IN THE COURT OF APPEALS OF IOWA

No. 7-268 / 96-0542

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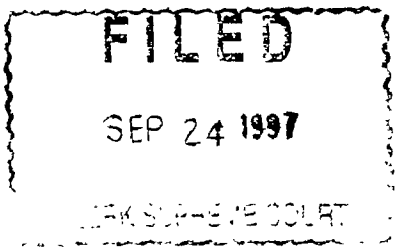
PAUL A. ANDERSON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Anderson appeals from the denial of his application for postconviction relief.

AFFIRMED.

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Considered by Cady, P.J., Streit, J., and McCartney, S.J.*

* Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Paul A. Anderson (Anderson), the applicant and appellant in this matter, appeals from the denial of his application for postconviction relief and the dismissal of his application by the trial court.

Anderson asserts that his trial counsel was ineffective (1) in failing to object to the failure of the respondent-appellee State to give notice of testimony of a witness rebutting Anderson's alibi witnesses, and (2) in not investigating and preparing for such testimony. He further asserts the postconviction relief court erred in refusing to grant his application for the appointment of a second expert to examine the alibi rebuttal witness proffered by the State. He also asserts the State failed to preserve certain exculpatory evidence, and that his trial counsel and postconviction relief counsel were ineffective in failing to move for a dismissal of the charges against him based on certain of these alleged errors.

We affirm.

The appellant was convicted of the crime of murder in the first degree. The trial was held in the autumn of 1991, and his conviction was affirmed upon direct appeal to the supreme court. *State v. Anderson*, 517 N.W.2d 208 (Iowa 1994).

Thereafter in the forepart of 1996, and with the assistance of counsel other than his trial counsel, the appellant filed his application for postconviction relief asserting a number of errors reportedly committed by the State and by his trial counsel in providing ineffective assistance of counsel.

We note that the counsel for the appellant handling the instant appeal is not the counsel for the appellant at the postconviction relief hearing and proceedings, nor was he trial counsel in the 1991 trial.

When questions of the competency of defense counsel are raised by postconviction relief applications, our review is de novo. *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984).

We review for an abuse of discretion with respect to the issue raised by the appellant that the trial court was in error in refusing to permit the appellant to have access to a second expert witness. *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987).

There is a presumption that trial counsel provided an effective defense, and the burden is upon the appellant to rebut that presumption. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Whether or not counsel's representative was effective involves a two-part test: (1) There must be a showing that the counsel at trial failed to perform a basic duty, and (2) such failure to perform the duty resulted in such prejudice that there is a reasonable probability there would have been a different outcome in the trial (here, an acquittal) and resultant verdict had such duty been performed. *Id.*

In considering whether or not counsel presented an effective defense, we are not to act as a "Monday morning quarterback." *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). Not every improvident strategy or judgmental mistake would amount to ineffective assistance of counsel. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa

1992). The appellant has the burden to prove both the breach of duty and the resulting level of prejudice. *Taylor*, 352 N.W.2d at 685.

The appellant was convicted of the murder of Joe Brown, whose body was found in a Bettendorf, Iowa, park at about 5:30 p.m. in March of 1988. Brown was a resident of Moline, Illinois, which is a short drive from Bettendorf. The appellant resided in McHenry, Illinois, which was conceded to be a two and one-half hour drive from Bettendorf. Brown was alive and well at 4 p.m. in Moline, and one and one-half hours later he was found in a dying condition in Bettendorf.

The appellant filed notice of an alibi defense pursuant to Iowa Rule of Criminal Procedure 10(11)(a) on December 4, 1991. The said rule provides the State must, within ten days of the filing of the notice of alibi defense, file written notice of those witnesses it proposes to use to rebut or discredit the alibi defense being asserted by the defendant. The State filed notice of additional witnesses approximately one month after the filing of the notice of alibi defense, filing such list of additional witnesses several weeks before the commencement of trial. Among the witnesses listed by the State as being used as an additional witness was John Hillman, but he was not designated as a rebuttal witness to the alibi defense.

The appellant did not properly file his notice of alibi defense inasmuch as he did not, in accordance with the rule, list the place or places where the alibi witnesses would testify the appellant was at the time of the commission of the murder.

At trial, the appellant objected to the introduction of Hillman's testimony on a number of grounds, all of which were overruled by the trial court. The lack of timely filing of notice of rebuttal witnesses, however, was not raised by trial counsel and this, in part, is the present objection of the appellant, i.e., the lack of timely filing by the State. However, the appellant and his attorney knew the nature of Hillman's statements, Hillman having been deposed by them. Hillman testified that at a time when the appellant was supposedly in his McHenry, Illinois, home, Hillman heard the wife of the victim refer to a caller at her apartment in Moline as "All" or "Paul." Hillman testified that he heard these comments by the victim's wife in mid- to late-afternoon on March 5, 1988, and if the "Paul" referred to was the appellant, that would place him much closer to the Bettendorf scene than at McHenry, Illinois, during that period of time according to his alibi witnesses.

The appellant and his trial counsel, therefore, knew Hillman's statements tended to place the appellant in the Moline-Bettendorf vicinity at a time when his alibi witnesses were testifying he was two and one-half hours away at McHenry, Illinois.

Under these circumstances, we do not believe the trial counsel was ineffective in not raising this particular issue. He, and presumably the appellant, were aware of the nature of Hillman's statements and had several weeks notice of it prior to trial. The purpose of the rule had been substantially served. The appellant also had failed to adequately comply with the rule in the first instance.

We agree with the postconviction court that the appellant did not show the failure to lodge this particular objection was so prejudicial it would have changed the outcome of the trial had it been made. There was other evidence indicating the appellant was in the Moline-Bettendorf vicinity during the crucial periods of time.

The appellant further claims his trial counsel provided ineffective assistance in failing to adequately attack the testimony of Hillman, either by challenging Hillman's competency to testify or his credibility as a witness.

We are satisfied this was a tactical decision made by counsel. At trial, Hillman's use of medications was clearly brought out, and the appellant has not shown the result of the trial would have been substantially different had Hillman not testified. On direct appeal, the supreme court held that there was sufficient evidence of guilt in spite of the appellant's alibi witnesses' testimony. The evidence that the murder victim and the appellant were engaged together in a criminal enterprise and had argued about the division of proceeds, the threats made against the victim by the appellant, and the appellant's tire tracks near where the body was found, together with other evidence of statements made by the appellant, all support the conclusion that even had Hillman not been permitted to testify, the other evidence of guilt militates against any presumption that the outcome of the trial would have been different had Hillman not testified.

The appellant further argues the postconviction relief court erred in refusing his request for an appointment of a second expert witness to examine Hillman.

The postconviction relief court did appoint an expert witness at the request of the appellant in the postconviction relief proceedings, appointing Hillman's treating psychiatrist. After deposing this psychiatrist, the appellant, being dissatisfied with that deposition testimony, asked that a second expert be appointed. This request was denied by the court.

The appropriate standard for review is for abuse of discretion by the postconviction relief court. *Coker*, 412 N.W.2d at 593. We are satisfied the court acted appropriately and within its sound discretion in denying the request for still another expert witness. We agree with the postconviction relief court that the root of the request for a second expert witness was occasioned by the appellant's dissatisfaction with the testimony elicited from the first expert witness and that he was simply casting about seeking to eventually find an opinion that would coincide with his own ideas. Again, we do not believe that even if Hillman had not testified, the outcome of the trial would have been any different given the other evidence of guilt.

Finally, the appellant asserts error was committed by the State inasmuch as the officers investigating the scene of the murder failed to preserve evidence of certain footprints observed near the place where Brown's body was found.

The appellant now contends his trial counsel was ineffective in failing to ask for a dismissal of this cause against him because of such alleged failure to preserve evidence, and further asserts his postconviction relief counsel was similarly

ineffective in failing to urge the dismissal of the cause because of this purported failure at the postconviction relief hearing.

The appellant also contends that the purported failure of the State to preserve evidence should result in dismissal of the cause, arguing that a rule requiring a showing of "bad faith" on the part of the officers in failing to preserve this evidence is inappropriate. He argues that the proper rule is to require only a showing that the State "failed to acquire and preserve, within the bounds of reasonableness" such evidence. *State v. Brown*, 337 N.W.2d 507 (Iowa 1983). However, on this issue, see *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988), and *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997).

Our review indicates that trial counsel filed a motion seeking a new trial or, in the alternative, an order arresting the judgment of conviction because of this purported failure of the State to preserve evidence. The appellant now asserts, however, this was ineffective inasmuch as counsel should have asked for a dismissal of the charge. On direct appeal, the supreme court reviewed the contentions made in this regard (although appellate counsel did not seek dismissal) and affirmed the conviction. In so doing, the supreme court stated, "We have considered all issues presented and find no basis for reversing defendant's conviction." *Anderson*, 517 N.W.2d at 215. Thus, the request for more modest relief from the judgment of conviction, i.e., a new trial or arresting the order of conviction, was considered by the supreme court and denied.

The supreme court on direct appeal states that the record was not sufficient to "allow us to judge the reasonableness of the State's decision to photograph some, but not all, of these footprints." The appellant argues such language indicated concern that the issue be treated further. However, the supreme court "considered" this, as well as other issues presented, and found "no basis for reversing defendant's [appellant's] conviction." There was no remand by the supreme court for further proceedings or the taking of further evidence on this issue, nor was there an express preservation of postconviction proceedings. We agree with the postconviction relief court that this issue has been adjudicated.

In view of this disposition of this issue, we are not required to entertain the request of the appellant that we not follow the "bad faith" rule.

Based upon the foregoing, the judgment of the postconviction relief court is affirmed.

AFFIRMED.