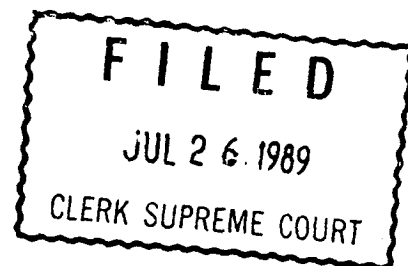


IN THE COURT OF APPEALS OF IOWA



THOMAS OVERTON,)
Applicant-Appellant,)
vs.)
STATE OF IOWA,)
Resister-Appellee.)

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9-150
88-330

Appeal from the Iowa District Court for Scott County
(72721), Margaret S. Briles, Judge.

Thomas Overton appeals from the denial of his
application for postconviction relief after a jury found
him guilty of second-degree theft. **AFFIRMED.**

Philip B. Mears, of Mears, Zimmerman & Mears, Iowa
City, for applicant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase,
Assistant Attorney General; and H.J. Pries, Assistant
County Attorney, for resister-appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Thomas Overton appeals from the denial of his application for postconviction relief after a jury found him guilty of second-degree theft. He contends the district court erred by refusing to recognize his allegations of ineffective assistance of counsel grounded in: (1) a conflict of interest; (2) a failure to preserve error on the State's striking of the only black member of the jury panel; (3) a failure on appeal to raise a speedy information issue; and (4) the taking of a deposition without his knowledge and out of his presence. Our review is of the totality of the circumstances. See Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980). We affirm.

We affirmed Overton's conviction on direct appeal. State v. Overton, No. 86-611, slip op. (Jan. 28, 1987) (unpublished opinion). That appeal was based on a claim of ineffective assistance of counsel. We found there was no resulting prejudice to the defendant as there was sufficient evidence to convict, despite counsel's failure to object to the prosecutor's closing statement. Furthermore, we found the remarks at issue were reasonable inferences drawn from the record, and hence not objectionable. The district court denied his subsequent application for postconviction relief.

On appeal from that denial, Overton alleges ineffective assistance of counsel on four distinct bases. Any of these points, if proven, must be sufficient to rebut a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-95 (1984). Furthermore, Overton must show, by a preponderance of the evidence, that (1) counsel's performance was deficient, and (2) counsel's deficient performance compromised the fairness of Overton's trial. Salis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). A mere showing that counsel did not achieve the desired result does not impugn the sufficiency of his performance. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

We must first determine whether the four contentions address essential duties of the defense counselor. If we find that an assertion does show failure to perform an essential duty, we must go on to test whether Overton was actually and substantially prejudiced as a result. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

I. Defense counsel had a conflict of interest.

Overton asserts his trial counsel, Richard Vesole, had a conflict of interest because he was concurrently representing the State's principal witness, Louis Woods, the purchaser of the stolen property, on a charge of possession of marijuana. The district court found there

was no conflict because the substance of Woods' testimony, that he bought the stereo from Overton, was admitted as fact by the defense. Overton asserts this finding is in error.

We find there was no concurrent representation of the parties. Attorney Vesole completed his representation of Woods on February 26, 1986, when a deferred judgment was entered for the marijuana charge. On February 28, 1986, Mr. Vesole, in his capacity as defense counsel for Mr. Overton, took a deposition from Mr. Woods.

In essence, Woods' deposition and his testimony at trial are consistent. Woods was unaware the stereo was stolen property at the time of his purchase. Woods did not inquire of Overton the source of the stereo when he bought it, nor did he know the identity of any third party who may have been involved. Overton insists Woods could have verified another person was Overton's source of the stereo. It must be noted that Overton and Woods were distantly related, but had seen each other only on rare occasions.

Overton was aware Woods had been a client of Mr. Vesole, before the deposition of Woods, and the subsequent trial. Yet Overton did not request another lawyer. Clearly, Overton did not perceive the conflict of interest, if indeed one existed, when he retained Mr. Vesole.

If Mr. Vesole's prior professional relationship with Woods was unknown to Overton, perhaps Overton might have an issue. See 23 C.J.S. Criminal Law § 982(9), at 978-79. But Overton had full knowledge of Vesole's former contact with Woods for the duration of the trial.

We look at the record to determine if indeed there is a conflict of interest, and if found, whether this conflict raised a substantial possibility of prejudice to Overton. See Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981).

The Woods' misdemeanor matter was unrelated to the Overton case. Vesole was not representing Woods at the time of his purchase of the stereo, nor at his deposition, nor during the Overton trial. This single isolated representation of Woods on the wholly unrelated matter of marijuana possession, does not even raise a remote possibility of conflict. See Nichols, 309 N.W.2d at 470.

Overton insists Woods would have offered proof that a third person was Overton's source of the stereo if Vesole had just pressed him harder. Woods insists he could not testify to the third party's involvement because he had no knowledge of it. Vesole did question Woods along this line during the trial. Defense had hoped to advance their position by establishing, through Woods, the idea that the property was stolen by a third person, and Overton was merely a conduit. Defense counsel tried, but Woods didn't state what he didn't know. Furthermore, at the

postconviction hearing new defense counsel did not establish new relevant information from Woods. The complaint of conflict of interest is without merit.

II. Failure to anticipate new grounds for objection.

Counsel failed to object to the prosecutor's strike of the only black juror. As of the date of trial, controlling Iowa precedent was State v. King, 225 N.W.2d 337 (Iowa 1975) and United States v. Childress, 715 F.2d 1313 (8th Cir.) (en banc), cert. denied, 464 U.S. 1063, 104 S. Ct. 744, 79 L. Ed. 2d (1984). Failing to anticipate a change in this law fails to rise to the status of omitting an essential duty to his client. "[It] is not necessary to know what the law will become in the future to provide effective assistance of counsel." Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981) (citing Boyer v. Patton, 579 F.2d 284, 288 (3rd Cir. 1978)).

Overton argues ineffective assistance of counsel hinges on the retroactive application of a recent United States Supreme Court decision, Batson v. Kentucky, 476 U.S. 79, 106, S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Overton complains Vesole should have seen this case coming, and challenged the prosecutor's strike of the only black juror on the panel. Batson mandates prosecutorial peremptory challenges of minority members of a jury panel, when the defendant is a minority, are grounds for objection and scrutiny. Id. However, we do not agree with the defendant

that the exercise of 20/20 foresight is an essential duty of defense counsel. "Counsel need not be a crystal gazer" Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981) (citation omitted).

**III. Appellate counsel failed to raise
speedy trial issue.**

Overton contends he was "arrested" on October 24, 1985, and the Trial Information was not filed until January 3, 1986. He was serving time on another offense in Johnson County, when he was charged with this crime in Scott County. We find Overton was not effectively "arrested" on the charge for second degree theft until he was moved into Scott County in January 1986. See State v. Beeks, 428 N.W.2d 307, 308 (Iowa App. 1988). We find appellate counsel did not have an essential duty to raise this unmeritorious issue. The third basis fails to support the charge of ineffective assistance of counsel.

**IV. Defense counsel performed in compliance with the
Confrontation Clause.**

The Confrontation Clause is satisfied by the opportunity to cross-examine a witness. California v. Green, 399 U.S. 149, 160, 90 S. Ct. 1930, 1936, 26 L. Ed. 2d 489, 497 (1970). Counselor Vesole's essential duty to Overton was performed when he cross-examined Woods at trial. Overton was not present at Wood's deposition. The deposition could have been the only opportunity for

cross-examination if Woods were not available for trial. But Woods was subsequently cross-examined at trial. The contingency that could have resulted in a failure of duty did not occur. Furthermore, the evidence in the deposition and Woods' trial testimony are consistent.

Overton urges the potential for conflict of interest would have been more apparent to him had he been present with Vesole at the deposition of Woods. The record shows Overton was aware of Vesole's professional relationship with Woods prior to the date of the deposition. The "need to see it to believe it" is not a legally sufficient argument in the context of the Confrontation Clause of the Sixth Amendment in support of an ineffective assistance of counsel allegation. See Green, 399 U.S. at 160, 90 S.Ct. at 1936, 26 L. Ed. 2d at 497. Finally, we found there was no conflict of interest in section I of this opinion.

The theories proffered to support an ineffective assistance of counsel claim do not demonstrate Overton's counselors failed to perform the essential duties of their roles. Furthermore, none of the four potential issues has been shown to have resulted in prejudice to Overton's case.

We affirm the denial for postconviction relief.

AFFIRMED.