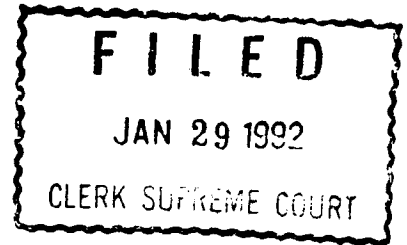


IN THE COURT OF APPEALS OF IOWA

No. 1-337 / 90-711



JIMMY LEE ALLEN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Polk County,
Anthony M. Critelli, Judge.

Allen appeals the district court's denial of
postconviction relief. **AFFIRMED.**

Bruce L. Cook of Cook, Gotsdiner, McEnroe & McCarthy,
Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan
and Mark Joel Zbieroski, Assistant Attorneys General, John
P. Sarcone, County Attorney, and Catherine H. Thune,
Assistant County Attorney, for appellee.

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

SCHLEGEL, P.J.

In 1982 Jimmy Allen and two confederates allegedly robbed and murdered Clifford Welling in Welling's Des Moines home. Allen acknowledged participating in a burglary attempt but argued he was innocent of murder. He claimed he and his confederates had agreed to abort the planned burglary if they found anyone home. He stated he thought the crime had in fact been stopped because Welling was home but that his two confederates unexpectedly attacked and killed Welling. He denied any prior knowledge or approval of this attack. The two confederates told stories which implicated Allen more directly in Welling's death.

Allen was convicted of first-degree murder in 1982. Upon direct appeal the Iowa Supreme Court affirmed the conviction. State v. Allen, 348 N.W.2d 243 (Iowa 1984). Allen later filed the present application for postconviction relief to challenge this conviction. The district court denied postconviction relief, and Allen has appealed.

Allen contends his trial attorney rendered ineffective assistance in numerous respects. He complains his attorney did not move to suppress evidence resulting from an invalid arrest, from an invalid search warrant, and from incriminating statements allegedly coerced by police. He also complains his attorney failed to depose a crucial witness and failed to secure Allen's personal presence at

certain depositions. Allen also contends certain instructions at his 1982 criminal trial shifted the burden of proof from the prosecution to the defense and eliminated the need for the State to prove all elements of the crime beyond a reasonable doubt. The State responds, among other things, that some of these complaints either were resolved adversely to Allen in the direct appeal or were waived because they were not raised in a timely fashion.

Finally, Allen seeks postconviction relief on the ground of newly discovered evidence. The alleged new evidence consists of a statement from Allen's brother, who was one of his confederates in the Welling crime. The statement allegedly supported Allen's original defense that he had renounced any criminal activity prior to a surprise attack on the victim by the two confederates. The State responds (1) the statement could have been discovered earlier in the exercise of due diligence, and (2) the statement had no likelihood of changing the trial result due to the declarant's lack of credibility. We address each issue below.

I.

Allen first claims he was originally arrested as a material witness without probable cause, consent, or exigent circumstances. He believes the evidence derived from that incident should have been suppressed. Allen argues the preliminary complaint which served as the basis for his arrest was insufficient on its face so that the

subsequent warrant was invalid. In addition, he argues the entrance into the third party's home to arrest him and the subsequent search were unreasonable. He states, therefore, that his statement and boots should have been suppressed.

On direct appeal of his conviction Allen claimed his trial counsel was ineffective because his attorney "failed to adequately prepare, investigate and file a motion to suppress any statements [Allen] made to police authorities . . ." The supreme court did not reserve the matter for postconviction relief; the court considered the claim on its merits and resolved the issue against Allen. Allen, 348 N.W.2d at 247-48. Because this claim has been fully adjudicated, we do not address it. Iowa Code § 663A.8 (1991).

II.

Allen next argues his counsel erred in excluding him from depositions, failing to depose a crucial witness, and failing to file motions to suppress. Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id.

at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

First, it is undisputed that Allen's attorney did not have Allen present when depositions were taken of some witnesses. Allen was present, however, when nineteen witnesses were deposed. Trial counsel did testify that he purposefully did not have Allen present at certain depositions. Because three different men were charged with murder in this case and an important issue was the relative degree of their involvement, his attorney wanted to avoid the inadvertent identification of his client as having to do more with the planning and act of murder. We believe this was a reasonable trial strategy and the attorney was not ineffective for failure to have Allen present. See Fryer v. State, 325 N.W.2d 400, 413-14 (Iowa 1982).

Second, Allen claims his counsel was ineffective for failure to take the deposition of Sergeant Fitzgerald. Fitzgerald had first-hand knowledge of Allen's taped statement. Counsel had a copy of Allen's transcribed statement. Because counsel knew of the intended testimony by other means and considered his best strategic decision not to depose the witness, we find he gave effective assistance. See State v. Williams, 341 N.W.2d 748, 752 (Iowa 1983); Kellogg v. State, 288 N.W.2d 561, 563-64 (Iowa 1980).

Finally, Allen argues his counsel was ineffective for not filing motions to suppress. He believes his statement was made in the course of custodial interrogation and should, therefore, be declared inadmissible as involuntary and induced by promises of leniency. Again we quote Allen's brief on direct appeal which argued his counsel "failed to adequately prepare, investigate and file a motion to suppress any statements [Allen] made to police authorities . . ." The supreme court has already found Allen's counsel was not ineffective on this suppression issue. Allen, 348 N.W.2d at 247-48. We decline to reconsider this aspect of Allen's argument.

III.

Allen also states the trial court erred in concluding testimony of his brother, Billy Allen, did not constitute newly discovered evidence. Billy Allen and Danny Reimers were codefendants in the murder trial. Reimers pled guilty

to an included offense, and Billy Allen was acquitted at trial subsequent to petitioner's trial. Reimers testified at Allen's trial and implicated Allen. Billy Allen did not testify at his brother's trial, but his testimony at the postconviction relief proceedings was consistent with his brother's.

We affirm the trial court on this issue also. We find Allen has failed to show either that the evidence was discovered after the verdict or could not have been discovered earlier in the exercise of due diligence. Allen, 348 N.W.2d at 246. In addition, Allen has failed to establish the evidence would have changed the result of the trial. Id. Billy Allen's testimony would have been the same as his brother's. We note here the trial court found Billy Allen is "not a credible witness." Allen has failed to show by a preponderance of the evidence that he is entitled to postconviction relief based on the alleged "newly discovered evidence."

IV.

Allen last claims the jury instructions given by the court impermissibly implied he had an obligation to prove his defense. Instruction number six informed "by burden of proof is meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party." The trial court found if all of the instructions were read together there would not be any improper imposition of a burden of proof on Allen. See

Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974). Instruction number two placed the burden of every material allegation on the State, and instruction number three instructed the jury of the defendant's presumption of innocence stating: "The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden of proof as to any fact or duty of calling any witnesses or producing any evidence." We believe the trial court correctly decided this issue.

Allen also refers to instructions fourteen, sixteen, and twenty. He believes these instructions leave the jury with the impression or presumption that Allen was aiding and abetting another. These three instructions must be considered with all other instructions; we determine they do not convey an impression or a presumption that Allen was in fact an aider or abettor.

V.

In summary, we find Allen has failed to prove by a preponderance of the evidence any one of the grounds he has alleged for postconviction relief. He is not entitled to postconviction relief.

AFFIRMED.