IN THE COURT OF APPEALS OF IOWA

No. 1999-501 (9-758) / 99-0451
Filed January 26, 2000

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CLERK SUPREME COURT

RICHARD MEDINA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

The appellant challenges the district court's grant of the State's motion for summary judgment in his postconviction action. He contends he was denied due process because there were genuine issues of material fact supporting his claims of newly discovered evidence and ineffective assistance of trial counsel. **AFFIRMED.**

William L. Binkard, South Sioux City, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill R. Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Applicant-Appellant Richard Medina was convicted of going armed with intent and attempted murder. His conviction was affirmed on appeal. *State v. Medina,* No. 94-0389 (Iowa App. Feb. 28, 1995). Medina brought this application for postconviction relief contending his trial attorney was not effective. The district court granted the state's motion for summary judgment and dismissed the application. This appeal follows. We affirm.

Our review of a grant or denial of summary judgment is at law. Iowa R. App. P. 4; *Patton v. Mun. Fire & Police Retirement Sys.*, 587 N.W.2d 480, 482 (Iowa 1998). Summary judgment is proper if the entire record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Summary disposition of a postconviction relief application is not proper if a material issue of fact exists. *See* Iowa Code § 822.6 (1995); *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). In determining whether a genuine issue of material fact exists we review the record in the light most favorable to the non-moving party. *See Patton*, 587 N.W.2d at 482; *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996). Summary judgment is appropriate under this standard if reasonable minds would differ on how this issue should be resolved. *Id.*

Medina was charged and convicted for carrying a switchblade knife and using it to cut the neck of Alan Gumeau in a bar in Sioux City, Iowa, early in the morning of August 31, 1993. Medina contends that his trial attorney should have (1) had the trial continued and hired an expert witness to testify as to the affect of Medina's problems with alcohol; (2) objected to the exclusion of all Native Americans from

the jury panel and from the jury that convicted Medina; (3) examined a witness on inconsistent statements; (4) objected to testimony of a confession Medina contends he gave before he had been advised of his right to remain silent; (5) pointed certain things out to the jury; and (6) located and called a witness. Medina also contends he received ineffective assistance of counsel when his attorney failed to raise these challenges on direct appeal.

The state contends that Medina has failed to preserve error. The state argues the only issue Medina presented on direct appeal was that because of his intoxication there was not sufficient evidence to prove he specifically intended to use a dangerous weapon against another and cause the victim's death. Medina claimed his appellate attorney was also ineffective for failing to raise the issues of ineffective assistance of counsel raised in this appeal.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show his claim was preserved for review by being made on direct appeal. *See Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). However, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence "sufficient reason" or "cause" for not having raised the issue at trial and on direct appeal, and also establishes prejudice resulted from the alleged errors. *See Kane v. State*, 436 N.W.2d 624, 626-27 (Iowa 1989); *Polly v. State*, 355 N.W.2d 849, 855-56 (Iowa 1984). Ineffective assistance of appellate counsel may provide "sufficient reason" or "cause" to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *Kane*, 436 N.W.2d at

627-28; *Scurr*, 304 N.W.2d at 235; *Sims v. State*, 295 N.W.2d 420, 422-23 (Iowa 1980); *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980). Without deciding if error was preserved we review Medina's claims.

The victim, Alan Gurneau, testified he was sitting at the bar when Medina came up behind him and slit his throat. Gurneau needed over thirty stitches to close the wound area. Gurneau also received a cut on the thumb from putting his hand up and attempting to protect his throat. Four other people in the bar at the time of the incident testified essentially verifying Gurneau's version of the events. The day following the incident Medina told a police officer he got into a fight with Gurneau and pulled a knife and cut the guy.

At trial there was considerable evidence Medina was intoxicated. He now contends his trial attorney should have hired an expert witness to testify his intoxication precluded him from having the requisite specific intent. Medina's trial attorney testified that he determined he had a greater chance of success by raising the issue of Medina's intoxication through cross-examination and defense witnesses than through expert testimony. The undisputed facts are that trial counsel made a strategic decision. We will not second-guess such a tactical decision, even though in hindsight one may argue that it was improvident or miscalculated. *Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991). We find no basis to reverse the district court on this issue.

Medina, a Native American, next contends that his trial attorney should have objected because there were no Native Americans in the jury pool or on the jury panel that convicted him. He advances that Native Americans comprise 1.7% of the population of Woodbury County.

The Sixth Amendment to the United States Constitution entitles a criminal defendant to a jury panel designed to represent a fair cross-section of the community. *See Holland v. Illinois*, 493 U.S. 474, 477, 110 S. Ct. 803, 805, 107 L. Ed. 2d 905, 914 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 537-38, 95 S. Ct. 692, 701-02, 42 L. Ed. 2d 690, 702 (1975); as does the Iowa constitution. *See State v. Lohm*, 266 N.W.2d 1, 4 (Iowa 1978); *State v. Knutson*, 220 N.W.2d 575, 577 (Iowa 1974). A systematic exclusion of "distinct" segments of the community violates the constitutional requirement. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 586-87 (1979).

To establish a prima facie violation of the cross-section requirement the criminal defendant must show:

> (1) [T]hat the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.; *State v. Watkins*, 463 N.W.2d 411, 414 (Iowa 1990).

If a prima facie case is established, the burden shifts to the state to demonstrate a justifiable reason for the disproportionate representation by showing that obtaining a fair cross-section is incompatible with a significant state interest. *Duren*, 439 U.S. at 368, 99 S. Ct. at 670-71, 58 L. Ed. 2d at 589-90; *Watkins*, 463 N.W.2d at 415.

Medina, a Native-American, is a member of a distinctive group. However, even if Medina's trial attorney had challenged the representation of Native Americans, he could not prove the representation of American Indians on the jury

panel is not fair and reasonable in relation to the number of persons in Woodbury County. In the administration of the jury laws, proportional class representation is not a constitutionally required factor. *Hoyt v. Florida*, 368 U.S. 57, 69, 82 S. Ct. 159, 166-67, 7 L. Ed. 2d 118, 126 (1961). Only if the deviation is substantial is the requirement that there be a fair cross-section of the community violated and a prima facie case established. *See Castaneda v. Partida*, 430 U.S. 482, 495, 97 S. Ct. 1272, 1280, 51 L. Ed. 2d 498, 511 (1977).

The Iowa court has said it only compares the distinctive group involved when determining if a prima facie case has been established. *State v. Jones*, 490 N.W.2d 792, 794 (Iowa 1992). And that the absolute disparity computation used by the supreme court is the appropriate method to be used. *Id.* (Citing *Castaneda*, 430 U.S. at 495-96, 97 S. Ct. at 1280-81, 51 L. Ed. 2d at 511.)

Absolute disparity is determined by taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel. *See Sanchez-Lopez*, 879 F.2d 541, 547; *United States v. Rodriquez*, 588 F.2d 1003, 1007 (5th Cir.1979). Here, the absolute disparity is the difference of 1.7%.

In *Swain v. Alabama*, 380 U.S. 202, 208-09, 85 S. Ct. 824, 829, 13 L. Ed. 2d 759, 766 (1965), the underrepresentation of as much as ten percent as calculated by the absolute disparity concept, was insufficient to establish a prima facie case. *See also United States v. Clifford*, 640 F.2d 150, 155 (8th Cir.1981) (holding that an absolute disparity of 7.2% did not represent a substantial underrepresentation of Native-Americans on the jury panel).

Even if his trial attorney had challenged the representation of Native

Americans on the jury, the proof of a 1.7% absolute disparity fails to establish a prima facie violation of the Sixth Amendment. There is no evidence this disparity is the result of a systematic exclusion of Native-Americans in the jury selection process. Nor is there any evidence of valid challenges to the assembly of the venire on statutory grounds. Medina has failed to present any evidence that shows he suffered prejudice by his trial attorney's failure to challenge the jury selection process.

Medina contends that Officer Lefler should have been questioned about what Medina claims is a discrepancy in Lefler's testimony in Officer Lefler's deposition. Lefler said he asked Medina on November 15, 1993 if he wanted to speak with anybody "reference the stabbing," and on January 20, 1994 he said he "didn't know the circumstances." Medina has failed to show present any evidence which would show the result of the trial would have been different had additional questions been asked.

Medina next contends that he made statements admitted in evidence without being advised of his right to remain silent. The officer taking the statement testified Medina was advised of his constitutional rights. Medina testified the advice was only as to an interrogation of another case. Medina's trial counsel filed a motion in limine seeking to exclude Media's statements. The motion was overruled. While Medina's trial attorney did not object to the evidence at trial, Medina has failed to show how the result of the trial would have changed had his attorney again raised that objection.

We find no basis to Medina's claim his trial attorney should have told the jury defendant was laughed at prior to the stabbing. Again, Medina has failed to

introduce any evidence to support a finding this would have likely changed the outcome of the trial.

Medina contends his trial attorney should have found Mel Taylor. Taylor made an affidavit after Medina's conviction stating he was in the bar at the time of the stabbing. He said his back was turned at the time of the stabbing but did relate that there was confusion after the stabbing as to the person who had stabbed the victim. There was no evidence that any other witnesses or Medina were aware that Taylor was in the bar at the time of the stabbing prior to Medina's trial. Trial counsel was not ineffective for failing to find Taylor. *See Heaton v. State*, 420 N.W.2d 429 (Iowa 1988).

We find there were no issues of material fact presented in defendant's application. We affirm the district court in its denial of Medina's application for postconviction relief.

AFFRIMED.