IN THE COURT OF APPEALS OF IOWA

No. 5-523 / 94-1215

FILED
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CLERK SUPREME COURT

DENNIS LAMAR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jasper County, Peter A. Keller, Judge.

Dennis Lamar appeals the denial of his application for postconviction relief.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, and Steve Johnson, County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

HUITINK, J.

Dennis Lamar was convicted of murder in the first degree and three counts of robbery in the first degree. He filed a claim for postconviction relief, claiming he received ineffective assistance of counsel and that there was newly discovered evidence. The district court denied his claim for postconviction relief, and he appeals. We affirm.

Lamar's claims for postconviction relief are based on the facts which were presented at his criminal case. Therefore, we will review some of these facts. On September 13, 1985, Lamar was on weekend furlough from the Newton Release Center. He had agreed to help Donald Novak sell some guns. Thomas Gladson and Russell Zitek had stolen the guns and had arranged for Novak to sell them. Gladson was then on escape from prison.

When Lamar arrived at Novak's apartment in Newton, Gladson was present. Lamar stated he intended to rob a Hy-Vee Store and needed a driver. Gladson initially stated he did not want to do it and said "Fuck that." However, Gladson gave Lamar a gun, took a gun himself, and left with Lamar. Novak understood that they were going to rob the Hy-Vee Store.

Lamar and Gladson went to the Hy-Vee Store, and Gladson parked in back. Lamar went into the store, and with his gun drawn, demanded money from several employees. One of these employees pressed a silent alarm. By the time Lamar left the store, police officers were at the scene.

Lamar ran toward the back of the building where the car was parked. Two police officers, Leland Groves and Myrna McFarland, followed Lamar. Another police officer, Daniel McPherren, was already at the back of the building. As Groves and McFarland were running, they heard gunshots.

Groves arrived at the scene first, and he saw McPherren exchanging shots with a subject. Groves shot at that subject. In the dark, he saw a muzzle flash come from another direction, and he shot at a second subject. Groves testified the second subject then shot toward him, and the shot hit a brick wall, leaving a mark. McFarland stated she never saw the second subject, but assumed there was someone there because she saw Groves shoot in that direction.

McPherren died from a gunshot wound. When Gladson was arrested he was in possession of the gun which fired the fatal shot. The gun which Lamar had used to rob the Hy-Vee was found at the scene. It had been fired three times.

At trial, Lamar admitted robbing the Hy-Vee. He stated that when he came out of the Hy-Vee he put the money and his gun in the car, and that when he heard gunshots, he ran and hid on top of a tractor. He denied firing any of the shots. He claimed Gladson had not wanted to be part of the robbery, and was acting on his own in the gun battle.

As noted above, Lamar was found guilty of murder in the first degree and three counts of robbery in the first degree. His convictions were upheld on appeal. *State v. Lamar*, No. 86-1044/7-267 (Iowa App. Nov 30, 1987) (Unpublished).

On October 22, 1990, Lamar filed an application for postconviction relief. He claimed he received ineffective assistance of counsel both at trial and on appeal. He also claimed he was entitled to a new trial due to newly discovered evidence. The district court determined Lamar's counsel acted within the range of normal competency. The court also concluded Lamar was not entitled to a new trial because his counsel had been aware of the evidence in question at the time of trial. Lamar appeals.

I. A proceeding for postconviction relief is a civil action and is triable at law. *Overton v. State*, 493 N.W.2d 857, 858 (Iowa 1992). Where a postconviction applicant asserts violations of constitutional safeguards, such as the right to counsel, an appellate court makes its own evaluation of the totality of the circumstances in a de novo review. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

An applicant is generally barred from assigning grounds for relief which were not asserted on direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, a claim of ineffective assistance of counsel may be raised for the first time in a postconviction proceeding if the applicant establishes by a preponderance of the evidence sufficient reason for not having raised the issue previously, and also establishes prejudice resulting from the alleged errors. *Id.*

To establish a claim of ineffective assistance of counsel, an applicant must show that (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jones*, 479 N.W.2d at 272.

Concerning deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. *Brewer v. State*, 444 N.W.2d 77, 93 (Iowa 1989). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, applicant must show that counsel's failure worked to his substantial and actual disadvantage, to the end that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Brewer*, 444 N.W.2d at 83.

II. Lamar claims he received ineffective assistance due to his counsel's failure to offer evidence favorable to his defense and failure to object to prosecutorial misconduct. We will discuss each of these arguments in turn.

At trial, Novak was questioned about Gladson's statements before he left with Lamar. The State objected to the question on the basis of hearsay. In chambers,

Lamar's counsel argued the statements should be admissible because they were being offered to show Gladson's state of mind, and not the truth of the matter asserted. The district court's ruling on the issue was not recorded. When the parties returned to the courtroom, defense counsel took up a new line of questioning. At the postconviction hearing, Lamar's trial counsel testified he felt he already had enough evidence of Gladson's initial reluctance to participate in the robbery, and thus, did not question Novak any further.

Lamar claims he received ineffective assistance because his counsel did not further question Novak concerning Gladson's statements which reflected his reluctance to participate in the robbery. He contends this evidence was important to his defense because he claimed Gladson was not participating with him in the robbery, and therefore, Gladson was acting on his own at the time he shot the police officer. Lamar believes the district court judge ruled in his favor on the hearsay objection. There is no other evidence on the court's ruling.

Clearly, if the district court sustained the State's hearsay objection to the evidence, there was no ineffective assistance on this ground. We find that even if the district court had ruled that the evidence was not hearsay, Lamar did not receive ineffective assistance due to his counsel's failure to further question Novak concerning Gladson's statements. There was already evidence in the record to show Gladson initially did not want to participate in the robbery.

Additionally, Lamar is unable to show prejudice. The evidence showed Gladson knew of Lamar's plan to rob the Hy-Vee, armed himself and Lamar, and accompanied Lamar to the store. Thus, even if more evidence had been presented to show Gladson initially did not want to participate in the robbery, the evidence shows he eventually changed his mind and did become a participant.

Lamar also claims his counsel was ineffective because he failed to object to prosecutorial misconduct. On cross-examination, the prosecutor asked Lamar to explain several instances where his testimony differed from that of other witnesses. The prosecutor asked Lamar if he thought the other witnesses were lying. Lamar claims he was prejudiced because he was asked to call police officers liars and states his counsel should have objected to the prosecutor's questions.

Here, even if we assume there was prosecutorial misconduct, we find Lamar has not shown he was prejudiced by the prosecutor's questions. Prosecutorial misconduct will not warrant reversal unless conduct was so prejudicial that defendant was denied a fair trial. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). Even without the prosecutor's questions, the jury would have been aware that Lamar's testimony different from that of other witnesses. We find Lamar has failed to show he was denied a fair trial as a result of the prosecutor's questions.

III. Lamar contends he received ineffective assistance of postconviction relief counsel. In his postconviction application, he claimed trial counsel was ineffective for

failing to raise sufficiency of the evidence. However, no motion for judgment of acquittal had been filed, but postconviction counsel failed to present the issue as a failure to file such a motion.

We find Lamar has failed to show he received ineffective assistance on this issue. A review of the record shows there was substantial evidence to support Lamar's convictions. The evidence showed Gladson was aware of Lamar's plan to rob the Hy-Vee and accompanied him to the store, where he waited with the car in back. Lamar robbed the Hy-Vee, and the two men were confronted by police officers before they had a chance to escape the scene. Gunshots were exchanged, and a police officer was killed. This evidence is sufficient to allow the jury to find Lamar guilty of murder under the felony murder rule, and to find him guilty of robbery.

Lamar also claims his postconviction counsel was ineffective in failing to: (1) call a certain expert witness to rebut Groves' testimony concerning the bullet hole; (2) call the owner of a certain pickup truck at the Hy-Vee parking lot; (3) present a more effective argument that minorities were systematically excluded from the jury; (4) present a more effective argument that the prosecutor injected issues of race into the trial; and (5) present a more effective argument on his claim that one of the jurors slept through a part of the State's presentation of evidence.

Although Lamar claims the expert witness and pickup owner would present testimony favorable to him, there is no evidence in the record to show what their

testimony would be, or that it would in fact be favorable to him. We find no ineffective assistance on this ground.

As to his third, fourth, and fifth claims, these arguments appear to be based on ineffective assistance of trial counsel. These claims were presented by Lamar's postconviction counsel, and were rejected by the district court. We find no grounds to show Lamar received ineffective assistance by his postconviction counsel merely because these claims were not successful. We conclude Lamar has failed to show he received ineffective assistance of postconviction counsel.

IV. Finally, Lamar claims the district court should have granted him a new trial based on newly discovered evidence. The alleged newly discovered evidence is an affidavit by Ronald Diggs, who Lamar met in prison. In the affidavit, Diggs states Gladson told him he was never going back to prison, and if he was confronted by the police he would kill them.

In order to prevail on a motion for new trial based on newly discovered evidence, defendant must show: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984). Our review of a district court order denying a new trial is for abuse of discretion. *State v. Jones*, 511 N.W.2d 400, 409 (Iowa App. 1993).

At the postconviction hearing, Lamar's trial counsel testified the subject of the affidavit was not new and he had presented other evidence on this issue at trial. We conclude Lamar has failed to show the information in Diggs' affidavit is actually newly discovered evidence. Furthermore, the evidence is hearsay and would not be admissible at trial.

After considering all issues raised in this appeal, we affirm the denial of Lamar's application for postconviction relief. Costs of this appeal are assessed to Lamar.

AFFIRMED.