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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DANIEL SULLIVAN ELAM,	)	
Applicant-Appellant,	)	Filed November 30, 1987
vs.	)	**89**
STATE OF IOWA,	)	7-372 86-607
Resister-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County (65655), L D Lybbert, Judge.

The applicant appeals the district court's denial of his application for postconviction relief from his conviction of first-degree murder. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Craig C. Ament of Olsen, Parsons & Ament, Cedar Falls, for applicant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brendon, Assistant Attorney General, for resister-appellee.

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

HAYDEN, J.

The applicant, Daniel Elam, appeals the district court's denial of his application for postconviction relief from his conviction of first-degree murder. He asserts the district court erred in finding he had not proved by a preponderance of the evidence that an alleged eyewitness testified falsely at his trial. He contends he was denied a fair trial by the prosecution's use of this allegedly false testimony. He also asserts he was denied effective assistance of counsel by his trial counsel and his postconviction counsel. We affirm in part and reverse in part.

I. **Allegedly False Testimony.** At Elam's trial, one Tanya Coleman testified she was present at the scene of the shooting and saw Elam fire the fatal shot. At the postconviction hearing, however, she recanted this testimony. She now claims she was not present at the shooting and, therefore, did not see Elam shoot the victim. She states the Waterloo police coerced her trial testimony by threatening her with incarceration for perjury and by mentioning the case of two juveniles, the Epps brothers, who were tried as adults for murder. Tanya was sixteen years old at the time of trial. Elam asserts the use of her trial testimony violated his due process right to a fair trial.

In postconviction cases we are ordinarily bound by the fact findings of the district court, but when constitutional issues are raised, we make our own evaluation of the totality of the circumstances. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). We look upon a witness's recantation of trial testimony with utmost suspicion. State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980). As such, the trial court is not required to believe the recantation. State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). The court has broad discretion in looking to the whole record to determine if the defendant had a fair trial

and we will reverse only upon a demonstrated abuse of discretion. State v. Folck, 325 N.W.2d 368, 377 (Iowa 1982).

Our review of the record reveals Coleman had pressure placed on her by her family, if by anyone, and not by the Waterloo police. Regarding her testimony at the trial of Ferman Jones, Elam's codefendant, she stated in a letter:

> I would request that I not be photographed during the trial of Ferman Jones. The reason for this is that he is my brother-in-law and I'm haveing [sic] to testify against him in front of many members of my family! This is going to be extremely difficult as it is.

We note also Tanya's mother, Minnie Coleman, faced charges, which were later dismissed, of tampering with a witness (not Tanya) and obstructing justice at the time of Elam's trial. Minnie was not, therefore, allowed to have contact with her family before the trial. Also illustrative of the pressure brought to bear on Tanya by her family was her explanation at Elam's trial for why, when initially interviewed by the Waterloo police, she denied being an eyewitness. She stated, "I was more or less trying to protect my family. I didn't want to say anything." Interestingly, Minnie was present at this initial interview.

We also find the chronology of events leading up to the shooting significant. These facts were proved at trial and may be found summarized at State v. Elam, 328 N.W.2d 314, 316-17 (Iowa 1982). Elam pursued a defense of justification at trial. He sought to show he reasonably believed the victim, Stevens, intended to harm him because Stevens thought he had been seeing Stevens's girlfriend. It is apparent to us, as it was to the district court, that Elam is attempting to change his defense at this late date.

Based on the foregoing, we conclude the district court's denial of Elam's application for postconviction relief on the basis of Tanya's recantation was correct.

II. Ineffective Assistance of Trial Counsel. Elam asserts his trial counsel was ineffective since he did not call Elam's aunt, Minnie Coleman, as a witness. He contends her testimony would have been favorable to him. Moreover, he contends the jury was allowed to speculate her testimony would have been adverse to him, since she was not called as a witness. Elam asserts this unfairly prejudiced him.

To establish an ineffectiveness claim, Elam must show that counsel failed to perform an essential duty and prejudice resulted. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). He must prove both requirements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). To satisfy the prejudice requirement, Elam must show counsel's failure amounted to "a denial of the accused's due process right to a fair trial, fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). This is done by showing that there is a reasonable probability the result at trial would have been different absent trial counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. And if it is easier to dispose of an ineffectiveness claim on the lack of sufficient prejudice, that course should be followed. Id. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. In regard to counsel's failure to perform an essential duty, the reasonable tactical decisions of counsel are not grounds for finding ineffective assistance. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Even improvident trial strategy, miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Sallis, supra, at 123.

At the postconviction hearing, Elam's trial counsel acknowledged certain aspects of Minnie's testimony might have aided Elam's defense. When asked why, then, he did not call her as a witness, he stated:

> Well, the thing that comes to mind was that she indicated that at some point in the course of events that evening, as Danny was leaving Building A, he kicked the door as if he were angry. This was apparently after he had come back from Vicky Barrett's house where he'd had an altercation of sorts with Chris Stevens. And I didn't really want to portray Danny as being an angry man that night. I wanted to show him as being, you know, frightened and scared, maybe even a little bit timid. And I felt that that aspect of her testimony would undercut the image of Danny we were trying to portray.

He also stated:

> Her version of events was always shifting in various ways. And frankly, I would have been kind of leery about putting her on the stand because there was just no way of predicting what Minnie Coleman was going to say. And I guess I felt that Minnie wanted, in her own way, to help; but I was afraid that in her efforts to do that she would shade her testimony or stretch it in such a way it would destroy her credibility and simply make the defense look bad by putting her on the stand.

The district court found trial counsel made a reasonable tactical decision. We agree. The district court's denial of Elam's application for postconviction relief on the basis of ineffective assistance of trial counsel was correct.

III. Ineffective Assistance of Postconviction Counsel. Elam requested his postconviction counsel to raise certain other issues regarding the ineffectiveness of trial counsel. When postconviction counsel did not address those issues in his brief, and following the postconviction hearing, Elam filed a pro se motion to the district court, which indicated his wish to amend his petition to include these issues and assert an ineffective assistance of postconviction counsel claim. The court allowed him to amend his petition and permitted both parties to file additional briefs and arguments concerning these new issues. However, Elam did not have an opportunity to offer evidence to support his new allegations.

The district court ultimately denied these claims on the basis of lack of evidence adduced at the postconviction trial

We conclude the district court's decision to rule on these claims was in error Elam deserves the opportunity to introduce his evidence and his postconviction counsel deserves the opportunity to respond to the charge of ineffective assistance for not raising those issues See State v Coil, 264 N.W.2d 293, 296 (Iowa 1978) We therefore reverse the district court's ruling in this regard as being premature

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.