

IN THE COURT OF APPEALS OF IOWA

No. 0-146 / 89-809

FILED

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CLERK SUPREME COURT

GENTRIC HICKS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Henry County,
(on change of venue from Lee County), R. David Fahey,
Judge.

Hicks appeals from the district court's denial of
postconviction relief. He contends his attorney in the
1976 murder trial rendered ineffective assistance in
several respects. **AFFIRMED.**

Michael J. Schilling, Burlington, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes,
Assistant Attorney General, and Michael P. Short, Lee
County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

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This is an appeal from a district court's denial of postconviction relief to challenge defendant's 1976 conviction for first-degree murder. We affirm.

On May 23, 1976, a motel office was robbed in Fort Madison, Iowa. During the course of the robbery, one of the victims was shot and killed. Additional facts are recited in the direct appeal filed by the defendant in State v. Hicks, 277 N.W.2d 889 (Iowa 1979). One of the points of the appeal concerned testimony of a criminalist regarding mathematical probabilities of fingerprints. The court held the objection was premature and was not the same issue on appeal that was at trial. The attorneys on appeal were the trial counsel.

Defendant filed a habeas corpus petition in United States District Court challenging the same criminalist's testimony. The United States District Court stated: "The challenged evidence may have been improper and might have been excluded by the trial judge had objection been made during trial. I cannot, however, conclude that its introduction alone deprived petitioner of due process." Hicks v. Scurr, No. 80-48-B mem. op. at 10 (S.D. Iowa 1981). The court further stated: "The burden of showing in a habeas corpus action that error was so prejudicial as to be unconstitutional is greater than that required to show plain error on direct appeal." Id. at 11. The court

concluded: "[T]hat the probability testimony and the prospects or argument of this evidence did not render the trial so fundamentally unfair as to deny petitioner due process of law or his right to trial by jury." Id. at 12.

Hicks in this appeal raises only one issue: "Whether Hicks was denied effective assistance of counsel at trial." Hicks states he was denied effective assistance of counsel because his trial "counsel failed to timely and properly object to the Chapman [criminalist] testimony and the State's improper use of evidence in closing argument." Hicks also claimed his trial counsel failed to obtain expert testimony on the fingerprint identification. He states, "The failure by trial counsel to timely and properly object to Chapman's prejudicial testimony was due, at least in part, to a failure by counsel to comprehend the significant differences between probability of concurrence and probability of identification."

The seminal fact to these claims of ineffective counsel is the opinion testimony of the witness Darwin Chapman, a criminalist, who said that the probability of "another individual having the same minutiae or individual characteristics that I found in the latent fingerprint as well as the known fingerprint of Mr. Hicks, the chances of another individual having those, not only those same individual characteristics but the same number of them, would be one in approximately seven million."

The federal trial court, Henry County District Court, and the appellee State all appear to accept the statistical professor's postconviction hearing testimony that the true statistical figures are one in 30,240 and not one in seven million.

The State claims Iowa Code section 663A.8 bars Hicks from bringing this action because he litigated this issue in federal court. The State asserts that the "any other proceeding," language in section 663A.8 should include federal, as well as state courts. In Herman v. Brewer, 193 N.W.2d 540, 543 (Iowa 1972), the court said section 663A.8 forecloses relitigation of an issue decided in a previous state habeas corpus action. The State cites Plater v. Warden, 154 A.2d 811, 812-13 (Md. 1959), cert. denied, 362 U.S. 955 (1960), as holding such a bar in a state postconviction statute encompasses prior habeas corpus proceedings in federal court.

Since an Iowa appellate court has not addressed the issue of whether section 663A.8 includes federal habeas corpus action, we will examine whether Hicks would succeed if we so held. Hicks's claim in the federal habeas corpus action did not raise the present issue of ineffective assistance of counsel but it did raise the seminal fact issue concerning the criminalist error opinion testimony of one in seven million probability. However, section 663A.8 does not permit piecemeal division of issues in direct appeal or postconviction proceedings.

We thus reach the issue of whether the failure of trial counsel to challenge the criminalist's erroneous opinion testimony is so egregious to require a new trial.

We will first examine the second prong of the Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984) standard for reviewing ineffective counsel issues. The question is whether there is a reasonable probability that the trial court proceedings would have been different without the error. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Hicks argues that the difference between odds of one in seven million and one in 30,240 is the difference between a near certainty and a mere possibility. He claims but for this erroneous testimony he would have been found not guilty.

The criminalist Chapman testified that the two latent fingerprints found at the scene were made by right middle and right ring fingers. He concluded the prints were not made by any of the proprietors. There were seven points of identification between the latent print made by a right middle finger and Hicks's right middle finger. There were three points of identification between the print made by a right ring finger and Hicks's right ring finger. There were no points of dissimilarity between the latent prints and those of Hicks. None of this evidence is disputed by Hicks.

Additional testimony at trial included the eyewitness testimony of Mrs. Foster. The Iowa Supreme Court in State v. Hicks, 277 N.W.2d 889 (Iowa 1979) said:

Mrs. Foster had ample opportunity to observe the robber closely. He was in close proximity to her in a well-lit room for approximately ten minutes. She was able to observe him prior to and during the crime. She had sufficient time to observe his face, hands, clothing, demeanor, and general appearance

. . . Mrs. Foster picked out Hicks'[s] picture less than five hours after the crime. Several days later she again picked him from a line-up.

Id. at 892-93.

At trial, the prosecutor asked Mrs. Foster:

Q. Is there any doubt whatsoever in your mind that this is the man [Hicks] that was in your house that evening? A. There's no doubt in my mind. There never was any doubt in my mind, there never will be any doubt in my mind that this is the man.

Hick's companion and codefendant Kenneth Lawrence identified Hicks as the person who shot Jerry Foster. Hicks admitted he and Lawrence were together throughout the evening and early morning hours before the robbery and murder.

Clarence Estrada testified Hicks came to his Fort Madison apartment at a time consistent with flight from the robbery scene.

We have reviewed the entire record and conclude that admission of the criminalist's erroneous opinion does not undermine our confidence in the conviction. When the erroneous opinion is placed up against the eye witness and

codefendant's identification it pales in its significance.

Since Hicks would not prevail even if we held federal habeas corpus actions bars relitigation in state postconviction litigation, we decline to decide this issue.

We affirm the trial court's finding that Hicks was not denied his constitutional right to effective assistance by counsel at trial.

AFFIRMED.