IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1-060 / 99-1547
Filed May 23, 2001

THERON TEARLE MONTGOMERY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Theron Montgomery appeals from the denial of his application for postconviction relief. He contends he was denied effective assistance of trial counsel, appellate counsel, and postconviction relief counsel. Montgomery also contends the evidence presented at his criminal trial was insufficient to support a conviction. **AFFIRMED.**

James H. Carter and Natalie Hope Cronk of McKinley, Stannard & Carter, L.L.P., Coralville, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Theron Tearle Montgomery appeals from the district court's denial of his application for postconviction relief. He contends he was denied effective assistance of trial counsel, appellate counsel and postconviction relief counsel. Montgomery also contends there was insufficient evidence to support his conviction for robbery in the first degree. We affirm.

I. BACKGROUND FACTS

The Farris Pawn Shop in Waterloo, Iowa was robbed in August of 1993. Bronson Cunningham and Dennis Hofmann were working at the shop at the time. Hofmann was inside the store assisting a customer, Chris O'Connell, and Cunningham was outside working on a soda machine. Cunningham testified he saw three individuals run from a blue University of Northern Iowa (UNI) van which was parked a short distance from the store. He described all three individuals as black males, with handguns, wearing dark clothing, and partially masked. Two of them ran by Cunningham into the shop and the third waved him into the store where all three occupants were forced onto the floor. Duct tape was placed over their eyes and around their hands. They could hear glass breaking and boxes being moved. Hofmann told the robbers how to open the cash register and to get the money out. After approximately ten minutes the front door slammed.

At this point O'Connell got his tape off, ran outside, and saw the UNI van going through the parking lot of a neighboring business, Zephyr Transport, and out onto the road. O'Connell got into his car and began to chase the UNI van, at which point he saw a police car turn and start to pursue the van so he returned to

the pawnshop. Hofmann had got up and pushed an alarm button as soon as the robbers had left. He then got his tape off in time to see O'Connell run outside, and to see the van going around the corner.

Mike Ott, an employee of Zephyr Transport, had seen the UNI van pull up and saw two masked individuals get out, one with a gun, and then a third individual, also with a gun, follow them. He was able to observe they were all three young, black males with black shirts and masks on. Ott also saw another individual in the van who eventually pulled it up to the door of the pawnshop. Ott noted the van's license plate number.

Officer Shoars was dispatched to a possible robbery on the morning in question. He proceeded toward the scene of the robbery and as he approached the vicinity he was flagged down and told that the blue van had just crossed the East 11th Street bridge and headed towards the east side. He turned around and proceeded after the van. He followed, at some distance, until he saw it turn right on Fowler Street where he lost sight of it. Officer Shoars turned onto Fowler Street and proceeded down to the 400-block at which point he saw two black males looking from around the corner of the house at 415 Fowler Street. One had on all dark clothing while the other, who was taller, had on dark pants and a light colored shirt. Shoars testified that when it appeared they thought he had seen them they took off running. Shoars then turned at the end of the block, proceeding north to Courtland Street where he observed one of the same two black males casually walk out and up onto the porch of 420 Courtland and sit down. This individual was later identified as Montgomery. Shoars approached Montgomery and advised him he was investigating a robbery and he fit the

description of one of the suspects. Shoars then asked Montgomery to accompany him to his patrol car and back to the pawnshop.

Approximately, five to ten minutes after the robbery Shoars returned to the pawnshop with Montgomery for a "show-up." Each of the three victims identified Montgomery as one of the robbers. Based on this eyewitness identification Montgomery was charged with robbery in the first degree.

Following a bench trial Montgomery was convicted and sentenced to an indeterminate twenty-five year term of incarceration. Montgomery appealed. Montgomery's court appointed counsel filed an Iowa Rule of Appellate Procedure 104 motion and brief alleging the appeal was frivolous. Montgomery filed a response contesting appellate counsel's motion and requested new counsel be appointed. The supreme court granted the rule 104 motion and dismissed the appeal.

Montgomery then filed a pro se application for postconviction relief. He subsequently was appointed five successive postconviction attorneys. His fifth postconviction attorney represented him at the postconviction hearing and raised several issues to the court. Montgomery alleges his postconviction counsel was ineffective for failing to raise or properly present a claim of ineffective assistance of appellate counsel based on appellate counsel's failure to preserve ineffective assistance claims regarding his trial counsel, specifically trial counsel's failure to attempt to suppress the "show-up" identification and trial counsel's failure to call

Herlie Johnson as an exculpatory witness. Montgomery's application for postconviction relief was denied and he now appeals from this denial.[1]

II. SCOPE AND STANDARD OF REVIEW

Generally an appeal from the denial of postconviction relief is reviewed for errors of law. *State v. Wenmark*, 602 N.W.2d 810, 814 (Iowa 1999). However, if the applicant raises constitutional issues we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.* (quoting *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997)). This scope of review is equivalent to de novo review. *Id.* Claims of ineffective assistance of counsel are derived from the Sixth Amendment to the United States Constitution, so we afford them a de novo review. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000).

To establish an ineffective assistance of counsel claim, an applicant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wenmark*, 602 N.W.2d at 814 (quoting *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984)). The test of ineffective assistance focuses on whether the performance by counsel was reasonably effective. *Wenmark, 602* N.W.2d at 814. The applicant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* The defendant must overcome this presumption and has the

[1] The State concedes Montgomery has preserved error on both of these issues by contesting the 104 motion. *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999); *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 34 (Iowa 1979).

burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981); *see also Wenmark*, 602 N.W.2d at 814. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000). To warrant a finding of ineffective assistance, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Aldape*, 307 N.W.2d at 42.

We need not determine whether counsel's performance was deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

III. MERITS

Montgomery argues his trial counsel was ineffective for failing to file a motion to suppress the pre-trial, "show-up" identification procedure and for failing to "investigate, subpoena, or otherwise compel" an alleged exculpatory witness, Herlie Johnson. Montgomery further contends that his appellate counsel was ineffective for failing to raise these issues on direct appeal and in failing to preserve the issue of the ineffectiveness of his trial counsel. Montgomery also

alleges his postconviction relief counsel was ineffective for failing to preserve the issue of ineffective assistance of appellate counsel and for failing to adequately address the pre-trial identification procedure. Finally, Montgomery asserts that because he was convicted almost solely on the basis of the pre-trial identification procedure, involving unreliable victim identifications, there was insufficient evidence to support his conviction.

A. Pre-trial Identification

Montgomery claims the "show-up" identification, which took place five to ten minutes after the robbery, and in which he was taken to the scene of the crime in a police car, removed and shown alone to all three victims together, was an impermissible violation of his constitutional right to due process of law. However, counsel is not ineffective for failing to raise meritless issues or to make questionable or meritless objections or motions. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998); *State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984). "In other words, counsel's performance was not deficient if he failed to exclude admissible evidence." *State v. Neal*, 353 N.W.2d 83, 86 (Iowa 1984). Therefore, in order to succeed on his claim of ineffective assistance of trial counsel for failing to file the motion to suppress the pre-trial identification, Montgomery must establish by a preponderance of the evidence that the identification procedure was unconstitutional. *Id.*

"The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ." *Stovall v.*

Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199, 1206 (1967) (footnote omitted). It has been generally conceded that such one-on-one confrontations are inherently suggestive. *State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973). This is particularly true in situations of one-on-one confrontations such as the one here, referred to as a "show-up." *See State v. Walton*, 424 N.W.2d 444, 447 (Iowa 1988). "But the balancing of 'substantial countervailing policy considerations' compels the holding that on-the-scene identification procedures, held shortly after the crime, are not violative of due process unless the confrontation is *unnecessarily* suggestive." *Salazar,* 213 N.W.2d at 493-94.

In order to succeed on a due process claim like that presented here Montgomery must demonstrate that the identification procedure was impermissibly or unnecessarily suggestive *and* that a substantial likelihood of irreparable misidentification of the accused existed. *Walton*, 424 N.W.2d at 447; *Neal*, 353 N.W.2d at 86; *State v. Mark*, 286 N.W.2d 396, 403-04 (Iowa 1979); *State v. Ripperger*, 514 N.W.2d 740, 744 (Iowa Ct. App. 1994). "Short of this, the identification evidence and its shortcomings or credibility are for the jury to weigh." *Neal*, 353 N.W.2d at 87 (citing *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L. Ed. 2d 140, 155 (1977)). We review de novo the totality of the circumstances on a case-by-case basis to determine whether the identification procedure at issue was so inherently unreliable that due process would bar its admission. *Ripperger*, 514 N.W.2d at 744.

Most of the events surrounding this "show-up" identification of Montgomery are the usual elements of any police-conducted, on-the-scene identification, and to the extent any of them were suggestive, they were not

unnecessarily or impermissibly so. *See Salazar*, 213 N.W.2d at 494. The fact Montgomery arrived at the scene of the robbery in a police car, was the only person in the car, and was presented to the victims by a police officer does not make this "inherently suggestive" procedure impermissibly suggestive. *Id.*

Montgomery alleges the identification procedure was also impermissibly suggestive because each victim's identification of him took place in the presence of the other victims. It appears that the police were attempting to determine as quickly as possible after the robbery whether the victims would identify Montgomery as one of the robbers. Such early "show-ups" serve the recognized purpose of determining whether or not a witness is able to identify a suspect at a time when the witness' memory of events is fresh. *See Walton,* 424 N.W.2d at 447; *Salazar,* 213 N.W.2d at 494-95; *State v. Jackson*, 387 N.W.2d 623, 631-32 (Iowa Ct. App. 1986). They also serve the important purpose of helping law enforcement personnel determine what further actions are necessary and how best to utilize their resources.

It perhaps might have been less suggestive for the police to have presented Montgomery to each witness separately. However, we need not determine whether presenting him to all three victims at once was "impermissibly" or "unnecessarily" suggestive because based on the totality of the circumstances we find there was not a substantial likelihood of irreparable misidentification.

Assuming the procedure used by the police was impermissibly suggestive, we must determine whether under the totality of the circumstances of the case, there is a "very substantial likelihood of irreparable misidentification." *Manson v.*

Braithwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L. Ed. 2d 140, 155 (1977); *see also Mark*, 286 N.W.2d at 405. Our criteria for this determination in cases dealing with visual identifications are well established. *Walton*, 424 N.W.2d at 447. They include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154; *Mark*, 286 N.W.2d at 405.

Applying these standards we find there was not a substantial likelihood of irreparable misidentification and each identification was sufficiently reliable to properly be admitted into evidence for consideration by the trier of fact. It does not appear from the testimony in the record that any of the victims hesitated whatsoever in identifying Montgomery as one of the robbers. There is no evidence that any victim consulted with another before positively identifying Montgomery, or relied on the opinion of another in doing so. The fact only five to ten minutes had elapsed between the crime and the show-up lends itself to the reliability of the identifications.

Furthermore, while there were some differences between the victims' descriptions of the robbers, and some differences between their initial statements to the police and their testimony at trial, these differences were not hugely contradictory as Montgomery suggests. They all described the robbers as black males, armed with handguns, wearing dark clothing, between five foot eight inches and six feet tall, and weighing between 160 and 200 pounds. They also

were able to identify some shoes and pants they observed while lying on the floor. The inconsistencies and discrepancies that do exist in the victims' descriptions are not unusual or unprecedented given the highly stressful situation they were in when they made their observations and the inherent difficulty of remembering upon later occasions the precise details of facts observed under such circumstances. We do not find any of the discrepancies to be so startling as to indicate the existence of a substantial likelihood of irreparable misidentification and offend due process. Short of this, such evidence is for the fact finder, here the trial court, to weigh. *Mark,* 286 N.W.2d at 405.

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Manson, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155. The trial court was competent, just as a jury would be, to take into consideration the inconsistencies in these identifications and determine what weight and credibility to give them. *See State v. Thorton*, 498 N.W.2d 670, 673 (Iowa 1993) (holding it is the very function of the jury to resolve conflicts in the evidence and make credibility determinations). The trial court specifically noted the inconsistencies in its written ruling and specifically relied on the "show-up" identifications only as further support for other evidence it found demonstrated Montgomery's guilt.

We find, based on our review of the totality of the circumstances, there was not a "very substantial likelihood of irreparable misidentification" and therefore the "show-up" identifications were sufficiently reliable to be admitted for consideration by the court. Thus, Montgomery's argument that the pre-trial

identification was impermissible and should have been suppressed must fail. *See Manson*, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155; *see also Mark*, 286 N.W.2d at 405.

Because we have determined Montgomery has failed to establish by a preponderance of the evidence that the identification procedures were unconstitutional he cannot prevail on his claim his trial counsel was ineffective for failing to file a motion to suppress these identifications. Evidence of the pre-trial identifications was admissible and thus trial counsel's performance was not deficient for failing to attempt to exclude it, nor could Montgomery have been prejudiced by this failure. As such, appellate counsel was not ineffective for failing to raise this issue on direct appeal and postconviction relief counsel was not ineffective for failing to adequately address the pre-trial identification procedures.

B. Failure to Call Herlie Johnson as a Witness

Montgomery alleges he was denied effective assistance of trial counsel because trial counsel failed to subpoena Herlie Johnson as a possible exculpatory witness. Herlie Johnson had plead guilty to the robbery in question prior to Montgomery's trial. Montgomery testified at the postconviction hearing that he asked his trial counsel to contact Johnson, and his trial counsel subsequently advised him that he had talked to Johnson's attorney and that Johnson would assert his privilege against self-incrimination so calling him would do no good.

Montgomery's trial counsel, Bradley Harris, also testified at the postconviction hearing and stated he recalled Montgomery requesting he contact

Johnson about testifying. Harris testified he did contact Johnson by way of a letter written to Johnson at the Eldora training facility. However, Harris believed he was informed that Johnson's attorney did not want Johnson to be talking in the Montgomery case so he did not pursue Johnson any further.

Herlie Johnson testified at the postconviction hearing that Montgomery was not involved in the robbery. Johnson stated he remembered getting the letter from Montgomery's attorney and that he gave the letter to his attorney. He testified his attorney advised him at the time not to get involved because he "could get some more time or something" so he just left it alone. Johnson further stated at the hearing that he tried to tell his attorney Montgomery was not involved but his attorney told him to just plead guilty and stay out of the rest "because I could get more time out of it if I testify and they found out." It is unclear from this testimony when exactly Johnson allegedly tried to come forward with his information regarding Montgomery.

In order to prove his trial counsel was ineffective for failing to subpoena Johnson, Montgomery must show that trial counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process the Sixth Amendment envisions. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A strong presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814.

We find that trial counsel's failure to subpoena Johnson was not a failure to perform an essential duty. Trial counsel honored Montgomery's request and contacted Johnson. Counsel learned that Johnson's attorney did not want

Johnson involved in Montgomery's case. Montgomery acknowledges that Harris told him the reason Johnson would not be subpoenaed was because he would assert his Fifth Amendment right to remain silent. Johnson himself testified that he had discussed the matter with his attorney and intended to follow his advice to not testify, which would apparently involve invoking his privilege against self-incrimination. Montgomery asserts Johnson could not invoke that privilege, as he had pled guilty to the robbery. However, it appears that other crimes may have been committed in addition to the robbery, such as theft of the UNI van, or operating it without the owner's consent. Testifying at Montgomery's trial could very well have subjected Johnson to further criminal liability on different grounds. Johnson specifically testified his attorney advised him not to testify for Montgomery because he could get "more time added on" if he did.

We find Harris was well within the normal range of professional competency and adequately fulfilled his constitutional duty of effective representation. Harris wrote a letter of inquiry to Johnson about testifying, at Montgomery's request, and determined not to call Johnson because it appeared certain he would validly assert his Fifth Amendment right to remain silent because he had been informed by his attorney he could subject himself to more prison time. We reiterate, a defendant is not entitled to perfect representation, but rather only that which is within the normal range of competence. *Artzer,* 609 N.W.2d at 531; *Cuevas v. State,* 415 N.W.2d 630, 632 (Iowa 1987).

Montgomery has failed to prove by a preponderance of the evidence that his trial counsel failed to perform an essential duty in failing to subpoena Johnson to testify at trial. He has also failed to prove that Johnson's intended assertion of

his privilege against self-incrimination would have been invalid, and has therefore failed to prove that he was prejudiced by trial counsel's decision. Therefore, his claim of ineffective assistance of trial counsel must fail. Furthermore, Montgomery's assertion that appellate counsel was ineffective for failing to preserve his claim of ineffective assistance of trial counsel based on trial counsel's decision, as well as his claim that postconviction relief counsel was ineffective for failing to preserve the issue of ineffective assistance of appellate counsel for the same reason, must fail.

C. Sufficiency of the Evidence

Montgomery next claims there was insufficient evidence to support is conviction, referring to the alleged unreliability of the positive identifications from the three victims and the lack of other physical evidence linking him to the crime.

Neither Montgomery's application nor the trial court's ruling indicates that this issue was raised or ruled on by the trial court in this postconviction relief proceeding. Montgomery asserts this issue was preserved for our review by his motion for judgment of acquittal and assertion of the claim on direct appeal. The State agrees citing *Bugley v. State*, 596 N.W.2d 893 (Iowa 1999). Where, as here, a defendant has resisted a Rule of Appellate Procedure 104 motion to withdraw, issues which could have been presented on direct appeal are preserved for a postconviction relief proceeding. *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 34 (Iowa 1979). Further, a postconviction applicant may pursue issues that could have been raised on direct appeal, but were not, by showing sufficient reasons for not raising them in response to a rule 104 motion. *Bugley*, 596 N.W.2d at 896. However, neither *Bugley* nor *Stanford*

holds that an issue may be raised in a postconviction appeal when not raised or ruled on in the postconviction trial court. Although we can and will consider questions of error preservation on our own motion, *see Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000), and doubt error was preserved here, we pass the question and address the merits.

The principles which guide our review of sufficiency of the evidence challenges are well established and have been frequently stated, are summarized in *State v. Thomas,* 561 N.W.2d 37, 39 (Iowa 1997), *State v. Dible,* 538 N.W.2d 267, 270 (Iowa 1995), and *State v. Kirchner*, 600 N.W.2d 330, 333-34 (Iowa Ct. App. 1999), and need not be repeated here. Our review of the record in light of these standards convinces us there was substantial evidence in the record to support the trial court's finding of guilt.

As set forth above, the pre-trial identifications were not violative of Montgomery's due process rights and the evidence was admissible. Questions of the reliability and credibility of the witnesses, which are the focus of Montgomery's present challenge, were for the trial court as fact finder. *See. Thornton*, 498 N.W.2d at 673. Furthermore, there was strong circumstantial evidence linking Montgomery to the robbery. Direct and circumstantial evidence are equally probative and a verdict may rest on circumstantial evidence alone. *Kirchner,* 600 N.W.2d at 334. The trial court explicitly stated it was not relying solely upon the eyewitness identifications because there were some inconsistencies and discrepancies in them. The court used the identifications only as further support for arguably strong circumstantial evidence it found showed Montgomery's participation in the crime. We find there was substantial

evidence to convince a rational fact finder beyond a reasonable doubt that Montgomery was guilty of robbery. Therefore, the trial court's verdict is binding upon us on appeal.

IV. CONCLUSION

We conclude Montgomery has failed to establish by a preponderance of the evidence that the pre-trial "show-up" identification procedures were unconstitutional. Even if we assume the procedures used were impermissibly and unnecessarily suggestive, we find that under the totality of the circumstances there was not a substantial likelihood of irreparable misidentification. We have carefully considered the reliability factors and find that the identifications were sufficiently reliable to be admitted into evidence for consideration by the trial court. Therefore, trial counsel was not ineffective for failing to file a motion to suppress the pre-trial identifications.

Trial counsel's decision not to subpoena Herlie Johnson to testify at trial was not a breach of an essential duty as there was a reasonable basis for trial counsel to believe Johnson would validly assert his Fifth Amendment right to remain silent. Further, Montgomery has failed to prove that assertion of the right would not have been honored and has thus failed to prove the required prejudice.

We conclude Montgomery has failed to prove ineffective assistance of trial counsel on either of the asserted grounds. Therefore, neither appellate counsel nor postconviction relief counsel was ineffective on the grounds urged here.

We pass the question of whether Montgomery has preserved error on his sufficiency of the evidence claim, and find there was substantial evidence of Montgomery's guilt.

We affirm the trial court's denial of Theron Tearle Montgomery's application for postconviction relief.

AFFIRMED.