

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

TERRY LEE SCHERTZ,)

Applicant-Appellant,)

vs.)

STATE OF IOWA,)

Resister-Appellee.)

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8-538
87-1332

Appeal from the Iowa District Court for Scott County
(No. 69086), C. H. Pelton, Judge.

Defendant appeals from the denial of postconviction relief after a jury found him guilty of first-degree murder, first-degree kidnapping, and second-degree theft.

AFFIRMED.

Philip B. Mears of Mears, Zimmerman & Mears, Iowa City,
for applicant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett,
Assistant Attorney General; and Victor Dietz, Assistant
Scott County Attorney, for resister-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

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Applicant-appellant Terry Lee Schertz appeals from the denial of postconviction relief following his conviction and sentencing for first-degree murder, first-degree kidnapping, and second-degree theft.

Terry and four other defendants, including his wife, Sheila, were jointly tried for their participation in a planned theft which resulted in the killing of one man and the kidnapping of a witness to the murder. See Schertz v. State, 380 N.W.2d 404, 407 (Iowa 1985); State v. LeCompte, 327 N.W.2d 221, 222 (Iowa 1982). On direct appeal, Terry's conviction was affirmed but the court preserved for postconviction proceedings his contention he was denied effective assistance of counsel based on six trial incidents. State v. Schertz, 330 N.W.2d 1, 3 (Iowa 1983).

Terry filed a postconviction relief petition which was denied. On appeal, he contends he was denied effective assistance of counsel when trial counsel failed to (1) object to prosecutor's closing argument comment which allegedly made reference to Terry's failure to testify, (2) reassert severance motion, seek protection for Terry, or make a record regarding threats Terry says he received from a codefendant which infringed on his right to testify, (3) object to improper cross-examination of a codefendant, (4) perform numerous other duties such as calling trial witnesses suggested by Terry or objecting to the

prosecutor's inflammatory closing remarks, all of which he alleges denied him a fair trial.

When a postconviction petitioner asserts violations of a constitutional safeguard such as the sixth amendment right to effective assistance of counsel, we review the totality of the circumstances, which is the equivalent of a de novo review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

When making the claims of ineffective assistance, Terry assumes the burden of proving by a preponderance of the evidence two particulars. First, he must show sufficient reason for not having raised the issue on direct appeal. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). Second, Terry must prove that counsel failed to perform an essential duty and prejudice resulted therefrom. Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988).

The court, when preserving the ineffective assistance of counsel claims for postconviction proceedings, did not list the specific incidents providing the basis for the claim nor the reason the record was insufficient to assess the ineffective assistance of counsel claims. State v. Schertz, 330 N.W.2d at 3. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987).

We note that Terry's trial counsel did not testify at the postconviction hearing, and no reason is given for this absence. Terry also claims the record is inadequate regarding the nature of threats made and what matters he would have testified to if he had taken the stand during trial. He asks the case be remanded to supplement the record. We find the record is sufficient to consider all the issues.

I.

Terry contends a comment made by the prosecutor in his rebuttal closing argument was an unconstitutional comment on his failure to testify. He argues his trial counsel's failure to object to the comment and preserve error for appeal was a violation of his sixth amendment constitutional right to effective assistance of counsel. Because we find Terry's contention that the prosecutor's comment was unconstitutional is without merit, his ineffective assistance of counsel claim also fails.

The closing arguments were not recorded. In the postconviction hearing the prosecutor testified he remembered stating something to the effect "whatever he [Terry's counsel] got up and told you may be true, but it doesn't matter." He said this was a comment intended to argue to the jury a compulsion defense, which was argued by Terry's counsel in closing, was not legally available because the victims were physically injured. See State v.

LeCompte, 327 N.W.2d 221, 224 (Iowa 1982). A codefendant's counsel testified he recalled a comment by the prosecutor which "was referring back to the argument made [Terry's counsel] and the prosecutor said where was any evidence presented to back that up"

Terry's wife, Sheila, also claimed her trial counsel was ineffective for not objecting to the same statement on the ground it was an unconstitutional comment on her failure to testify. Schertz v. State, 380 N.W.2d 404, 409 (Iowa 1985). The court held the prosecutor's comment was a proper rebuttal answer to a codefendant's argument and when taken in context did not naturally and necessarily focus the jury's attention on Sheila's evidence. Id. at 410.

Similarly, our focus is whether the prosecutor's comment in response to Terry's counsel's argument did naturally and necessarily focus the jury's attention on Terry's silence. State v. Taylor, 336 N.W.2d 721, 727 (Iowa 1983).

During his postconviction testimony, Terry acknowledged compulsion was his theory of defense at trial which was not submitted to the jury due to lack of evidence to support the theory. Generally, we will not find the prosecutor manifestly intended to comment on defendant's right to remain silent when an equally plausible explanation exists for the statement. State v. Bishop, 387 N.W.2d 554, 563 (Iowa 1986) (citing United States v. Griggs, 735 F.2d 1318,

1322 (11th Cir. 1984) (per curiam)). The comment, even if accepted as alluding to lack of evidence, does not demonstrate such a manifest intent to comment on Terry's silence. The prosecutor's comment, in direct response to defense counsel's nonevidentiary argument, was proper rebuttal when viewed in this context.

II.

Terry also makes a claim, similar to his wife's postconviction claim, that a codefendant made threats which prevented him from making a voluntary decision not to testify. Again he argues trial counsel's failure to make an adequate record regarding the threats to preserve error for appeal denied him a constitutional right to effective assistance of counsel. See Schertz, 380 N.W.2d at 410. Terry argues trial counsel should have somehow provided protection for Terry to testify or moved for a separate trial.

We note two other codefendants did testify without incident. Like Sheila, Terry testified at trial in response to his attorney's questions as follows:

MR. SHAPLEY: Terry, is it your decision not to testify in this case?

DEFENDANT TERRY LEE SCHERTZ: Yes.

MR. SHAPLEY: Have I discussed those options with you testifying versis not testifying?

DEFENDANT TERRY LEE SCHERTZ: Yes.

MR. SHAPLEY: Has anyone threatened you or made threats against you to force you to make this decision?

DEFENDANT TERRY LEE SCHERTZ: No.

The only evidence Terry presented in the postconviction hearing to prove the existence of threats was his own testimony. Other evidence proved Terry was attacked by codefendant Gavin during a prison riot even though Terry did not testify during the trial. Terry introduced testimony of Gavin from a separate hearing in which Gavin admitted he had threatened to kill all codefendants during his sentencing hearing. We agree with the trial court's conclusion that Terry failed to carry his burden to prove threats were made prior to trial which affected his decision not to testify. After reviewing the totality of the circumstances, we conclude Terry has not shown that his trial counsel failed to act competently even if the threats existed. Trial counsel clearly gave defendant an opportunity to make a record regarding the threats.

III.

On direct appeal, it was held that codefendant Gavin was improperly impeached by the State with a prior felony-escape conviction. State v. Gavin, 328 N.W.2d 501, 503 (Iowa 1983). The court found this was prejudicial error as it directly impacted on Gavin's credibility as a witness and he had testified the victim was killed in self-defense. Id. Terry's trial counsel did not preserve

error on this issue, and it was not raised at the postconviction hearing. Terry contends all his attorneys, including postconviction counsel, were ineffective for not raising or preserving this issue at earlier proceedings. Postconviction proceedings are inappropriate for presentation of issues not properly raised in prior proceedings. Iowa Code § 663A.8 (1987). This court has observed that under both the waiver doctrine and the ineffective assistance of counsel claims, the defendant or petitioner must prove prejudice to obtain relief. Gavin v. State, 425 N.W.2d 673, 675 (Iowa App. 1988).

After reviewing the trial evidence linking Terry to the crimes for which he was convicted, we cannot say Terry was prejudiced by this improper impeachment of a codefendant. Therefore, failure of his attorneys to preserve this issue in earlier proceedings cannot be held a violation of Terry's right to effective assistance of counsel. The witness to the murder and kidnap victim, Russell Grier, positively identified Terry as the man who held a knife to his throat while two other codefendants killed the victim by slashing his throat. It was Terry who nodded to the two to proceed with the killing. Grier also testified it was Terry who caught him when Grier tried to escape and Terry who continued to threaten him with a knife while driving Grier to an isolated location. We find this testimony and other physical evidence provides overwhelming support for

Terry's convictions.¹ It would be unreasonable to find prejudicial error on this issue in light of the overwhelming evidence against Terry.

IV.

Terry also appeals the trial court's dismissal of twenty-four additional claims which he contends have a cumulative effect of denying him effective assistance of counsel. The only evidence presented by Terry at the postconviction hearing to support these claims was his own testimony. He alleged his trial counsel failed to call witnesses at his request, failed to object to inflammatory comments made by the prosecutor in closing arguments, and failed to object to jurors Terry felt were prejudiced or biased. We find nothing else in the record to support these or the remaining claims. A petitioner has the burden to demonstrate more than just a need for further development of the record. State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987). We find Terry has failed to cite persuasive authority, if any at all, indicating counsel's actions were ineffective or any prejudice which could have resulted therefrom in light of the evidence against Terry mentioned earlier. Id. He has made no indication of

1. On remand, codefendant Gavin was again convicted of first-degree murder despite the fact his felony-escape conviction was not used to impeach him. Gavin, 425 N.W.2d at 675.

evidence or testimony he could discover to corroborate his bald assertions. Terry has failed to carry his burden of proof that counsel was ineffective or, if ineffective, prejudice was a result. See generally State v. White, 337 N.W.2d 517, 519 (Iowa 1983); State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981). The trial court's denial of Terry's postconviction petition is affirmed.

AFFIRMED..