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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-335 / 88-1352

RICHARD D. RUBY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Paul H. Sulhoff, Judge.

Appellant appeals the denial of his application for postconviction relief after a jury found him guilty of second-degree murder. **AFFIRMED.**

Clarence B. Meldrum, Jr., of the Meldrum Law Office, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Richard Ruby appeals the denial of his application for postconviction relief after a jury found him guilty of second-degree murder. We affirm the denial.

Ruby contends that he was denied due process when the State did not make available to him before trial the prior statements later used to impeach defense witnesses. He suggests that the withholding of this evidence constitutes prosecutorial misconduct. Alternatively, he claims ineffective assistance of trial counsel grounded in a failure to pursue discovery. Ruby also alleges ineffective assistance of appellate counsel in the murder case based on a failure to raise these issues on appeal.

In 1982 Richard Ruby came to trial charged with first-degree murder after he allegedly killed a man by knocking him down and then stomping on his head during a barroom brawl. He claimed that he had acted in self-defense, that he was intoxicated, and that his actions had not caused the victim's death. During the trial, Ruby's attorneys were caught by surprise when the State impeached a number of defense witnesses with statements they had made to police officers shortly after the killing. These prior statements had not been made available to Ruby despite his earlier motion to produce all essential evidence. In due course the jury found Ruby guilty of the lesser charge of second-degree murder. This

court affirmed the resulting conviction, and subsequently the district court denied Ruby'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). However, when 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.

Appellant first contends he was denied due process of law due to the failure of the prosecution to reveal inconsistent statements of certain defense witnesses. Appellant bases his claim on the United States Supreme Court case of United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Bagley requires the prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. Id. at 473 U.S. 675, 105 S. Ct. 3380, 87 L. Ed. 2d 490.

In the Bagley case, as well as the two earlier cases of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the prosecution failed either to disclose exculpatory evidence or evidence

that the defense might have used to impeach government witnesses. Based on those three cases there appears to be a requirement that the hidden evidence be helpful in some way to the defense, not that it will hurt less if disclosed. Even if it can be assumed that impeachment evidence to be used against the defense must be disclosed under Bagley, the evidence was not material to the appellant's defense. Before a new trial is granted there must be a finding that the evidence which has been held back is material to the guilt of the defendant. Bagley at 373 U.S. 677, 105 S. Ct. 3381, 87 L. Ed. 2d 491. Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. Id. at 373 U.S. 674-75, 105 S. Ct. 3379, 87 L. Ed. 2d 489. The appellant admits that he had no recollection of the events and was totally dependent on the statements of witnesses for his defense. The impeachment evidence was not going to go away and would have been used anyway. Prior disclosure might have allowed defense counsel to better prepare, but an examination of the record shows that counsel's rehabilitation of the witnesses after impeachment was very good. While the prosecutor undoubtedly should have been forthcoming with the statements, early disclosure of the impeaching statements would not have affected the outcome of the trial and defendant was not deprived of due process.

Appellant's next contention is that his counsel was ineffective for not discovering the impeaching statements prior to trial, and for not raising the issues of admissibility of the statements and due process on appeal.

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). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. 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.

There was no failure to perform an essential duty and no prejudice resulted from the actions of appellant's counsel. Counsel requested disclosure of items acquired by the prosecution in its investigation of the case and in its preparation of the case for trial. This should have been enough to obtain the statements. Regardless of whether the statements were obtained, Ruby has failed to show that material prejudice resulted. He has failed to carry his burden to show that had the statements been revealed, the outcome of the trial would have been different. Such a

showing is required to show ineffective assistance of counsel. Strickland at 466 U.S. 694, 104 S. Ct. 2068, 80 L. Ed. 2d 698, (1984).

Counsel did not fail to perform an essential duty on appeal, but merely made a judgment call that the issues would have little merit. It is apparent from our present decision that failure to raise the issues of the admission of the impeaching statements and the denial of due process did not prejudice the defendant's right to a fair trial. Appellant has failed to overcome the presumption that his trial counsel or his appellate counsel failed to perform competently. The district court was correct in denying appellant's application for postconviction relief.

AFFIRMED.