

FILED

JUN 26 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EDWARD LEE BUMGARDNER,

)

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Filed June 26, 1984

Petitioner-Appellant,

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vs.

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4-174
83-207

STATE OF IOWA,

)

Respondent-Appellee.

)

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Petitioner appeals the denial of his application seeking postconviction relief
from his conviction of second-degree burglary and the concurrent determination
that he is a habitual offender. **AFFIRMED.**

LuAnn White, Assistant Appellate Defender, for petitioner-appellant.

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

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

Petitioner appeals the denial of his application seeking postconviction relief from his 1981 conviction of second-degree burglary and the concurrent determination that he was a habitual offender under Iowa Code section 902.8. Petitioner asserts that he was denied effective assistance of trial counsel, that postconviction counsel failed to render effective assistance, and that the postconviction court erred by precluding inquiry on petitioner's claim that his trial counsel labored under a conflict of interest arising from counsel's role as part-time prosecutor. The State concedes petitioner's last assertion. In light of this, we affirm the judgment of the postconviction court, but do so without prejudice to petitioner's right to seek postconviction relief on his conflict of interests claim.

In December 1980, petitioner was charged with second-degree burglary. A jury subsequently found him guilty as charged. The State then filed a supplemental information alleging that petitioner was a habitual offender as described in Iowa Code section 902.8. Two prior felony convictions were stipulated to by petitioner. The trial court sentenced petitioner as an habitual offender to an indeterminate fifteen-year term of incarceration.

The original burglary charge arose out of petitioner's alleged entry of a house in Davenport. At trial petitioner presented an entrapment defense. His claim was that Steve Cady, the State's principal witness, had set him up.

At the postconviction hearing, petitioner presented two witnesses who testified that they conversed with Cady prior to the postconviction hearing, that Cady indicated to them that he had been told what to say when testifying in petitioner's criminal case, and that Cady told them he was willing to testify differently now because authorities had failed to carry through with some deal. Cady testified at the postconviction hearing that he had not discussed his testimony during his conversation with these witnesses.

Petitioner, his trial attorney John Mullen, and the prosecuting attorney James Hoffman each testified at the postconviction hearing. There was testimony regarding photographs of the crime scene showing a broken window through which petitioner allegedly entered the house in question. Mullen testified that he did not offer the photographs into evidence at trial because he thought they were more probative for the State than the defendant. Petitioner asserted that the photographs proved he had not entered the house through the window and that, regardless of his entrapment defense, they therefore were probative as to the burglary elements of breaking with an intent to commit theft. Prosecutor Hoffman also testified about his reasons for not introducing the photographs at trial. The postconviction court concluded the photographs were not relevant to the prosecution and that petitioner had failed to show prejudice regarding the photographs.

There was testimony regarding Mullen's alleged failure to investigate and develop a record regarding the relationship between Cady and Bettendorf police Lieutenant Fogarty. This testimony involved petitioner's claim that Cady was a confidential police informant who had been protected by Fogarty to petitioner's detriment. The postconviction court concluded that trial counsel Mullen had done his best to expose this relationship to the jury.

There was testimony regarding Mullen's alleged failure to cross-examine adequately the State's witnesses Cady and Glenn and Darcey Austin in order to expose inconsistencies between their deposition and trial testimony regarding petitioner's whereabouts prior to the alleged burglary. Mullen testified that he had elicited the alleged inconsistency, but that he did not want to overemphasize it so as to permit the prosecutor to clarify the testimony. Petitioner claimed that Cady gave false and inconsistent testimony implicating him in a prior burglary. The postconviction court concluded trial counsel had attempted to impeach these witnesses and that petitioner had failed to establish ineffective assistance on this issue.

At the postconviction hearing, when counsel began to address the issue of an alleged conflict of interest arising out of Mullen's role as a part-time prosecutor and defense counsel in the instant case, the postconviction court precluded further evidence on grounds that this issue had been decided by the supreme court on direct appeal. In fact, the supreme court had specifically reserved this issue for postconviction proceedings. The State concedes error on this issue.

Postconviction counsel did not present any evidence about petitioner's postconviction claims regarding trial counsel Mullen's failure to investigate possible defenses and failure to call certain witnesses. The postconviction court considered those claims, but concluded that trial counsel was not ineffective regarding the defenses issue and that petitioner had failed to show an affirmative factual basis regarding the witnesses issue. Postconviction counsel also did not amend the application for postconviction relief to include a claim that trial counsel Mullen was ineffective for failing to challenge the applicability of the habitual offender statute. On appeal petitioner asserts that he may not have had counsel on a 1959 felony conviction on which application of the habitual offender statute was based. Finally, postconviction counsel did not introduce the original trial record into evidence at the postconviction proceeding.

I. Scope of Review

The allegation raised by petitioner that he received ineffective assistance of counsel is a constitutional claim. Zacek v. Brewer, 241 N.W.2d 41, 50-51 (Iowa 1976). Therefore our review is essentially de novo. See Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The burden is on petitioner to establish his claim by a preponderance of the evidence. He must develop an affirmative factual basis which demonstrates that counsel's performance fell outside the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

II. Ineffective Assistance of Trial Counsel

Petitioner asserts that trial counsel rendered ineffective assistance in three particulars. First, he argues that counsel failed to introduce into evidence photographs of the crime scene which petitioner argues prove he could not have entered the Davenport residence. Counsel testified at the postconviction hearing that he considered the photographs to be evidence which would ultimately prove damaging to petitioner and that he was surprised that the State had not introduced them into the evidence. Prosecuting attorney James Hoffman testified that he did not utilize the photographs because petitioner had filed notice that he was asserting the defense of entrapment and was not denying the elements of the offense.

Clearly trial counsel's failure to introduce the photographs into evidence was a strategic decision. Speculation on whether the strategy was good or bad is irrelevant to our decision. We have often stated that "[i]mprovident trial strategy, miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective counsel." Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980). Counsel's decision not to use the photographs here fell within the range of normal competency.

Petitioner argues that trial counsel rendered ineffective assistance by failing to investigate the relationship between the State's principal witness, Steve Cady, and certain members of the Davenport Police Department. Just what sort of relationship petitioner is referring to is unclear. Petitioner cites State v. Webb, 309 N.W.2d 404 (Iowa 1981) for the proposition that when entrapment is raised as a defense, disclosure of the identity of a police informant is material; however, an examination of the trial testimony indicates that trial counsel did question relevant witnesses in order to show that Cady was a police informant and

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that Cady and one of the police officers had had business dealings prior to petitioner's arrest. Petitioner has failed to assert what additional investigation should have been done and how additional investigation would have provided more effective assistance. Absent this, he is not entitled to relief. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980).

Petitioner claims that trial counsel was ineffective for failing to impeach three of the State's witnesses. The alleged inconsistencies were elicited by trial counsel and concerned when the witnesses had last seen petitioner prior to the burglary. We point out that this was a collateral matter and petitioner has not demonstrated prejudice resulting from counsel's failure to emphasize the inconsistency. Petitioner must show prejudice if he is to secure relief. State v. Blackford, 335 N.W.2d 173, 178 (Iowa 1983). More important, at the postconviction hearing, counsel testified that once he had elicited the inconsistency he did not overemphasize it because he wanted to bring it to the jury's attention without giving the State an opportunity to rehabilitate the witnesses. This was a matter of trial strategy and does not amount to ineffective assistance of counsel. See Hinkle at 34.

III. Ineffective Assistance of Postconviction Counsel

Petitioner has raised numerous allegations of ineffective assistance of postconviction counsel. He claims that postconviction counsel was ineffective in failing to properly pursue the relationship between police Lieutenant Fogarty and Steve Cady, that postconviction counsel was ineffective in failing to present evidence on two claims raised in the application for postconviction relief, that postconviction counsel was ineffective in failing to challenge the application of the habitual offender statute to petitioner, and that postconviction counsel was ineffective in failing to make the original trial proceedings part of the postconviction record. We will deal with each allegation separately.

Our examination of the transcripts from petitioner's postconviction hearing indicates that postconviction counsel questioned Lieutenant Fogarty about his relationship with Steve Cady. Although this was essentially a repetition of the line of questioning pursued by trial counsel at trial, petitioner has not indicated that anything should have been elicited from the witness other than the fact that Cady was a police informant. Since that fact had been made quite apparent to the jury by trial counsel, we fail to see what more postconviction counsel could be expected to do.

Postconviction counsel did not present evidence on two claims raised in petitioner's application for postconviction relief. The firsts of these claims was that trial counsel was ineffective in failing to investigate all possible defenses to the charge, and the second was that trial counsel was ineffective in failing to call witnesses for the defense who could prove that petitioner was in Texas prior to the burglary. Petitioner has not shown how any further action by postconviction counsel on these claims would have helped establish that trial counsel was ineffective. A review of the defenses recognized in Iowa (these are insanity, diminished responsibility, self-defense, alibi, and entrapment) indicates that the defense relied upon by trial counsel was the only defense which could be used. Even if trial counsel had neglected to investigate any other defense, no prejudice could have resulted.

Similarly, petitioner's whereabouts at any time prior to the burglary was a collateral issue. Petitioner has not disclosed who his potential witnesses might have been, nor has he given any indication as to how their testimony would be material. Absent prejudice, trial counsel cannot have been ineffective for failing to call certain witnesses; and absent ineffective assistance of trial counsel, postconviction counsel cannot have been ineffective in failing to present evidence on that claim.

Petitioner argues that postconviction counsel provided ineffective assistance by failing to challenge the application of the habitual offender statute. We are precluded from ruling on this claim by petitioner's failure to make a record upon which counsel's conduct may be judged.

Petitioner lastly argues that postconviction counsel rendered ineffective assistance by failing to make the original trial proceedings part of the postconviction record. The postconviction court's statements indicate it had the trial record before it and, therefore, petitioner was not prejudiced by counsel's oversight.

IV. Conflict of Interests

The State concedes that petitioner has been improperly denied an opportunity to develop the conflict of interests claim raised in his petition for postconviction relief. He is therefore entitled to raise that issue in a further postconviction proceeding.

AFFIRMED.