IN THE COURT OF APPEALS OF IOWA

No. 8-538 / 97-1618
Filed November 30, 1998

RICK FREEMAN,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

On appeal from the denial of his application for postconviction relief, the appellant claims the district court erred in denying his motion to suppress. **AFFIRMED.**

Craig M. Dreismeier of Reilly, Petersen, & Hannan, P.L.C., Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

HUITINK, J.

In this postconviction relief proceeding, Rick Freeman claims the district court erred in denying his motion to suppress and that he was denied effective assistance of counsel. We affirm.

I. Background Facts and Proceedings.

Rick Freeman was convicted in 1993 of first-degree burglary and second-degree robbery. The State alleged he and Chad Vore had fled from police when they were caught in the act of robbing a tavern. During the commission of the crime, two Council Bluffs police officers happened onto the scene and observed the crime in progress.

At trial, one of the police officers testified he observed Freeman from a distance of three to four feet in the act of robbing the tavern. Additionally, the State offered Freeman's wallet into evidence. The wallet was found during a warrantless search of Vore's vehicle near the scene of the crime. Freeman was not in or around the vehicle at the time it was searched and Freeman had not yet been apprehended. The search of Vore's car was later found to be in violation of the Fourth Amendment. Freeman filed a motion to suppress the discovery of his wallet. His motion was denied.

Freeman filed an application for postconviction relief in 1995. The district court denied Freeman's application, finding he had no standing to challenge the

search of Vore's vehicle, his counsel had not been ineffective, and he had failed to establish prejudice.

Freeman appeals. He claims he was a "person aggrieved" by the search of Vore's truck because he owned the wallet which was seized by the police. He also claims his trial counsel was ineffective in failing to: (1) contact his alibi witnesses and also for failing to timely move for a continuance of the trial when it became apparent the witnesses would not be available to testify; and (2) adequately advise him about whether his alibi witnesses could testify if he was retried following a mistrial.

II. Standard of Review.

We review a district court's ruling on a motion to suppress illegally obtained evidence de novo. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996).

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction petitioner asserts violations of constitutional safeguards—such as ineffective assistance of counsel—we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.*

III. Error Preservation.

Initially we note that although Freeman failed to file a direct appeal from his conviction, the postconviction court found he established sufficient reasons for this deficiency. We agree. Our review of the record reflects Freeman relied upon his trial counsel to file an appeal following his conviction. His counsel indicated he would

file a timely appeal. Freeman was never informed that the appeal was not filed until it was too late. We hold Freeman has adequately preserved the issues raised in his application for postconviction relief.

IV. Motion to Suppress.

Freeman asserts the district court erroneously admitted his wallet into evidence. His wallet was discovered by police during a warrantless search of Vore's car. The search was later ruled to be in violation of the Fourth Amendment. He contends it was error not to grant his motion to suppress. We disagree.

We hold Freeman lacked standing to assert a violation of his Fourth Amendment rights based on the warrantless search of Vore's vehicle. *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, 401 (1978)(defendant who was passenger in vehicle lacked standing to challenge its search); *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995); *State v. Hungerford*, 311 N.W.2d 699, 700 (Iowa App. 1981). It is undisputed Freeman held no possessory interest in Vore's vehicle at the time police searched it. He was not a passenger in the vehicle at the time it was searched. In fact, he was not in the immediate vicinity of the vehicle when it was searched. Therefore we find no error in denying Freeman's motion to suppress.

V. Ineffective Assistance of Counsel.

Established principles govern our review of appellant'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. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

The Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor*, 352 N.W.2d at 685. The court quoted *Strickland v. Washington*:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700). Pursuant to *Taylor v. State*, we may affirm applicant's

conviction because he has failed to prove prejudice, without deciding whether there was a failure of duty. *See Taylor*, 352 N.W.2d at 685.

Upon a review of the record in this case, we determine applicant has failed to satisfy the prejudice component of an ineffectiveness claim. *See Taylor*, 352 N.W.2d at 685 (citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674).

A. Alibi Witnesses.

Freeman has failed to demonstrate he was prejudiced by his counsel's failure to contact several defense witnesses. The defense witnesses referenced by Freeman fall into two categories: (1) his girlfriend, brothers and friends who would allegedly testify on Freeman's alibi and (2) Chad Vore, his co-defendant, who would testify Freeman was not present with him during the commission of the robbery.

We focus our analysis here upon the first category. At no time has Freeman proffered the testimony of any defense witness in the first category. There is no basis for us to determine that these alleged defense witnesses would have testified consistently with Freeman's alibi. Freeman has not produced any witness, nor have any of the witnesses been subjected to cross-examination. We are not persuaded by Freeman's conjecture as to how the witnesses would have testified. We find Freeman has failed to demonstrate prejudice resulting from his attorney's actions. *See Luke v. State*, 465 N.W.2d 898, 902 (Iowa App. 1990)(applying same analysis).

With regard to his co-defendant, Freeman did present Vore for examination at the postconviction relief proceedings. While Vore testified Freeman was not the man

with him during the commission of the robbery, we are not convinced his testimony is enough to undermine our confidence that justice was done in this case. Specifically, Vore's testimony at the postconviction relief hearing contained numerous contradictions with Freeman's testimony at his trial. Vore's testimony was not only at odds with Freeman's in some respects, it was also open to strong attacks to its credibility. Not only was Vore Freeman's co-defendant in the robbery trial, but he was a convicted felon. Vore's testimony was also contradicted by Officer Miller's testimony that Vore indicated he had been with Freeman on the night of the robbery. Additionally, Vore's testimony would have been at odds with the arresting officer's eyewitness testimony that he observed Freeman in the act of robbing the tavern. In light of these deficiencies, we find Vore's testimony, weighed in its entirety, does not create a reasonable probability that the outcome of the trial would have been different.

B. Advice Regarding Effect of Mistrial.

Freeman has also failed to demonstrate prejudice resulting from his counsel's advice regarding the propriety of accepting a mistrial. During jury deliberations, the district court learned one juror had become ill. There were no alternates. Faced with an eleven member jury, the district court informed Freeman it would grant a mistrial if he moved for one; otherwise he could choose to accept an eleven member jury. Freeman contends his counsel provided incorrect advice which he relied upon in accepting the eleven member jury.

Freeman fails to demonstrate prejudice, however, as the twelve member jury reached a verdict before the presiding judge notified the jury it would be proceeding with only eleven members. We therefore affirm on this issue.

AFFIRMED.