reason to believe that Detective Thompson's live testimony would have more likely created a reasonable doubt in the minds of the jury regarding Johnson's guilt than the testimony set forth in the deposition. In addition to Medhaug's description of Johnson, witness Rosezella Massina also testified that she saw Johnson at the bar where the robbery occurred. Both Medhaug and Ms. Massina identified Johnson from a photographic lineup.

Moreover, we find there is overwhelming circumstantial evidence that Johnson was the perpetrator of the robbery. Money which was stolen from Medhaug was found in a motorcycle which Johnson had borrowed the day of

the robbery. Glasses fitting Johnson's prescription were found near the area where the motorcycle was found. The car which Medhaug described the perpetrator of the robbery as driving matched the description of the vehicle which Johnson was driving at the time of his arrest. Medhaug and Ms. Massina testified that they had both seen Johnson in the bar the previous Friday morning when Medhaug went to the bank to get money at approximately the same time. In light of these facts, we cannot say that under the totality of the circumstances that had trial counsel made an offer of proof the result of Johnson's trial would have been different. Johnson has therefore demonstrated no prejudice on this issue.

Johnson next argues that trial counsel was ineffective for failure to object to Jury Instruction No. 17. Instruction No. 17 stated to the jury that a prosecuting attorney is required to provide the defendant in a criminal case with minutes of testimony of all witnesses whose evidence is to be introduced at trial. The instruction further stated that the prosecutor may in certain cases present testimony not contained in the minutes and that in the present case a continuance was granted as a result of the presentation of such testimony. Johnson argues that as a result of the State's amendment to the minutes regarding the location of the glasses found and the location where the money was found, Instruction No. 17 created an impression that trial counsel's opening statements were misleading.

Johnson did not raise this issue on direct appeal. Trial counsel may have concluded that the instruction as given explained the reasons for the switch in testimony without unduly signaling to the jury that the defense had changed its position. "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance." Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). Furthermore, Johnson has not shown nor does

he argue that the results of his trial would have been different had trial counsel made a timely objection. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L Ed. 2d at 698. We therefore cannot say that but for trial counsel's failure to object to the instruction, the trier of fact would have had a reasonable doubt respecting Johnson's guilt. Id. at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. We therefore hold that even assuming trial counsel failed in not objecting to Instruction No. 17, Johnson suffered no actual prejudice thereby. Polly, 355 N W.2d at 855.

Johnson also contends that trial counsel was ineffective for failing to bring out on cross-examination the discrepancy of the identification of Johnson by witness Medhaug in two photographic lineups. Johnson does not argue in any way that he suffered prejudice as a result of this alleged failure. We find that Johnson has failed to show any actual prejudice as a result of trial counsel's failure to more fully cross-examine witness Medhaug. There is simply no evidence in the record to show that trial counsel's failure permeated the trial with prejudice of constitutional dimensions. Polly, 355 N.W.2d at 855. Our own independent examination of the record reveals that trial counsel provided a vigorous defense. Furthermore, Medhaug testified that the pictures used in the photographic display were of very poor quality. Witness Detective Joseph Snider additionally testified that the facial characteristics of the two pictures taken of Johnson were different. In light of these facts, and taken with the overwhelming evidence connecting Johnson with the alleged robbery, we find Johnson has suffered no prejudice. Johnson's argument of ineffective assistance of trial counsel on this issue must therefore fail.

III.

Johnson lastly contends that the court in the postconviction relief hearing erred in failing to find ineffective assistance of appellate counsel. To the extent

that this claim relates to the failure of appellate counsel to assert the same claims of ineffective assistance of trial counsel which are now being urged in this postconviction proceeding, we reject these claims for the same reasons we rejected such claims alleged against trial counsel. See Schrier v. State, 347 N.W.2d 657, 667 (Iowa 1984).

One claim is made solely against appellate counsel. Johnson argues that appellate counsel failed to challenge the search of his residence on the ground that certain items were seized from areas of the house which were not under his control. We find no merit in such contention. In Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980), the Iowa Supreme Court stated that "[a]s a matter of policy, if defense counsel must weigh every action on the scale of a potential subsequent ineffective counsel claim . . . in the end the client's case will suffer." We believe such reasoning is applicable to appellate counsel as well. Sound trial strategy generally dictates that only the most promising issues be raised on appeal. Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987, 994 (1983).

In the present case the record reveals that Johnson admitted at the postconviction hearing that most of the rooms in the residence were shared with others residing there. There is no indication that any items seized as a result of the search were actually introduced into evidence at trial. Appellate counsel did raise another issue concerning the search of Johnson's home, specifically that the police officers gave a false accounting to the magistrate who issued the search warrant of the known facts relevant to Johnson's guilt or innocence. We find that the fact that appellate counsel raised the issue of the search warrant's validity rather than the issue of whether items were illegally seized, supports the district court's conclusion that appellate counsel chose not to raise

the issue as a matter of trial strategy We therefore hold that Johnson's claim of ineffective appellate counsel must fail

We have considered all issues and claims presented in the present action, and we can find no basis for reversing the judgment of the postconviction court denying relief to Johnson The judgment of the district court is affirmed.

AFFIRMED.