IN THE COURT OF APPEALS OF IOWA

No. 9-151 / 97-0628
Filed May 26, 1999

STEVEN B. HEPPERLE,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

Steven Hepperle appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Raymond D. Perry, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Zimmer, JJ.

HUITINK, P.J.

Steven Hepperle appeals the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Procedure.

Steven Hepperle was convicted and sentenced to life imprisonment for the first-degree murder of Diane Voss. In an unpublished opinion, we affirmed his conviction on direct appeal. *See State v. Hepperle*, 423 N.W.2d 906 (Iowa App. 1987).

Voss's body was discovered in the bedroom of her Waterloo home on July 17, 1985. Investigators determined Voss died between midnight and 2:00 a.m. on July 17. There was physical evidence indicating Voss was bound and sexually abused. All of Voss' underwear and a coffee can containing approximately thirty dollars in change were missing from a dresser in Voss' bedroom.

Vern Voss, Diane's husband; Mike Winters, Vern's business associate; and Dale Viers, a neighbor and known voyeur, were all original suspects in Diane's murder. Hepperle was first implicated on July 18, 1985, when his girlfriend made an unsolicited statement to police claiming Hepperle was with her at the time Voss was murdered. In a subsequent interview, Hepperle told police he visited the Voss residence on July 16 to use the telephone.

The postconviction court summarized the State's case against Hepperle as follows:

a. He was a former neighbor of the victim, was personally acquainted with her and had been in her house before;
b. His fingerprint was found inside of one of the drawers on the dresser in the victim's bedroom; her underwear was usually kept in that drawer, but was missing; the fingerprint could not be dated, but was in a position where it could have been easily rubbed off;
c. His fingerprint was also found on a plexiglass window pane in the back of the victim's house. The location of the print was consistent with the removal of the pane; the victim had reported an attempted burglary through that door a few days before her death;
d. His alibi testimony was inconsistent and not confirmed by the persons he claimed to be with;
e. He wrote a letter to an acquaintance asking her to help him fabricate an alibi, but she refused and informed the police;
f. He confessed to killing Voss to an inmate in jail, providing details;
g. He had been previously convicted of third-degree sexual abuse in Marshall County, Iowa, and the facts of that crime were very similar;
h. Dale Viers, a window peeper outside the victim's window overheard statements made by a man whose voice was very similar to Hepperle's

The State's theory of the crime as summarized by the postconviction court was:

> Hepperle tried unsuccessfully to break into the Voss home on July 13 when the victim's husband was not home. He returned on the evening of July 16 and used some ruse to gain entry to the home, bound the victim and strangled her. Afterwards he tried to manufacture an alibi, but when the police discredited his alibi, he tried to find someone else to help fabricate one.

We share the assessment of the State's theory and supporting evidence and adopt it as our own.

In this application for postconviction relief, Hepperle requested a new trial based on newly discovered evidence implicating Dale Viers. Hepperle additionally claims his trial counsel was ineffective in failing to cite Viers' connections to the murder and for failing to call Hepperle to testify on his own behalf.

The district court denied the application finding, even upon consideration of new evidence regarding Viers, Hepperle failed to show how the outcome of the trial would have been different had this information been introduced at trial. The court concluded Hepperle failed to show prejudice. The court also found no evidence of ineffective assistance of trial counsel. On appeal, Hepperle renews the arguments made in district court. He also contends the cumulative effect of counsel's many trial errors justifies a new trial.

II. Standard of Review.

Postconviction relief proceedings are law actions triable to the court. We review for errors at law. *Kinnersley v. State*, 494 N.W.2d 698, 699 (Iowa 1993). To the extent Hepperle's ineffective assistance of counsel claim raises constitutional issues, we review de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994).

III. Newly Discovered Evidence.

To obtain a new trial on the basis of newly discovered evidence, Hepperle must prove:

> (1) that the evidence was discovered after the verdict;
> (2) that it could not have been discovered earlier in the exercise of due diligence;
> (3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and
> (4) that the evidence probably would have changed the result of the trial.

Whitsel v. State, 525 N.W.2d 860, 863 (Iowa 1994). In *Whitsel,* the court also stated: "motions for new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly." *Id.*

The record indicates investigators interviewed Melinda Viers, then married to Dale Viers, shortly after Voss' death. In a signed statement, Melinda related a July 27, 1985, incident in which Dale Viers returned home in the early morning hours and woke her. She described Dale Viers as "pale as a ghost, shaking, sweating, nervous, constantly turning and watching and looking out the windows to see if somebody was there." Melinda also stated after she fell back to sleep, she again awoke to find Dale straddling her with his hands at her throat yelling "Tell my old lady and you will die, bitch." Melinda now claims these events occurred on July 17, 1985, rather than July 27, 1985, as she originally claimed.

Hepperle contends this newly discovered evidence necessitates a new trial. We disagree.

Hepperle has failed to show Melinda's corrected version of her original statement would have probably changed the outcome of his trial. Even if true, Melinda's corrected statement does not diminish the strength of the State's physical evidence implicating Hepperle. Additionally, Melinda's corrected statement is insufficient to dispel the inferences of guilt resulting from Hepperle's fabricated alibi or admissions made to a fellow inmate. Moreover, Viers' conduct as described by Melinda can be explained by events independent of Voss' murder. The record

indicates Viers was abusing cocaine and methamphetamine and was subsequently convicted of rape of another woman at or near the time referred to in Melinda's statements.

We affirm on this issue.

IV. Ineffective Assistance of Counsel.

Established principles govern our review of Hepperle's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93.

To prevail on his claim of ineffective assistance of counsel, Hepperle must ultimately show his attorney failed to perform an essential duty and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). To prove failure of an essential duty, Hepperle must overcome a presumption that counsel is competent, and demonstrate that under the entire record and totality of the circumstances, counsel's performance was not within the range of normal competency. *Henderson v. Scurr*, 313 N.W.2d

522, 524 (Iowa 1981). Because a criminal defendant is not entitled to perfect representation, we will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989); *Fryer v. State*, 325 N.W.2d 400, 413-15 (Iowa 1982).

Hepperle advances two contentions in support of his ineffective assistance claim. First, he asserts his trial counsel was ineffective for failing to argue that Dale Viers was the "real" killer. Second, he argues his attorneys were ineffective for failing to call him to testify in his own defense. We find Hepperle has failed to satisfy the first prong of a viable ineffective assistance of counsel claim on either argument.

Hepperle's attorney of record both at trial and on direct appeal was Gary Kazragis. Based on Kazragis' investigatory conclusions, he decided to focus on Vern Voss, not Dale Viers, as the person who killed Diane Voss. At the postconviction trial, Kazragis testified he made his tactical decision based on his belief it was the most likely to result in Hepperle's acquittal. He also testified Hepperle participated in formulating this trial strategy. We are unable to say counsel's tactical decisions were unreasonable or Hepperle was resultingly deprived of effective assistance of trial counsel.

At his initial trial, Hepperle testified:

> Q. Mr. Hepperle, I [Kazragis] have been your attorney since approximately October 5; is that correct?
> A. Yes.
> Q. Have we had the opportunity to discuss at length about this case?

A. Yes.
Q. Have we talked about your testifying in your own behalf in this case?
A. Yes, we have.
Q. In discussing this matter, have we come to the mutual decision that you would not testify?
A. Yes, that's correct.
Q. Is that your decision not to testify?
A. Yes, it is.

We are also unable to say counsel's tactical decision not to call Hepperle was a breach of an essential duty. Had Hepperle testified, he could have been impeached concerning inconsistency in his alibis, explanations of the amount of change discovered in his possession, and prior felony convictions.

Even if we were to find counsel breached any essential duty, the record clearly establishes Hepperle's failure to prove he was prejudiced by counsel's actions.

We have considered Hepperle's argument that he is entitled to a new trial based on the "cumulative effect of the errors committed by the courts, prosecution, and ineffective assistance of counsel." We find the argument to be without merit.

We affirm the district court's denial of Hepperle's application for postconviction relief.

AFFIRMED.

No. 97-0628. [9-151] HEPPERLE v. STATE

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