

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

LENNY LEROY HOLLINGSWORTH,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed September 6, 1984

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4-284

83-1137

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Petitioner appeals from denial of his application for postconviction relief, asserting that a new trial should have been granted and alleging ineffective assistance of trial counsel. AFFIRMED.

Kermit L. Dunahoo, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., Schlegel, and Sackett, JJ.

OXBERGER, C.J.

The decision of the postconviction court rejecting a motion for new trial and claims of ineffective assistance of counsel is appealed by the petitioner. We affirm the court's decisions.

Lenny LeRoy Hollingsworth was convicted by a jury on January 9, 1981, of second-degree robbery and sentenced for a period up to ten years in prison. This was his second trial because the first trial resulted in a hung jury. Petitioner claims that since one of three witnesses identifying him as the robber of a Kentucky Fried Chicken restaurant has now recanted his story, he should get a new trial. The witness, David LeRoy, apparently was a fellow inmate of petitioner's at the penitentiary. The two met at the penitentiary and two years after identifying petitioner as the robber, LeRoy sent the following letter to petitioner's attorney.

I did tell Lenny [Hollingsworth] and Mr. Davis [another jail inmate] that I had made a mistake and that I didn't think he was the robber after I had seen him up close while I was in jail. I was pressured by Officer Jerry Jones. He just about told me who the robber was when he brought the pictures to my house to identify the robber. He even pointed at one of the pictures and said, 'Is this the guy?' That is how I picked him out of the lineup. After I had seen his picture a couple of times, I didn't have much trouble picking him.

Petitioner's attorney at the trial, Robert Rigg, testified at the postconviction hearing that if LeRoy had not positively identified petitioner, the verdict might have been different, since LeRoy was more sure of himself in identifying petitioner as the robber than the other two witnesses.

A new trial is granted if new evidence is discovered only when it is discovered after trial and before judgment, when it could not have been discovered before the conclusion of the trial with the exercise of due diligence, and when the new evidence is material and would probably change the result if a

new trial is granted. State v. Overstreet, 243 N.W.2d 880 (Iowa 1976)(citations omitted). This is a stringent standard, as pointed out in State v. Jackson, when the court noted motions for a new trial "are not favored in the law and should be closely scrutinized and sparingly granted. . . . this court will not interfere with the trial court's ruling on such a motion unless it is reasonably clear the court abused its discretion." State v. Jackson, 223 N.W. 229, 233 (Iowa 1974). Recanted testimony is viewed with the "utmost suspicion." State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980).

We believe the trial court's decision that a new trial should not be granted was not a clear abuse of discretion. LeRoy did not alter his testimony for two years. His change of heart came only after he met petitioner at the penitentiary, and petitioner admits that he was "scared to death" of petitioner. While his counsel says the the State's case was much stronger with LeRoy's testimony, the other two witnesses were still able to identify him in court. We affirm the trial court's denial of the request to grant a new trial.

Petitioner also claims that his counsel was ineffective because he was not allowed to testify at his second trial, and because his counsel did not call any alibi witnesses. The standard for reviewing claims of ineffective assistance of counsel was most recently stated at State v. Miles, 344 N.W.2d 231 (Iowa 1984). There the court said the defendant must show his counsel (1) failed to perform an essential duty, and (2) prejudice resulted therefrom. Id. at 234. The resulting prejudice must work to the defendant's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id.

Petitioner says his counsel, Rigg, refused to let him testify, but Rigg says the final decision was left to petitioner. Petitioner had testified at his first trial, and Rigg advised him not to testify the second time. His counsel had interviewed

the foreman of the first jury, who told Rigg petitioner was not a credible witness on his own behalf, and the jury hadn't believed him. Petitioner also told his counsel he wanted to change some of the times involved in his first testimony. Rigg told him this could work to his substantial disadvantage, since the prosecution could impeach him with the transcript of the first trial. Therefore, it appears the decision was left to petitioner as to whether he should testify.

Petitioner also says his counsel was derelict in not calling as alibi witnesses his mother and two sisters. He claims they saw him at the time of the robbery when he went to his mother's house to borrow a vacuum cleaner. However, at the first trial petitioner testified he was alone that day, and when asked pointedly if he was alone at 11:00 a.m., the time of the robbery, he replied yes. Rigg also testified he specifically asked petitioner out of court if there was anyone at the house when he went to borrow the vacuum cleaner, and he told Rigg he was alone. It was not until the time of the postconviction hearing that petitioner claimed he misunderstood the question asked at trial. He says when questioned about whether he saw anyone that day, he thought Rigg was asking whether he was alone after he picked up the vacuum cleaner. If he had been asked whether he was alone at his mother's house, he now says, he would have said he saw his mother there. This was never brought to Rigg's attention and petitioner never objected to the fact alibi witnesses were not called. We agree with the trial court when it said, "Trial counsel is completely within discretionary bounds if he ignores his client's request to pursue an alibi when his client's own sworn statements would make the production of same a mockery." We affirm the trial court's conclusions on the claim of ineffective assistance of counsel.

AFFIRMED.