

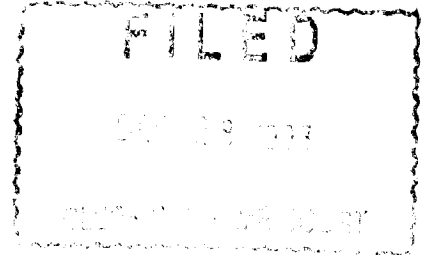
IN THE COURT OF APPEALS OF IOWA

No. 8-522 / 97-1112
Filed December 28, 1998

WENDELL HARRINGTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, George W. Bergeson,
Judge.

Wendell Harrington appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Wendell Harrington, Anamosa, pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney,
for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Wendell Harrington appeals the district court's denial of his application for postconviction relief. We find Harrington was not denied effective assistance of counsel and therefore affirm.

Background procedure. Harrington was convicted of third-degree burglary following a jury trial in 1994. On appeal, we affirmed his conviction and preserved his claims of ineffective assistance for postconviction proceedings. *See State v. Harrington*, No. 94-1742 (February 2, 1996). Harrington filed an application for postconviction relief in March of 1996; an amended application was filed in September of 1996. After a hearing, the district court denied Harrington's application. Harrington now appeals pro se.

Scope of review. Generally, an appeal from the denial of an application for postconviction relief is review for errors at law. *Mabrier v. State*, 519 N.W.2d 84, 85 (Iowa 1994). However, as Harrington raises the constitutional issue of effective assistance of counsel, our review is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

I. Ineffective assistance by trial counsel. Harrington raises three claims of ineffective assistance with regard to his trial counsel's performance.

To prevail on an ineffective assistance of counsel claim the applicant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Pearson*, 547 N.W.2d 236, 240

(Iowa App. 1996). In evaluating counsel's performance, we presume counsel acted competently. *Id.* Prejudice requires proof that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 694 (1984). If the applicant makes an insufficient showing on either prong of the two-part test, we need not address both components. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998); *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985).

Failure to investigate and cross-examine Trent Lee. Harrington first asserts that his trial counsel was ineffective in failing to investigate and thoroughly cross-examine his brother, Trent Lee, about his plea agreement with the State.

The burglary at issue was committed on November 16, 1993. The following day, Harrington asked Lee to give him a ride to go pick up some property in an alley near the burglarized home. The brothers proceeded to load the property into the car; Lee was aware the property had been stolen. On the way home, they were pulled over by Des Moines police for numerous traffic violations. Police discovered there were active warrants out for Lee and observed the large amount of property in the car. Both men were taken into custody.

Pursuant to a plea agreement with the State, Lee testified in Harrington's first trial which ended in a mistrial. Essentially, Lee agreed to testify in exchange for placement in the Department of Corrections Violator Program. Before Harrington's second trial, Lee was arrested and charged with another theft. In addition to the terms

of his initial agreement, the State agreed to drop the new charge in exchange for Lee's testimony at Harrington's second trial. Harrington asserts that he was prejudiced by his counsel's failure to cross-examine Lee to reveal the new charge. Harrington also makes a claim of prosecutorial misconduct with respect to this issue, asserting that the State failed to disclose the full agreement with Lee. Assuming this was preserved for our review, we find no evidence of prosecutorial misconduct.

We further find, as did the district court, that Harrington's counsel made inquiry of the prosecution as to all the details of the agreement with Lee. He then made the jury aware of the nature of Lee's original agreement with the State and sufficiently established that Lee had a motivation to lie. Harrington's counsel quizzed Lee thoroughly with regard to the initial statement he gave to police and his subsequent retraction, in addition to his criminal history and recent probation revocation. The fact that the State also dismissed a third-degree theft charge in exchange for Lee's testimony is of little consequence in light of the condemnatory information extracted on cross-examination. *See also State v. Frazier*, 559 N.W.2d 34, 42 (Iowa App. 1996) (finding defendant had failed to show the materiality of alleged perjured testimony regarding a witness's plea agreement with the State; "the withheld information was of little, if any, additional impeachment value in light of the defense's utilization of the known terms of the agreement for impeachment purposes.")). There was more than sufficient evidence presented at trial to support that Harrington had committed the burglary. We find Harrington did not show his counsel

failed to perform an essential duty and further failed to establish prejudice. Therefore, his claims of ineffective assistance and prosecutorial misconduct fail.

Jury instructions. Harrington next asserts that his trial counsel should have objected to Jury Instructions No. 13 and 14, both of which were uniform instructions. *See Iowa Crim. Jury Instructions Nos. 200.8 and 200.4 (1988).* Instruction No. 13 defined aiding and abetting; No. 14 explained the necessity of corroboration of accomplice testimony.

We find Instruction No. 13 was a correct statement of the law and was properly submitted. The evidence at trial established that police found Harrington and Lee together in a car with items taken from the burglary. Lee also testified that Harrington told him that the property had been stolen the night before. This evidence provided sufficient support for submission of the aiding and abetting instruction, therefore there was no duty to object.

Harrington did not raise a claim with regard to Instruction No. 14 on direct appeal nor in his application for postconviction relief or amended application. His claim is therefore not preserved for our review. *See Love v. State*, 543 N.W.2d 621, 624 (Iowa App. 1995). Furthermore, the instruction was specifically requested by Harrington's trial counsel. We find the instruction was not only appropriate but potentially helpful to Harrington's case. There was no duty to object and therefore no ineffective assistance.

Additional witnesses. Finally, Harrington asserts that his trial counsel was ineffective in failing to call his mother, Lou Jean Reed, and Des Moines Police Technician Rex Sparks at trial.

Officer Sparks testified at Harrington's May 1994 trial which ended in a mistrial. At the time, he opined that the exterior storm window of the burglarized home could have been pried open with a screwdriver. He further stated that impressions discovered using latent fingerprint powder suggested that the perpetrator had worn gloves. When officers arrested Harrington, they found a screwdriver in his pocket and two pairs of gloves in the car. Although Sparks could not say whether or not the screwdriver found on Harrington could have been used in the burglary, Sparks' testimony would not appear to have been exculpatory. We cannot see how trial counsel's failure to call Mr. Sparks prejudiced Harrington, therefore this claim must fail. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) (withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffective assistance of counsel) (citation omitted).

Harrington also asserts that had his mother been called as a witness, she would have testified that she had received a letter from Lee in which he allegedly recanted testimony regarding the burglary. We find that any such potentially inadmissible hearsay testimony from Mrs. Reed on this point would have essentially provided cumulative impeachment evidence. *Id.*

We conclude Harrington suffered no prejudice from counsel's failure to call either Officer Sparks or Mrs. Reed at trial.

II. Ineffective assistance of appellate counsel. Harrington raises assorted claims of ineffective assistance against his appellate and postconviction counsel, James Tomka.

Claims of ineffective assistance by appellate and postconviction counsel are tested the same as ineffective-assistance-of-trial-counsel claims. *See Osborn*, 573 N.W.2d at 922; *Jones v. State*, 545 N.W.2d 313, 314-15 (Iowa 1996).

Harrington asserts that Tomka was ineffective in failing to lay the proper foundation for admission of the letter that Lee wrote Mrs. Reed. We have already determined that any evidence submitted through Mrs. Reed would have been cumulative, therefore Harrington suffered no prejudice from any alleged failure. We further find any other claims of ineffective assistance made against Mr. Tomka in this matter to be without merit.

Having considered all issues properly before us on appeal, we hereby affirm the district court's denial of Harrington's application for postconviction relief.

AFFIRMED.