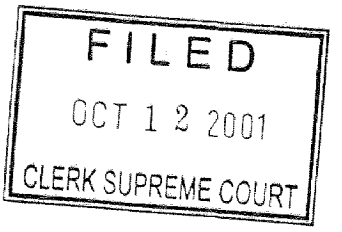
IN THE COURT OF APPEALS OF IOWA

No. 1-518 / 00-863
Filed October 12, 2001



TERRY WILSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Alan L. Pearson, Judge.

Terry Wilson appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Christopher Kragnes, Sr. and Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith and Jack Lammers, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Terry Wilson appeals from the denial of his application for postconviction relief. He argues the postconviction court erred in holding his trial counsel was effective despite the fact that counsel did not ensure his presence during the deposition of one of the State's witnesses. He also claims his postconviction counsel was ineffective in failing to adequately present evidence regarding his challenge to the racial make-up of the jury pool. We affirm.

I. Background Facts and Proceedings

On August 27, 1996, Waterloo police arrested Terry Wilson for selling a simulated controlled substance. Wilson's apprehension and arrest were the result of an undercover operation by a drug task force. An undercover officer patrolled the city pretending to be a potential buyer of crack cocaine. He attracted the attention of Barbara Matlock, who informed the undercover officer that although she did not have any cocaine, she knew where they could find some.

After a fruitless venture to a nearby drug hang out, the pair returned to their initial meeting place where Matlock saw Wilson. She identified him as "the dopeman" to the undercover officer and proceeded to initiate a drug buy. Soon, Matlock returned to the officer's car with what appeared to be crack cocaine wrapped in a plastic baggie. Matlock informed the officer that Wilson could supply more cocaine, if he was interested. The officer declined, paid for the cocaine with a serialized $20.00 bill, and left the area. Wilson was then apprehended by other members of the drug task force and charged with possession with the intent to deliver.

At trial, a jury convicted Wilson of possessing a simulated controlled substance with the intent to deliver in violation of Iowa Code section 124.401(1)(c) (Supp. 1995) and Iowa Code sections 124.411 and 124.413 (1995). Because of his status as a habitual offender, Wilson was sentenced to a term not to exceed fifteen years, subject to the mandatory minimum sentence, and ordered to pay restitution and fees. His conviction was affirmed on appeal with several issues being preserved for postconviction proceedings. *State v. Wilson,* No. 97-0029 (Iowa Ct. App. Jan. 27, 1999). Wilson's postconviction relief action, involving various claims of ineffective assistance of counsel, came before the district court for hearing April 5, 2000. The district court denied Wilson's petition for relief, and he appeals.

II. Scope of Review

Generally, an appeal from the denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State,* 569 N.W.2d 594, 596 (Iowa 1997) (citations omitted). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances of the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v. State,* 511 N.W.2d 622, 627 (Iowa 1994)). This is equivalent to a de novo review. *Id.* (citing *Hinkle v. State,* 290 N.W.2d 28, 30 (Iowa 1980)). Our review is de novo because Wilson alleges a denial of his constitutional right to effective assistance of counsel. *See Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1985) (citations omitted).

III. Ineffective Assistance of Counsel

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). To establish an ineffective assistance of counsel claim the applicant must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Irving*, 533 N.W.2d at 540. In proving the first prong, the postconviction applicant faces a strong presumption that the performance of counsel falls within a wide range of reasonable professional assistance. *See State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed.2d at 693-94). We will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994).

IV. The Merits

Presence at deposition. Wilson first claims his trial counsel was ineffective in failing to secure his presence when Matlock was deposed. Wilson claims he wanted to be present when trial counsel deposed Matlock, but was not taken from the jail to the courthouse, where the deposition took place. Because Wilson was not present when Matlock was deposed, his first opportunity to hear her account of the alleged drug sale was during her trial testimony. He claims this hindered his ability to assist his attorney during cross-examination of Matlock, and rendered his trial counsel ineffective.

We addressed a similar issue in *Van Hoff v. State*, 447 N.W.2d 665, 675 (Iowa Ct. App. 1989). In *Van Hoff*, we held that a defendant's absence from a discovery deposition did not constitute the failure to perform an essential duty by his counsel. Mirroring the circumstances in *Van Hoff*, in the present case, Matlock's deposition was clearly taken as a discovery deposition, rather than for the purpose of perpetuating the testimony of a witness who could not appear at trial. In fact, Matlock personally testified in court only a few hours after being deposed. She was not deposed earlier because it was not clear she would be called as a witness.[1] Matlock's deposition was not introduced as evidence. Wilson was present at his trial where his attorney had an adequate opportunity to cross-examine Matlock. On appeal, Wilson fails to state or show how his presence at Matlock's deposition would have changed the outcome of his trial. We agree with the district court that it is "better practice" for a defendant to be present during the taking of all depositions; however, failing to secure Wilson's presence at Matlock's discovery deposition did not render his trial counsel ineffective. We affirm on this issue.

Failure to Challenge Jury Pool. In his second assignment of error, Wilson contends his postconviction counsel was ineffective in failing to present sufficient evidence at his postconviction trial to support his claim that African-Americans were improperly excluded from his jury pool. As a result, he claims his sixth amendment right to a jury pool designed to represent a fair cross section of the community has been violated.

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[1] A tape recording had been made of police dealings with Matlock. During pretrial proceedings, Wilson's trial counsel listened to the tape and reviewed a copy of the transcript. He shared the information he gained with Wilson but Wilson did not listen to the tape itself.

In his application for postconviction relief, Wilson, an African-American, asserted his trial counsel was ineffective for failing to challenge the racial makeup of his jury pool. During jury selection at Wilson's trial, fifty panel members were called. One juror of the fifty was African-American. Trial counsel did not object to the panel of prospective jurors or to the composition of the jury selected to hear Wilson's case.

The sixth amendment entitles a litigant to a jury panel designed to represent a fair cross section of the community. *State v. Fetters*, 562 N.W.2d 770, 776 (Iowa Ct. App. 1997). To establish a prima facie violation of the cross-section requirement, a defendant must first show that the group alleged to be excluded is a "distinctive" group in the community. *Duren v. Missouri,* 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed.2d 579, 586-87 (1979). Second, the defendant must show that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. *Id.* Third, the defendant must establish that this under-representation is due to systematic exclusion of the group in the jury-selection process. *Id.* Our supreme court has held that the manner of jury selection set out in Iowa Code section 607A.22 is proper. *See State v. Jones,* 490 N.W.2d 787, 794 (Iowa 1992).

Following trial on his application for postconviction relief, the trial court found Wilson established the first element set forth in *Duren* because he is an African-American. The postconviction court concluded there was minimal evidence to support element two and no evidence to support element three. The

court concluded there was no basis to find that Wilson's trial counsel breached an essential duty in failing to challenge the makeup of the trial jury.

On appeal, Wilson suggests his postconviction counsel did not adequately prepare for his postconviction hearing. He also suggests that postconviction counsel could have offered more direct evidence concerning the percentage of African-Americans in Black Hawk County. He asks us to remand for a new trial on his application for postconviction relief. We decline to do so.

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Viewed in its best light, Wilson's contention on appeal suggests that further investigation by his postconviction counsel might have enabled him to establish the second prong of the *Duren* test.

Even if we assume for purposes of this appeal that Wilson's contention is correct, his request for postconviction relief must fail. Under the third prong of the *Duren* test, Wilson is required to show that African-Americans are under-represented in the jury selection process due to systematic exclusion. *Fetters*, 562 N.W.2d at 777. To make this showing, a defendant must establish the exclusion is "inherent in the particular jury selection process utilized." *Id.* (citation omitted). The record before us is void of any evidence suggesting that the alleged under-representation of African-Americans in the assembled jury pool was due to a systematic exclusion in the jury selection process utilized in Black

Hawk County. In this case, Wilson presents no challenge to the specific procedures utilized in Black Hawk County for drawing jury venires. Moreover, he does not propose what any further investigation by his postconviction counsel would have revealed regarding this issue or how anything discovered would have affected the result obtained below. We conclude he has failed to demonstrate the need for further development of the record in this case. We affirm the district court on this issue.

V. Conclusion

Wilson has failed to demonstrate either a breach of an essential duty or prejudice with regard to his claim that trial counsel was ineffective for proceeding with the deposition of a State's witness in his absence. Wilson has also failed to demonstrate the ineffectiveness of his postconviction counsel in regards to his sixth amendment challenge to the jury pool. After considering all of the errors alleged by the petitioner, and finding them without merit, we affirm the district court's denial of postconviction relief.

AFFIRMED.