

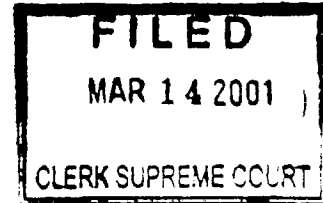
IN THE COURT OF APPEALS OF IOWA

No. 1-065 / 99-1749
Filed March 14, 2001

KENNETH ALLEN FRAZIER, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul,
Judge.

Applicant contends he is entitled to a new trial based on newly discovered
evidence. **AFFIRMED.**

Stephanie Forker Parry of Forker and Parry, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Cristin C. Odell, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Paul E. Kittredge, Assistant
County Attorney, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Kenneth Frazier sought postconviction relief in the district court from a judgment and sentence for first-degree burglary, assault while participating in a felony, and aggravated assault. He asserted newly discovered evidence entitled him to a new trial. The district court denied the application on the ground the evidence was not material and was relevant only for impeachment purposes. We affirm.

I. Background Facts and Proceedings.

A Sioux City apartment was burglarized in the early morning hours of January 31, 1995. Lyndon Hamann, an occupant of an apartment in the same building, was a key witness for the State. Hamann testified he intercepted Daniel Halstead breaking into the building on the evening of January 30, 1995. He later heard noises coming from the apartment above him, which he knew to be vacant. Hamann went up to investigate, saw Halstead with an armful of clothes, and told him to leave. When Halstead did not, Hamann returned with a baseball bat and was met by a man, later identified as Frazier, who pointed a gun in his direction. Halstead, Frazier, and a third man, later identified as Herbert Davis, left the scene and were arrested after Hamann notified the police.

Frazier and Halstead waived their rights to jury trials and were tried together to the court. Pursuant to a plea agreement, Davis testified for the State in the trial of the other two defendants. He essentially corroborated Hamann's testimony, stating he, Frazier, and Halstead went to the apartment to burglarize it, were interrupted by Hamann, then left. Davis also confirmed Frazier pointed a gun at Hamann.

The district court adjudged Frazier guilty of first-degree burglary, assault while participating in a felony, and aggravated assault. Iowa Code §§ 713.1, 713.3, 708.1(3), 708.3, 902.7 (1993). The court sentenced him to prison terms not exceeding twenty-five, five, and two years respectively, to be served concurrently. Our court affirmed his judgment and sentence. *State v. Frazier*, 559 N.W.2d 34, 36 (Iowa Ct. App. 1996).

Frazier filed an application for postconviction relief. He claimed two persons, Karen Freeman and Jose Gardea, possessed information obtained after trial that implicated the State's own witness, Hamann, in the burglary.¹ The district court found this evidence immaterial and denied the application. Frazier appeals.

II. Waiver of Error and Ineffective Assistance of Counsel.

Frazier raises his newly discovered evidence claim under the rubric of an ineffective assistance of counsel claim, asserting trial, appellate and postconviction counsel were ineffective in failing to raise the newly discovered evidence issue and, accordingly, there is "sufficient reason" for not having raised this issue earlier. See Iowa Code § 822.8; *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999) (interpreting provision to require showing of sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal). Citing *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994), the State responds Frazier need not show "sufficient reason" for failing to raise the newly discovered evidence issue earlier. We assume without

¹ Frazier also contended the State did not disclose its dismissal of drug charges against Hamann in exchange for his testimony and did not disclose the full extent of Davis' plea agreement with the State. The district court rejected these contentions and Frazier does not pursue them on appeal.

deciding that the State is correct and, accordingly, do not address the ineffective assistance of counsel issue.

III. Newly Discovered Evidence.

Iowa Code section 822.2(4) authorizes postconviction relief applications where "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." An applicant alleging this ground as the basis for postconviction relief must show: (1) the evidence was not discovered until after judgment; (2) the evidence could not have been discovered earlier through the exercise of reasonable diligence; (3) the evidence is material to the issue, not merely cumulative or impeaching; and (4) the evidence would probably change the result if a new trial is granted. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). The district court found the third and fourth elements lacking with respect to each of the proposed witnesses. We will examine each witness's evidence in light of these elements.

A. Freeman. Freeman asserted that shortly after the burglary she overheard Hamann describe how he went to the upstairs apartment, kicked in the door, took things, and made it appear there had been a burglary. She further testified Hamann gave her boyfriend the social security cards of people who had previously lived in the upstairs apartment and her boyfriend in turn gave them to her. This evidence, if true, bore directly on a fact in issue, the identity of the burglar. See *State v. Adamson*, 542 N.W.2d 12, 14 (Iowa Ct. App. 1995).

We are not convinced, however, Freeman's testimony would more likely than not have changed the result of trial, as Davis confirmed the essential

aspects of Hamann's testimony. Accordingly, we conclude Freeman's evidence did not entitle Frazier to a new trial.

B. Gardea. Gardea testified he recalled Hamann saying "[s]omething about him calling the cops and having them raid the guys upstairs, I think, and breaking in after they got arrested or before they got arrested and stole some stuff." However, he could not remember when the conversation occurred or how it came about. Given his lack of memory concerning these key facts, we conclude his testimony was not material.

In sum, Frazier failed to establish the third and/or fourth elements for obtaining postconviction relief based on newly discovered evidence. Accordingly, we affirm the district court's denial of Frazier's application for postconviction relief.

AFFIRMED.