IN THE COURT OF APPEALS OF IOWA

No. 8-571 / 97-2283

LYNN LEWIS III,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

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

Catherine K. Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Vogel, and Mahan, JJ. Streit and Zimmer, JJ., take no part.

SACKETT, C.J.

Applicant-appellant Lynn Lewis III appeals following the district court's denial of his application for post-conviction relief. Lewis, who was convicted of second-degree robbery in violation of Iowa Code section 711.3, asserts (1) his first defense attorney failed to conduct discovery before the trial date and withdrew too close to the trial date; (2) his second defense attorney did not adequately prepare for trial; and (3) his appellate counsel failed to raise these issues on direct appeal.

Lewis was arrested June 16, 1995, and released from jail on June 20; a trial information was filed July 19, 1995. A Polk County public defender was appointed to represent him. Between Lewis's release from jail and a pre-trial conference on September 8, 1995, he had not contacted the public defender or her investigator. Lewis appeared at the pre-trial conference and indicated he would waive his right to a speedy trial. Trial was set for October 4, 1995.

Lewis did not contact the public defender. She asked to withdraw on September 25, 1995, stating "lack of staff," though the district court granted her application to withdraw because Lewis had not contacted her. The next day, Francis Hoyt, Jr., was appointed as Lewis's attorney.

On October 3, 1995, Hoyt met with Lewis telling him he was not prepared for trial. Hoyt and Lewis appeared in court that day and Lewis told the district court he demanded his trial, set for October 4, be held as scheduled but with proper representation. Trial was continued until October 23, 1995, the last date within the speedy trial requirement.

The primary witness against Lewis was not available but appeared to testify October 23, 1995. Lewis was given the opportunity to allow Hoyt to depose the witness and prepare. Hoyt talked to the witness. A record was then made Hoyt had recommended a continuance for preparation, but Lewis wanted to go forward that day.

A jury found Lewis guilty. Lewis appealed and was represented on appeal by attorney John Messina. His conviction was affirmed. *State v. Lewis*, No. 95-2200 (Iowa App. Nov. 27, 1996). Lewis then filed this application for postconviction relief which the district court denied.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996).

Lewis contends the public defender was ineffective because she did not conduct discovery and withdrew so close to the trial date. The public defender testified and the district court found she did not conduct discovery and withdrew because Lewis did not maintain contact with her. Even if the public defender had been ineffective in not contacting Lewis and preparing for trial, Lewis can show no prejudice. While Lewis next contends Hoyt was not effective because he did not adequately prepare the case for trial, the decision not to depose the primary victim and engage in additional trial preparation was Lewis's. He made the decision contrary

to both Hoyt's recommendation a continuance be requested for further preparation and the trial judge's suggestion it was in his interest to do so.

The victim had not been available prior to trial and the trial judge indicated this would justify a continuance. Lewis's claim the two attorneys did not prepare for trial fails because Lewis disregarded Hoyt's advice and proceeded to trial. Any prejudice Lewis may have suffered was the result of his rejecting Hoyt's advice.

Lewis's further claim his appellate counsel was not effective because he did not raise the issue of the prior attorneys' ineffective assistance of counsel on direct appeal also fails as there was no basis for Messina to make such a claim.

We affirm the decision of the district court denying Lewis's application for postconviction relief.

AFFIRMED.