IN THE COURT OF APPEALS OF IOWA

No. 0-530 / 99-1600
Filed September 27, 2000

EDGAR FORTSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, John G. Linn, Judge.

On appeal from the denial of his postconviction relief applications, the applicant contends the court erred in concluding (1) he was not prejudiced by his counsel's ineffective assistance in failing to object to evidence of alleged prior bad acts, and (2) he was not prejudiced by the State's prosecutorial misconduct.

AFFIRMED.

Curtis Dial of Frazier Law Offices, Keokuk, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael Short, County Attorney, and Bruce McDonald, Assistant County Attorney for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Edgar Fortson of delivering or aiding and abetting in the delivery of cocaine. After the Iowa Supreme Court dismissed his direct appeal as frivolous, Fortson filed a postconviction relief application, which the district court denied. On appeal from that denial, Fortson contends: (1) his trial attorney was ineffective in failing to object to evidence of a prior drug delivery and (2) the prosecutor committed misconduct when he raised the prior delivery at trial without first notifying Fortson of his intent to rely on that evidence. We affirm.

I. Background Facts and Proceedings

On June 17, 1997, Lee County police officers Todd Shields and Thomas Crew set up a drug transaction using confidential informant Bill Briley. The officers dropped Briley off at a local park where he had arranged to meet Donnie Spring, an individual from whom he had previously purchased drugs. Spring arrived in a blue van driven by a man later identified as Fortson. Spring got out of the van, approached Briley, took $100, and said he would be back with the drugs. The van left and returned less than an hour later. Briley approached the van and saw a rock of crack cocaine sitting on the console. Spring told Briley that Fortson wanted a piece of the crack for his efforts, and Briley agreed. Fortson chipped off a piece and was about to begin smoking it when a police car approached. The van left and Briley turned over the drug to police officers.

The State charged Fortson with aiding and abetting the delivery of cocaine, in violation of Iowa Code section 124.401(1)(c)(6) (1995), and the case proceeded to trial. During his opening statement, the prosecutor, without any intervening defense objections, told the jury that Fortson had also been involved

in a drug transaction on May 7, 1997.[1] He then elicited testimony from Shields, Crew and Briley concerning this prior incident, again without objection from defense counsel. This prior incident was not mentioned in the minutes of testimony, nor was it the subject of a pre-trial motion in limine.

A jury convicted Fortson of the charged offense and the court sentenced him to a term not to exceed fifteen years. The court later revoked Fortson's suspended sentence on a prior drug conviction and ordered him to serve that sentence consecutively with the fifteen year sentence.

Fortson appealed. His appointed appellate counsel filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104 governing frivolous appeals. Fortson did not respond to the motion and the Iowa Supreme Court dismissed the appeal.

Fortson then filed two applications for postconviction relief which were consolidated for hearing. The district court considered two issues: (1) whether the prosecutor committed misconduct by offering evidence of the May 7 drug transaction without first disclosing his intent to use that information and with knowledge the evidence might be inadmissible and (2) whether Fortson's trial attorney rendered ineffective assistance by (a) failing to object to the prosecutor's opening statement and evidence of the May 7 incident as an inadmissible prior bad act; (b) failing to object to the May 7 incident as being outside the scope of the minutes; and (c) requesting a continuance of the probation violation hearing.[2]

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[1] The prosecutor stated, "Mr. Spring leaves the shelter house in Kilbourne Park and walks up to that same blue conversion van with that same license number being driven by that same man and comes back and hands what he purports to be methamphetamine."

[2] On appeal, Fortson does not raise this third ineffective assistance of counsel claim.

The court ultimately rejected both claims and denied the applications. This appeal followed.

II. Waiver of Error

Relying on Iowa Code section 822.8,[3] the State preliminarily maintains Fortson waived error on his postconviction relief claims. We have interpreted that section as requiring a postconviction relief applicant to show sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal. *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999). The State contends Fortson did not raise his ineffective assistance and prosecutorial misconduct claims on direct appeal and did not provide sufficient reasons for failing to do so. The district court considered and rejected a waiver of error theory, stating:

> While the appeal was dismissed as frivolous the issue of ineffective assistance can still be found to have been raised on direct appeal. Thus, the Court finds this, and all matters brought forth here by the Defendant, are properly raised in the postconviction relief action.

The State urges us to reach a contrary conclusion and affirm the court's denial of Fortson's postconviction relief application on this alternate waiver theory. *See Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991) (stating we may affirm where any proper basis appears for the district court ruling even if not the basis relied on by the court).

We disagree with the State that Fortson waived error on his ineffective assistance of counsel claim. In his motion to withdraw, appellate counsel asked

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[3] That section requires a postconviction relief applicant to raise all grounds for relief available to the applicant in the applicant's original, supplemental or amended application "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application."

the Iowa Supreme Court to preserve an ineffective assistance of trial counsel claim, stating:

> [D]efense counsel made no effort to bar or limit the testimony concerning defendant's prior bad acts or previous drug dealings. As stated, above this evidence appeared to be crucial in the jury's evaluation of defendant's innocence or guilt. The evidence was introduced to permit the jury to speculate as to what the defendant knew about Spring's business dealings. The lack of effort by defense counsel may have been related to a specific strategy. Additionally, this evidence may very well be admissible but prudent counsel would have either challenged the admission of this evidence or sought to limit the state's ability to rely on this evidence. ...Counsel should be given an opportunity to respond to defendant's complaints, if any, as this record is insufficient to make such judgments about defendant's claims. The issue of the possible ineffective assistance of counsel should be preserved for a postconviction relief claim by the defendant.

In *Bugley,* the Iowa Supreme Court found a similar request by appellate counsel in a motion to withdraw established sufficient cause for failing to raise the issue on direct appeal. 596 N.W.2d at 898. For this reason, we conclude Fortson did not waive error on his ineffective assistance of counsel claim. However, we cannot reach the same conclusion on Fortson's prosecutorial misconduct claim because appellate counsel's motion makes no reference to this claim and Fortson did not furnish any reason for failing to assert that issue on direct appeal. Therefore, we conclude Fortson waived error with respect to the misconduct claim.

III. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). A postconviction relief applicant must prove by a preponderance of the evidence that (1) trial counsel breached an essential duty and (2) prejudice resulted. *State v. Ame*, 579 N.W.2d 326, 330

(Iowa 1998). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). The second element, prejudice, is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996).

The district court found trial counsel breached an essential duty by (1) "not objecting to the testimony of the State's witness as to the Defendant's involvement in the prior uncharged delivery; and (2) "not objecting on the basis that the testimony of all of the State's witnesses was well beyond the scope of the minutes of evidence." The court nevertheless rejected Fortson's ineffective assistance of counsel claims on the ground he suffered no prejudice. Unlike the district court, we elect to focus only on the prejudice prong of the ineffective assistance of counsel claim. *See Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa App. 1989) (noting if easier to resolve ineffective assistance of counsel claim on prejudice prong, that course should be followed).

Even assuming trial counsel breached an essential duty, by failing to object to evidence of the May 7 incident, we are not convinced Fortson demonstrated there was a reasonable probability the trial outcome would have changed as a result of the breach, in light of the evidence presented concerning the June 17, 1997 transaction. First, at trial, Briley identified Fortson as the driver. Although he did not know who the driver was on June 17, 1997, he

testified he was close enough to Fortson during the drug transaction to "tell his face." Additionally, according to Briley, the drug transaction took place in Fortson's presence, with the drug resting between Spring and Fortson. Third, Briley testified Fortson essentially acknowledged he furnished the drugs sold by Spring when he asked for a piece of the drug. Briley stated, "it's standard procedure. Somebody scores you something, they get a piece of it."

Fourth, Officer Crew testified he noted the license plate number of the van and determined it was Fortson's vehicle. We recognize this fact does not necessarily mean Fortson was driving the vehicle. *See State v. DeDios*, 540 N.W.2d 293, 294 (Iowa App. 1995). However, Officer Crew's partner testified Crew identified the driver as Fortson when the van drove by the officers' surveillance car. Additionally, Officer Crew testified Fortson was the driver. However, we are unwilling to ascribe as much weight to Crew's testimony as the district court did, in light of his concession on cross-examination that he had earlier been less than a hundred percent certain Fortson was the driver.[4] We nevertheless conclude that the combination of testimony from Briley, Shields and Crew concerning the June 17 incident rendered it reasonably probable the trial outcome would not have changed even if trial counsel had objected to evidence concerning the May 7 drug transaction. For this reason, we reject Fortson's ineffective assistance of counsel claim. We affirm the district court's denial of Fortson's postconviction relief applications.

AFFIRMED.

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[4] Defense counsel pointed out that while Crew identified Fortson with certainty at trial, he had not expressed such certainty during an earlier deposition, stating, "[a]t that time I couldn't a hundred percent say it was Mr. Fortson driving."