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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-392 / 91-1528

GARY R. TITUS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

The defendant, Gary Ray Titus, previously convicted of first-degree murder, appeals the district court's judgment denying his application for postconviction relief. **AFFIRMED.**

Emil Trott, Jr., Des Moines, for applicant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, and John P. Sarcone, County Attorney, for resister.

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

SCHLEGEL, J.

The defendant, Gary Ray Titus, previously convicted of first-degree murder, appeals the district court's judgment denying his application for postconviction relief. Titus contends he received ineffective assistance of trial counsel when counsel failed to object to a detective's testimony regarding statements allegedly uttered by a coconspirator. The coconspirator's statement indicated Titus said he enjoyed the robbery and killing. Titus also contends he was denied effective assistance of postconviction relief counsel.

Titus was tried and convicted of first-degree murder in the stabbing death of Kenneth Eaton on February 13, 1988. The court of appeals affirmed Titus's conviction in an unpublished opinion on November 27, 1989. Further review was denied by the supreme court.

On June 4, 1990, Titus filed the present application for postconviction relief. Titus claims he was denied effective assistance of counsel due to his court-appointed counsel's failure to object on hearsay grounds to testimony by Officer Thielman offered by the State to show Titus was involved in the stabbing. Titus's court-appointed attorney filed a brief on his behalf but subsequently withdrew. Another attorney, George Appleby, was appointed. Hearing on the matter was continued until December 20, 1990.

At the hearing, the State called Titus's defense attorney, Roger Owens, to testify. Owens testified he did

not object to the testimony of Officer Thielman because he was afraid the State would seek to introduce all of codefendant Green's personal testimony into the record. Owens testified he did not believe Thielman's hearsay testimony regarding Green's statement was inconsistent with Titus's defense. Green allegedly told Thielman that Titus said to Green just after the crime that Titus enjoyed killing and robbing Eaton.

After hearing Owens' testimony, Judge Walters indicated his desire to view Green's entire statement which Owens was concerned the State would introduce upon a hearsay objection. Judge Walters left the record open for seven days and later reopened the record for the taking of further testimony. He noted Green had admitted to the stabbing in his statement, and he declared the statement did not contain the utterance purportedly made by Titus according to Officer Thielman. Following a June 6, 1991, hearing, the district court denied the application for postconviction relief.

On October 7, 1991, Titus, appearing pro se, filed an application for a delayed appeal. Titus argued that pursuant to a letter dated July 9, 1991, he had requested Appleby to file an appeal. However, no appeal was filed, and Titus did not learn of this until October 3, 1991. In accordance with an order signed by Justice Carter dated October 29, 1991, the supreme court granted the delayed appeal. Titus filed his notice of appeal on November 26, 1991.

Titus argues his trial counsel was ineffective in failing to object to Officer Thielman's testimony regarding statements made by Green and attributed to Titus. He argues these statements were inadmissible hearsay and could not have been admitted into evidence under the excited utterance exception to the hearsay rule, despite Owens' belief to the contrary. Titus argues a reasonable probability exists his trial would have resulted differently if the jury had not heard Thielman's testimony concerning Green's statements.

Titus also argues he received ineffective assistance of postconviction relief counsel. He contends Appleby's decision regarding Titus's absence from the postconviction hearings became untenable once Owens was called to testify. He argues he would have been able to assist Appleby in the cross-examination of Owens by pointing out inconsistencies in the testimony.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

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)). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985).

In order for the applicant to prevail, the record must indicate (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

Titus first contends his trial counsel failed to perform an essential duty by failing to object to Thielman's hearsay testimony. While we agree Thielman's testimony constituted inadmissible hearsay evidence under Iowa Rule of Evidence 801, we disagree with Titus's contention that counsel's decision to refrain from objecting constituted ineffective assistance. Trial counsel strategically elected not to object to the hearsay testimony.

Counsel stated at the postconviction relief hearing he decided not to lodge a hearsay objection because he feared

a successful objection might have resulted in the prosecution calling Green as a rebuttal witness or the trial judge admitting into evidence Green's entire interview. In either event, admission of Green's interview would have contradicted Titus's defense: Titus and Green went to the "gay loop" and the victim's apartment for the sole purpose of "mooching" liquor or beer (i.e. without the intent to rob Eaton), and Green had murdered Eaton on his own--for reasons unknown to Titus--while Titus was outside the apartment. Green's interview revealed Titus and Green actually went to the loop specifically to commit a robbery.

Though no evidence exists indicating the State would have negotiated a plea agreement with Green in order to obtain his testimony, trial counsel was convinced Green would voluntarily testify against Titus as a way of bringing Titus down with him. Trial counsel believed Green was angry with Titus because Green felt Titus was "snitching" on him. Counsel testified he had information Green had been in contact with the county attorney's office regarding his potential testimony.

In addition, as the district court observed, Green's interview "directly implicated Titus as an accomplice in a felony murder." As counsel realized given his twenty years of experience and extensive criminal law practice, admission of Green's interview could have led directly to a verdict of first-degree murder under the felony-murder rule. In either event, trial counsel successfully kept out

of evidence those aspects of Green's interview which counsel reasonably believed to be most damaging. Trial counsel permitted Officer Thielman's testimony regarding what counsel believed to be Titus's ambiguous statements to Green following the murder as a way of compromising to avoid the more damaging evidence that Green and Titus planned to rob Eaton.

Secondly, Titus contends his rights to effective assistance of postconviction relief counsel and to be present during the postconviction relief evidentiary hearings were violated. We find these contentions to be without merit. Titus's contention he could have assisted counsel in various ways during the postconviction relief hearings is unpersuasive.

Our review of the record reveals Titus's trial counsel and postconviction relief counsel acted within the normal range of competency in performing their duties. Titus's claims of ineffective assistance are unfounded. Accordingly, we affirm the district court's denial of the defendant's postconviction relief claim.

AFFIRMED.