IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-234 / 95-0574

RAYMOND BRODENE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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

Raymond Brodene appeals the denial of his application for postconviction relief.

AFFIRMED.

Ronald A. Bayavan, Des Moines, for appellant.

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

Considered by Habhab, P.J., and Cady and Huitink, JJ. Vogel, J., takes no part.

HUITINK, J.

Raymond Brodene appeals the district court's denial of his application for postconviction relief. We affirm.

Raymond Brodene was charged with first-degree murder after a gas station attendant, Robert Duchene, was found shot to death at the Southtown 66 station on Southwest Ninth Street in Des Moines. At trial, Brodene admitted he was at the gas station when the attendant was shot. A witness observed Brodene's car at the gas station about one hour before Duchene was discovered, and that witness saw a man inside the vehicle. Another witness stopped by the station between 6:30 and 7:30 p.m., heard something that sounded like firecrackers, and saw a man in a black coat running from the back of the station with a noticeable limp. Brodene, who walks with a limp, was arrested wearing a black coat

A cab driver testified he had picked Brodene up outside Ted's Tattoo Parlor, just blocks from the gas station, at approximately 9 or 10 p.m. and took him to the home of Vicki Butler on Southwest Ninth Brodene brought a jar of change with him to Butler's apartment which was later identified as a coin jar taken from the gas station. Brodene later returned to the tattoo parlor in a second cab and rode with a tow truck driver when his car was towed home The tow truck driver testified Brodene acted nervous and was listening to a scanner Brodene said he purchased that day. Brodene paid the thirty-two-dollar tow charge in one dollar bills which he drew from a large wad

of cash. When the tow truck driver counted the money, he discovered many of the bills were covered with blood. The blood was later determined to be human, though further analysis was not successful. The money bag from the station was found the next day outside the tattoo parlor.

When a police officer approached Brodene at about 5 a.m. the next morning and asked Brodene who he was, Brodene answered, "I'm the one you're looking for." Gunshot residue later taken from Brodene's hands was consistent with him having held a gun. Brodene admitted he hid the gun used to shoot the attendant at Butler's apartment but claimed he had given the gun to Jeff Gunter when they were at the gas station. He testified that he later heard the sound of firecrackers when Gunter was in the station and that Gunter told Brodene he accidentally shot Duchene. Brodene stated that Gunter then gave the gun to Brodene and later went to Butler's apartment to retrieve the gun on his own initiative.

Gunter testified he lives across the street from Brodene and, on the evening of the shooting, Brodene came to Gunter's home and said he was wanted for questioning. Gunter stated Brodene offered him twenty dollars to retrieve the gun from Butler's apartment, which he did. When Gunter returned home he and Brodene watched the police search Brodene's home and car, and Brodene then asked Gunter to keep the gun. Gunter contacted police later that day and gave them the gun. Bullets discovered at the

gas station and recovered from Duchene's body were later found to match those fired from this gun.

The jury found Brodene guilty of first-degree murder. Trial counsel was allowed to withdraw, and new counsel was appointed before sentencing. New counsel moved for a new trial on grounds trial counsel was ineffective in several respects. The district court refused to authorize preparation of trial transcripts and denied the motion for new trial. Brodene appealed.

We concluded on appeal the refusal to authorize transcript preparation was reversible error. The supreme court, however, found this error harmless in light of the overwhelming evidence against Brodene and affirmed the conviction on further review, preserving Brodene's ineffective assistance of counsel claims for postconviction proceedings. *See State v. Brodene*, 493 N.W.2d 793, 797 (Iowa 1992). Appeal follows the district court's denial of Brodene's application for postconviction relief.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When, however, 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)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

Brodene first contends trial counsel was ineffective because his allegedly inadequate investigation of the case resulted in counsel's failure to call defense witnesses and discover exculpatory evidence. Brodene claims that had counsel adequately investigated, he would have called Dr. Joseph Doro to testify regarding Brodene's physical disability. Brodene maintains that although a prosecution witness testified she saw the assailant running from the crime scene, Dr. Doro would have testified Brodene's physical disability makes running an impossibility for him. As a result, Brodene claims Dr. Doro's testimony would have provided the jury with reasonable doubt of his guilt. We disagree.

Our review of the record reveals that although the witness described the assailant as "running," she noted that "[i]f the person had been walking he would have been limping. He was running or trying to go faster, so therefore his leg was dragging."

This account establishes the individual the witness saw fleeing the murder scene was not "running" in the ordinary sense, but was instead running in a manner consistent with having a limp. As a result, Dr. Doro's testimony would have done nothing to challenge the State's identification of Brodene as the assailant. Moreover, because at least five other individuals testified regarding Brodene's disability and resulting inability to run, any further testimony on this issue would have been cumulative and unnecessary. Accordingly, we cannot say counsel's failure to call Dr. Doro as a witness rendered him ineffective. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) (counsel cannot be found ineffective based on failure to call witness whose testimony would merely have been cumulative).

Brodene also lists several other witnesses he contends counsel should have called in his defense. We, however, find no evidence in the record indicating any of these alleged witnesses had personal knowledge of any fact relevant to Brodene's defense. As such, we do not find counsel breached any essential duty in failing to call these witnesses. *See Heaton v. State*, 420 N.W.2d 429, 431 (Iowa 1988) (counsel's duty to investigate and prepare a defense is not limitless and does not require counsel to pursue each possible witness); *see also Lamphere v. State*, 348 N.W.2d 212, 216-17 (Iowa 1984) (counsel's failure to call witnesses who could not account for petitioner's activities at the time of the crime is not ineffective assistance of counsel).

We further reject Brodene's claim counsel did not sufficiently investigate the jar of change stolen from the murder scene. Although Brodene contends trial counsel should have had DNA tests performed on blood samples allegedly found on the jar, we find nothing in the record indicating any such blood samples even existed. We also do not believe counsel was ineffective in failing to examine the jar for sugar residue based on Brodene's claim the jar was not stolen from the gas station but instead had previously been used by his parents to store sugar. It is not apparent from the record trial counsel was ever told about the possibility the jar had been used for sugar and, accordingly, cannot be faulted for failing to look for evidence in a place where he had no reason to believe evidence existed.

Brodene also contends counsel was ineffective in failing to confer with him about his defense. He claims that had trial counsel consulted him, counsel would have elicited testimony from Brodene that the gun he owned had a brown handle whereas the gun identified at trial as the murder weapon had a black handle.[1] Our review of the record, however, reveals Brodene admitted at trial he and another individual had purchased the murder weapon that he had it in his possession at the gas station a few minutes before the murder that he had it in his possession when he was parked in the

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[1]Although Brodene raises other issues which he claims counsel should have discussed with him, he did not raise these specific issues on direct appeal nor has he established any reason for his failure to do so. We find Brodene did not preserve error with regard to these claims and, accordingly, will not consider them on appeal. *See Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991).

driveway at the tattoo parlor shortly after the murder, and that he hid it at a friend's apartment The fact Brodene may have owned a second gun with a brown handle was irrelevant in light of Brodene's admitted connection to the murder weapon Counsel breached no essential duty in not raising this issue at trial

Finally, Brodene contends trial counsel improperly and ineffectively expressed his own doubt about Brodene's version of events Brodene raised this claim for the first time during postconviction proceedings and did not state any reason for his failure to raise the issue on direct appeal Because Brodene neglected to allege sufficient reason for his failure to raise this claim on direct appeal, we find he has waived this claim and need not consider it here *See Collins v State*,.477 N W 2d 374, 376 (Iowa 1991) (postconviction applicant who seeks to raise a new claim in postconviction proceedings must establish that there is sufficient reason for his or her failure to raise the issue at trial and on direct appeal or claim is waived)

Even if counsel did in fact breach some essential duty in his representation of Brodene we find no prejudice On direct appeal, the supreme court found trial court error harmless based on the overwhelming evidence against Brodene *See State v Brodene* 493 N W 2d 793 797 (Iowa 1992) We believe that even if counsel had called the witnesses Brodene claims he should have called and conferred more with his client regarding the defense the overwhelming evidence against Brodene would likely have yielded the same result The evidence at trial established Brodene was in

possession of the murder weapon before and after the shooting, that he was present in the gas station a few minutes before the crime, that an individual with similar distinctive physical characteristics was seen fleeing the gas station immediately after the shooting, that he had blood-stained money in his possession shortly thereafter, and that he had a motive to commit robbery. Accordingly, we cannot say Brodene was prejudiced by any of counsel's allegedly unprofessional errors. Brodene was not denied effective assistance of counsel. *See Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984) (petitioner must show both breach of duty and actual prejudice to establish ineffective assistance of counsel).

We have considered all of Brodene's arguments and find them to be either covered by this opinion or without merit. We affirm.

AFFIRMED.