

IN THE COURT OF APPEALS OF IOWA

No. 6-305 / 95-865

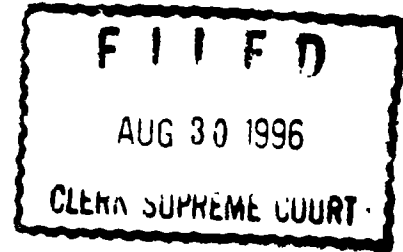
ANTHONY A. BROWNE,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

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

Robert J. Phelps of Phelps & Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County
Attorney, for appellee.

Heard by Cady, P.J., Huitink and Vogel, JJ.

CADY, P.J.

Anthony Browne appeals the district court's denial of his application for postconviction relief, based upon ineffective assistance of counsel. On our review, we affirm the district court.

In 1991, a jury found Browne guilty of willful injury and criminal gang participation, stemming from an incident in which a gang member's mother was shot. According to trial testimony, Browne and other members of the Black Gangster Disciples went to the home of a rival gang member, Dewey Lamp, after Lamp threw a bicycle against their home. One of the members, Buddy Black, announced he was going to Lamp's house to shoot him. The group arrived at the home, and when a figure came into view through the window, one of the gang members yelled "cap the bitch." Black then fired his gun. The bullet struck Lamp's mother, puncturing her lung. Browne and a codefendant, Brandon Taylor, were tried jointly on charges of aiding and abetting attempted murder and willful injury, and for criminal gang participation.

The jury acquitted Browne of attempted murder but found him guilty on the other counts. On appeal, Browne argued insufficient evidence supported his willful injury and criminal gang participation convictions, the trial court erred by not severing his charges from his codefendant, and his trial counsel rendered ineffective assistance by failing to object to misstatements of fact in the State's closing argument

or to correct the misstatements during Browne's closing argument. His convictions were affirmed on appeal. *See State v. Browne*, 494 N.W.2d 241 (Iowa 1992).

Browne subsequently filed for postconviction relief in the district court, alleging numerous acts of ineffective assistance of counsel. Browne also claimed the postconviction court should have granted his motion for summary judgment essentially based on a presumption that evidence destroyed by the State was exculpatory. The district court denied his application for postconviction relief and motion for summary judgment, specifically refusing to grant the requested presumption.

Browne appeals. He contends his trial counsel rendered ineffective assistance in failing to request a proper accomplice corroboration instruction for the jury, timely seek a severance from his codefendant when conflicts arose, and challenge the constitutionality of the criminal gang participation statute. He further contends his appellate counsel ineffectively failed to include, even after Browne requested, the accomplice corroboration issue in his claim for ineffective assistance of trial counsel. He also contests the district court's denial of the presumption that exculpatory evidence was destroyed. He finally argues he was denied equal protection and due process of law based on the lack of evidence at trial indicating his association with the Black Gangster Disciples.

I. Standard of Review and Preservation of Error

To prevail on a claim of ineffective assistance, a postconviction applicant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced applicant. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Applicant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*

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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

In order to assert a claim for ineffective assistance of trial counsel in a postconviction proceeding, an applicant must ordinarily demonstrate preservation of his claim for review through a direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, a claim of ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995); *See also Collins*, 477 N.W.2d at 376 (ineffective assistance claim may be made in postconviction proceeding if applicant establishes sufficient reason or a cause for not raising it on direct appeal).

II. Accomplice Corroboration

Browne claims his trial counsel rendered ineffective assistance in failing to argue for an appropriate limiting jury instruction regarding the corroboration of accomplice testimony, and his appellate counsel ineffectively failed to include the issue on direct appeal. Browne argues the only testimony concerning his presence at the shooting came from other potential accomplices, thus necessitating additional corroborating evidence. We find Browne sufficiently preserved error on this issue.

Claims for ineffective appellate counsel require an examination of the trial counsel's alleged incompetency. *See Luke v. State*, 465 N.W.2d 898, 904 (Iowa App. 1990) (when no finding of ineffectiveness of trial counsel, claim for ineffective appellate counsel for failing to challenge trial counsel's representation fails). Trial counsel's tactical, strategic decisions, unless outside the scope of normal competency, do not constitute ineffective assistance. *State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982).

At the postconviction proceeding, Browne's trial counsel testified he did not seek an accomplice corroboration instruction because it would have been inconsistent with his theory of defense, and "could have muddied [the] waters, by implying that . . . Browne was somehow involved." He stated he also considered the substantial amount of corroboration evidence presented by the State in choosing not to seek a corroboration instruction. Browne's appellate counsel also stated he chose not to challenge trial counsel's failure to seek an accomplice corroboration instruction

because the State proved sufficient corroboration of the accomplice testimony. We find these to be tactical decisions on the part of Browne's trial and appellate counsel.

Moreover, at trial the State presented evidence Browne had been involved in an earlier altercation with the victim's son prior to the retaliatory shooting, and stated to others "someone had been shot" after the shooting occurred. Corroboration testimony need not be strong, but must support some material part of the accomplice's testimony to connect the defendant to the commission of the crime, *State v. Doss*, 355 N.W.2d 874, 879-80 (Iowa 1984).

We also cannot find but for the corroboration instruction, Browne would have been acquitted. As such, we find Browne suffered no prejudice as result of trial and appellate counsel's actions, and the tactical decisions not to request a jury instruction, and not to challenge trial counsel's failure to do so, fell within the range of normal competency.

We find neither Browne's trial nor his appellate counsel were ineffective in not challenging the accomplice corroboration issue. The district court properly denied Browne postconviction relief.

III. Other Ineffective Assistance of Trial Counsel Claims

On appeal from the district court, Browne narrowly asserts his trial counsel rendered ineffective assistance by failing to appeal the issue of accomplice corroboration as it pertains to ineffective assistance. Normally, such claims of ineffectiveness of trial counsel without allegations of ineffective appellate counsel,

are not sufficiently preserved for our review. *See LeGrand*, 540 N.W.2d at 668. However, in Browne's application for postconviction relief to the trial court, he raised other appellate ineffectiveness claims, including failing to challenge trial counsel's failure to move for a severance when a conflict of interest first became apparent, and address constitutional and prejudicial issues involved with the criminal gang participation statute. As such, we find sufficient reason and cause to permit our review of the district court's denial of postconviction relief for these issues. *See Collins*, 477 N.W.2d at 376.

A. Severance

Browne asserts his trial counsel and the attorney who represented his codefendant were members of the same law firm, thus creating a conflict of interest requiring a motion for severance upon discovery. He also asserts a conflict of interest arose when his defense became mutually antagonistic to the codefendant's defense to the point a severance was necessary. A motion to sever was filed by trial counsel when the State admitted a potentially prejudicial taped confession of the codefendant.¹

Browne fails to show a true conflict of interest which prevented his attorney from zealously representing his interests at trial. *See State v. Gatewood*, 179 N.W.2d

¹ The trial court denied the motion to sever and issued a cautionary instruction to the jury. The Iowa supreme court ruled the trial court's cautionary instruction cured the potential prejudice to Browne and did not require a severance. *See Browne*, 494 N.W.2d at 244.

520, 523-24 (Iowa 1970)(without clear showing of true conflict of interest, defendant was not denied ineffective assistance merely because his trial attorney also represented codefendant). Moreover, both Browne and his codefendant were fully informed about the professional connection between their attorneys, and Browne did not object. As such, Browne waived any potential conflict of interest which may have arisen from his trial counsel's relationship with his codefendant's attorney. See *Wheat v. United States*, 486 U.S. 153, 163, 108 S. Ct. 1692, 1699, 100 L. Ed. 2d 140, 151 (1988); *State v. Duncan*, 435 N.W.2d 384, 487 (Iowa App. 1988) (potential conflicts of interest may be waived by criminal defendant). We find Browne's trial counsel possessed no duty to file a motion to sever because an attorney in his law firm represented the codefendant.

Defenses which conflict to the point of being irreconcilable and mutually exclusive require a severance in order to prevent denying codefendants a fair trial. *State v. Snodgrass*, 346 N.W.2d 472, 475 (Iowa 1984). Such defenses must be more than merely conflicting, hostile, or antagonistic in order for prejudice to result from a trial court's denial of a motion to sever. *Id.* Both Browne and his codefendant argued at trial they had no involvement with the gang activity at the victim's home. These defenses do not rise to the level of being irreconcilable and mutually exclusive. As such, we also find Browne's trial counsel did not possess a duty to move to sever the trial due to inconsistent defenses.

B. Constitutionality of the Criminal Gang Participation Statute

Browne also argues his trial counsel inadequately argued the constitutional and prejudicial flaws of the criminal gang participation statute, thus rendering ineffective assistance. He contends trial counsel should have argued the statute was unconstitutional because the prohibited conduct constituted a status offense and violates the First Amendment's right to peaceably assemble. Browne's trial counsel filed a motion to dismiss his claims due to the unconstitutionality of the criminal gang participation statute, which the trial court denied.

We first note the criminal gang participation statute has withstood challenges to its constitutionality under the grounds of vagueness, overbreadth, and due process violations. *See State v. Walker*, 506 N.W.2d 430 (Iowa 1993). The statute imposes criminal responsibility for a person who

actively participates in or is a member of a criminal street gang *and who willfully aids and abets any criminal act* committed for the benefit of, at the direction of, or in association with any criminal street gang .

Iowa Code § 723A.2 (1991) (emphasis added). The statute also does not unconstitutionally impinge on a citizen's's freedom of association. *Walker*, 506 N.W.2d at 403. *See also Griswold v. Connecticut*, 381 U.S. 479, 483, 85 S. Ct. 1678, 1671, 14 L. Ed. 2d 510, 514 (1965) (constitutional right of association, though not expressly included in First Amendment, is broader in scope than right the to assembly and protects more than right to attend meetings, but expressions, attitudes, and beliefs).

We find the criminal gang participation statute does not impose liability for mere status or membership in an organization, but imposes an additional requirement of aiding and abetting criminal activity. As such, we reject Browne's contention his trial counsel possessed a duty to raise this constitutional issue to the trial court. We also find Browne's trial counsel possessed no duty to argue the statute unconstitutionally infringes upon the constitutional right to peaceably assemble.

IV. Presumption of Exculpatory Evidence

Browne requested the production of certain documents, including witness statements, videotapes, audiotapes, and police reports, from the State prior to his postconviction proceeding. The Davenport police department had previously destroyed the majority of the items, during a the normal and ordinary course of procedure, due to the conclusion of the trial and appellate processes and the passage of time. Browne requested the district court grant him a presumption or inference the materials requested were exculpatory in nature.

The issue of whether to apply inferences from missing evidence lies largely in the district court's discretion. *State v. Langlet*, 283 N.W.2d 330, 335 (Iowa 1979). We find no error in the district court's refusal to grant a presumption of exculpatory evidence or a new trial. No evidence indicated the State purposefully or in bad faith destroyed the items requested. The district court specifically found the police department acted in good faith and pursuant to routine procedure when it destroyed the materials. *See Langlet*, 283 N.W.2d 330 (trial court did not abuse its discretion

in refusing to submit unfavorable inference instruction against State when no showing of intentional destruction).

V. Equal Protection and Due Process Violations

Browne finally asserts his equal protection and due process rights were violated since no evidence exists to support his association with the Black Gangster Disciples street gang.

We first note Browne never raised this constitutional issue to the postconviction court. Issues not presented in the trial court may not be raised for the first time on appeal. *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985). We find Browne failed to preserve error on this issue.

We also find this claim parallels the sufficiency of evidence claim, which has previously been decided adversely to Browne on direct appeal. *See State v. Browne*, 494 N.W.2d 241 (Iowa 1992). As such, Browne is bound by his adverse ruling, and may not relitigate this issue in postconviction proceedings. *See Hall v. State*, 360 N.W.2d 836, 839-40 (Iowa 1985).

We find the district court properly denied Browne postconviction relief. We affirm his convictions.

AFFIRMED.