FILED
APR 25 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

36

CHARLES NICHOLAS CHADWICK,)
Petitioner-Appellant,)
vs.)
STATE OF IOWA,) 8-458 / 87-453
Respondent-Appellee.)

Appeal from the Iowa District Court for Pottawattamie County (54203), Leo F. Connolly, Judge.

Defendant appeals the denial of postconviction relief after a jury found him guilty on two counts of first-degree murder. **AFFIRMED.**

Bruce L. Cook of Cook & Gotsdiner, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for respondent-appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

The defendant appeals the trial court's denial of postconviction relief after a jury found him guilty on two counts of first-degree murder. He assigns error to the district court for failing to find that: (1) the State withheld material evidence favorable to the defense and that this evidence constitutes "newly discovered" evidence; (2) the prosecution engaged in outrageous misconduct by tampering with potential witnesses; and (3) the defendant was denied effective assistance of counsel because his trial attorney failed to interview key defense witnesses. We affirm.

The defendant, Charles Chadwick, and his codefendant, John Hrbek, were charged with two counts of first-degree murder for the execution-style slayings of Stanley Fisher and his mother, Kate Fisher, on highway 275 near Council Bluffs, Iowa. Stanley Fisher was found murdered in his blue Corvette. Kate Fisher was found just outside her black Datsun. A red Toyota pickup truck had been seen leaving the area at a high rate of speed. After a high-speed chase, the defendant and Hrbek were apprehended. A jury found Chadwick guilty on both counts and the supreme court affirmed the conviction in State v. Chadwick, 328 N.W.2d 913, 918 (Iowa 1983). Claiming newly discovered evidence, Chadwick later applied for postconviction relief but was denied. He now appeals from that denial.

Postconviction review proceedings are actions at law, triable to the court. State v. Mulqueen, 188 N.W.2d 360, 362 (Iowa 1971). Our review is ordinarily not de novo, however, when constitutional violations are raised, this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which rulings on those constitutional rights were made. Spratt v. State, 315 N.W.2d 844, 845 (Iowa App. 1981).

I. Chadwick claims that the State suppressed exculpatory evidence from him prior to trial and that this evidence constitutes "newly discovered" evidence . He claims that this exculpatory evidence consists of certain statements made by eyewitnesses Marita Reilly and Peggy Vincent to Sheriff Ford on the morning after the murders. The record shows that Reilly and Vincent went to the Pottawattamie County Sheriff's Office the day after the murders and reported that they had been traveling north on highway 275 past the highway 370 junction only moments before the shootings. They reported that they had seen a woman, with dark hair, glasses and a light colored top, sitting in a small medium blue stationwagon on highway 275 facing a northerly direction on the righthand shoulder of the road, and that a few moments later that same stationwagon passed them traveling at a high rate of speed, followed by a small green car. Both women indicated that

the two cars which passed them continued north and had just disappeared behind a rise in the highway when they approached the location of the double homicide. The report futher stated that Mrs. Vincent noticed that "one of the men, the driver, got out of [a] [red Toyota] pickup [at the scene] and began walking towards the small [black Datsun parked in the driveway]." She further stated that "it seemed there was one man left inside the car."

Chadwick claims that the sheriff's report left out critical information given by the women, and that the sheriff did not inform either the prosecutor or the defense attorney that 1) codefendant Hrbek was observed outside the pickup, walking toward one of the victim's vehicles with a gun in his hand, and 2) that defendant was seen sitting in the pickup, doing "nothing unusual" and without a gun. In support of this claim, Reilly testified at the postconviction hearing that the sheriff's report of her statement was incomplete, and Vincent testified that she told the sheriff that a lighter-haired man was sitting on the driver's side of the pickup (Chadwick), and a darker-haired man (Hrbek) was outside the pickup, walking toward the hatchback car parked in the driveway. Chadwick claims that both women's testimony support his argument that Hrbek alone committed the crimes and that the sheriff's "selective editing" must be held to constitute suppression in direct violation of the rule announced by

the United States Supreme Court in Brady v. Maryland, 383 U.S. 83, 89, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, 218 (1963).

In order to prevail on this claim, Chadwick must demonstrate that the evidence was: 1) suppressed, 2) favorable to his defense, and 3) material. State v. Thongvanh, 398 N.W.2d 182, 188 (Iowa App. 1986). Based upon our review of the record, we fail to find merit in defendant's claim. The record supports the trial court's conclusions that both Reilly and Vincent's testimony at the postconviction hearing lack credibility, especially in light of the inherent inconsistencies in their stories, and the trial testimony of the State's key eyewitness. Furthermore, the record indicates that the Pottawattamie County Attorney's Office had an "open file" policy and that all investigative material was in fact supplied by them and available to defense counsel. We find no merit to either of defendant's claims.

II. Chadwick also claims that his conviction should be reversed because sheriff's deputy Bruce Bernhards intimidated and tampered with defense witnesses. In support of this allegation, both Reilly and Vincent testified that Bernards contacted both of them after their initial interview with Sheriff Ford and arranged to meet with them in Vincent's home. They testified that Bernhards, "6'3" and 300 pounds," attempted to intimidate

them and convince them that they had not seen the woman in the blue stationwagon at the murder scene. Mrs. Vincent further testified that Bernhards later nearly ran her off the road and pointed a shotgun at her as she drove to Reilly's home.

We agree with the trial court's characterization of this testimony as a "wild tale." At the hearing, both Sheriff Ford and Deputy Bernhards testified as to their roles in the investigation. The record indicates that Bernhards participated little in this matter, did not specifically recall ever meeting either woman, and denied under oath that he ever contacted the women subsequent to their initial interview with Sheriff Ford. Deputy Bernhards further testified that he had never weighed 300 pounds in his life, and that at the time of the investigation he weighed 185 pounds and was 5'11" tall. We find no basis for defendant's claim.

III. Chadwick further claims that he was denied effective assistance of counsel because his trial attorney failed to interview Reilly and Vincent, and failed to realize their importance to his defense. In order to prove an ineffective assistance of counsel claim, Chadwick must prove, by a preponderance of the evidence, that 1) his counsel failed to perform an essential duty; and 2) prejudice resulted. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In examining trial counsel's performance, we

require more than a showing that trial strategy did not work or that another attorney would have taken different steps in the preparation and trial of the case. Fryer v. State, 325 N.W.2d 400, 413-415 (Iowa 1982).

The record indicates that Chadwick's attorney, Anthony Troia, had handled between 20-30 criminal cases prior to Chadwick's case. He testified at the postconviction hearing that he had reviewed all police reports and the physical evidence and determined that it was not necessary to depose any witnesses. We agree with the trial court that Troia's efforts in investigating, trying, and cross-examining this case fell well within the range of competency required by counsel in a trial of this nature and we find defendant's claim to be without merit.

AFFIRMED