IN THE COURT OF APPEALS OF IOWA

No. 8-610 / 97-0916

WILLIAM L. STRINGER,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

William Stringer appeals from the district court order denying him postconviction relief. **AFFIRMED.**

Thomas J. McCann, Des Moines, for appellant

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Applicant-appellant William Stringer appeals from the district court order denying him postconviction relief. Stringer, who was convicted of first-degree murder, contends (1) the district court erred in failing to grant him a new trial based upon newly-discovered evidence, and (2) he was denied due process of law because of the State's destruction of evidence. We affirm.

Stringer was accused and convicted of shooting Jim Clay on November 4, 1986, in Clay's apartment in the Sherman Hills division of Des Moines. Stringer contends statements of two inmates at Fort Madison were newly-discovered evidence supporting his request for new trial. The inmates testified Gary Lewis, a roommate of Stringer at the time of the shooting, related to them after Stringer's trial it was Lewis, not Stringer, who committed the murder.

The testimony at trial was that on the night of the murder a black man with a painted face wearing a stocking cap, a black coat, and black pants, and with a nylon pulled over his face, entered the apartment where the victim lived with Lynn Ballard and Kevin Colburn. The victim was upstairs at the time. The black man carried a sawed-off shotgun. He grabbed Ballard and yelled he wanted money or drugs. The victim came downstairs and pleaded with the man to let Ballard go. Police were called. Ballard and Colburn ran outside. The man shot the victim and left the apartment. The victim came outside and asked for assistance before he collapsed at the curb and died. The man fled.

Gary Lewis, a black man, called the police later that night telling them Stringer confessed to the killing. Lewis told the police Stringer had been staying with him and was asleep in his apartment. The police arrived and Lewis gave them the gun he took from Stringer and a jacket and pants he had loaned to Stringer that night. The police also took a bottle of make-up and a nylon cap. Lewis stated Stringer used the nylon cap to keep his hair down at night.

At trial, Colburn and Ballard identified Stringer as the assailant. Lewis testified about the events of the night, including Stringer's confession he "iced" Clay. The nylon cap, although seized by the police, was not admitted as an exhibit at trial. During closing arguments, Stringer's defense counsel argued Lewis was the killer, not Stringer.

The jury returned a guilty verdict and sentenced Stringer to life imprisonment. Stringer's direct appeal was unsuccessful. *State v. Stringer*, 438 N.W.2d 33 (Iowa App. 1988). His first postconviction relief proceeding was also unsuccessful. *Stringer v. State*, 522 N.W.2d 797 (Iowa 1994).

On May 8, 1996, Stringer filed an application for postconviction relief advancing he had newly-discovered evidence in the form of two inmates' statements. He contended he should have a new trial. Prior to the hearing, Stringer requested the State produce the seized nylon cap taken into evidence by the police. The State responded the nylon cap could not be found. At the hearing, the two inmates, Robert Conner and Charles Watkins, testified about Lewis's alleged confession. Conner said Lewis was a family friend and Watkins stated Lewis was his partner on the street.

The district court concluded the inmates' testimony was not credible. Additionally, the district court determined, assuming the testimony was credible, it would not likely change the result of the trial because of the positive identification of Stringer by Ballard and Colburn. Stringer contends the district court erred in finding the newly-discovered witnesses would not have changed the outcome of his trial.

We review the district court's denial or grant of a motion for new trial on the basis of newly-discovered evidence for abuse of discretion. *See State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). We find an abuse of discretion only when discretion is exercised on grounds clearly untenable or to an extent clearly unreasonable. *Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l.Life Ins. Co.*, 452 N.W.2d 389, 393 (Iowa 1990).

Stringer bears the burden of establishing the district court abused its discretion in not granting him a new trial. *See State v. Belt*, 505 N.W.2d 182, 184-86 (Iowa 1993); *State v. Holland*, 485 N.W.2d 652, 655-56 (Iowa 1992). The district court's discretion in granting or denying a motion for new trial is unusually broad when the new trial motion is grounded on newly-discovered evidence. *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992). Motions for new trial are not favored and should be closely scrutinized and sparingly granted. *State v. Weaver*, 554 N.W.2d 240, 245 (Iowa 1996); *State v. Overstreet*, 243 N.W.2d 880, 886 (Iowa 1976).

To prevail on a claim of newly-discovered evidence, a postconviction applicant must show (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and

not merely cumulative or impeaching; and (3) its admission would likely change the result if a new trial were granted. *Brewer v. State*, 444 N.W.2d 77, 80 (Iowa 1989); *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 32-33 (Iowa 1979).

Stringer correctly advances the evidence could not have been discovered before his trial. The State concedes it was not available earlier. If it is believed the evidence was material to the issue of Stringer's innocence or guilt, the focal question is whether its admission would have changed the result if a new trial were granted.

Because Stringer raises issues of constitutional magnitude, our task is to evaluate independently the totality of the relevant circumstances. *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986); *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). We give weight to the findings made by the postconviction court regarding the credibility of witnesses. Iowa R. App. P. 14(f)(7); *Taylor*, 352 N.W.2d at 687.

The State advances Stringer cannot show the results of his trial were changed. It points to Ballard's and Colburn's positive identification of Stringer as the murderer. The State further notes both witnesses saw Lewis before trial and were positive he was not the murderer. The State points out the jury saw both men, and though Stringer's attorney argued Lewis was the murderer, the jury saw fit to reject this position. The State also advances both witnesses are incarcerated for the commission of felonies which is an attack on the credibility of their testimony. We find no valid reason to depart from the district court's decision on this issue and affirm.

We next address Stringer's claim he was denied due process by the State's failure to produce the nylon cap seized by police on the night of the murder.

The State contends Stringer did not preserve any issue regarding the nylon cap as he requested no specific relief from the postconviction court. Additionally, the State argues the issue of genetic testing of the cap could have been raised on direct appeal or in the first postconviction relief application.

The due process claim raised on appeal was not raised before the district court's sentence. We do not consider claims not presented to or decided first by the district court. *State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997).

AFFIRMED.