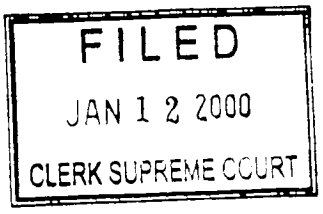
IN THE COURT OF APPEALS OF IOWA

No. 1999-316 (9-569) / 98-1120
Filed January 12, 2000



HAROLD STRATTON,
Appellant,

vs.

STATE OF IOWA,
Appellee,
JOHN WUNDER,
Intervenor.

Appeal from the Iowa District Court for Muscatine County, Mark Smith, Judge.

Harold Stratton appeals for postconviction relief on newly discovered evidence, ineffective assistance of counsel and counsel's failure to keep evidence of Stratton's driving record from the jury. **AFFIRMED.**

Thomas G. Reidel, Muscatine, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christianson, Assistant County Attorney, for appellee.

John Wunder, Muscatine, intervenor.

Considered by Streit, P.J., and Vogel, and Hecht, JJ.

HECHT, J.

Harold Stratton appeals from the district court's denial of his request for postconviction relief. He claims he should be granted a new trial because of newly discovered evidence, the district court's failure to review the entire transcript, and ineffective assistance of trial counsel. We affirm.

I. Factual Background and Proceedings. On the evening of May 16, 1992, Harold Stratton ("Stratton"), Bret Stalkfleet ("Stalkfleet"), and Susan Rasmussen ("Rasmussen") were involved in a motor vehicle accident near Muscatine, Iowa. Stratton was the owner of the vehicle which left the highway and rolled down the embankment until it came to rest upside down on a cement river culvert. All three were thrown from the car. Rasmussen was killed in the accident, Stalkfleet suffered serious injuries, including the loss of a portion of his leg, and Stratton sustained a concussion and some bruises.

All three had been at a party that evening immediately before the accident. They consumed alcoholic beverages at the party prior to leaving in Stratton's car to go to another party. Evidence at trial conflicted as to who was driving the vehicle when it left the party. A witness testified she saw Stratton get into the driver's side of the car, and she observed Rasmussen and Stalkfleet get in on the passenger's side. Stalkfleet testified he was in the passenger seat with Rasmussen on his lap, and Stratton was driving at the time of the accident. After the accident, Stratton admitted he had been driving to several people, including law enforcement personnel, an

emergency room physician, and Rasmussen's mother. He later denied he was the driver and claimed he had no memory of the accident or the surrounding time frame due to a concussion. He claimed his admissions of being the driver were derived from the assumptions of others that he was driving. In support of his contention he was a passenger rather than the driver, Stratton strenuously urged, with the aid of expert medical testimony, physical evidence of trauma to his torso (bruising and discoloration) had been inflicted by the passenger-side seat belt.

Prior to trial, Stratton's counsel attempted to gain access to Stalkfleet's medical records in furtherance of the assertion it was Stalkfleet who was driving the car at the time of the accident. Counsel believed the records would evidence physical trauma or other evidence consistent with Stalkfleet's status as driver of the vehicle. Stalkfleet did permit access to his emergency room records from the Muscatine General Hospital where he was first treated after the crash, but he declined to authorize access to his medical records from the University of Iowa Hospital where he was subsequently transferred for treatment of his serious leg injury. The district court refused to order Stalkfleet to produce the University of Iowa Hospital records.

Jury trial in this matter commenced on April 5, 1993, on the charges of vehicular homicide, serious injury by vehicle, operating while intoxicated, and driving while revoked. Midway through trial, Stratton's counsel discovered the Iowa Department of Transportation had erred in its certification of the period of revocation on Stratton's driving record. Moreover, it was determined Stratton's license was not

actually revoked at the time of the May 1992 wreck. Consequently, the driving while revoked charge was dismissed during the course of trial.

On April 8, 1993, the jury found Stratton guilty of the remaining three charges. On direct appeal, the Iowa Supreme Court vacated the verdict relating to the operating while intoxicated charge, ruling it merged with vehicular homicide. *State v. Stratton,* 519 N.W.2d 403, 405 (Iowa 1994). Thereafter, Stratton achieved access to Stalkfleet's medical records generated during treatment at the University of Iowa Hospital and filed an application for postconviction relief. The district court denied his application and his subsequent motion to reconsider. Stratton appeals.

II. Standard of Review. We apply an abuse of discretion standard when reviewing the district court's ruling on motions for new trial based on newly discovered evidence. *State v. Jefferson,* 545 N.W.2d 248, 249 (Iowa 1996). In general, motions for new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly. *Whitsel v. State,* 525 N.W.2d 860, 863 (Iowa 1994).

When a postconviction petitioner asserts violation of constitutional safeguards, such as ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. *Jones v. State,* 479 N.W.2d 265, 271 (Iowa 1991). This is the equivalent of de novo review. *Origer v. State,* 495 N.W.2d 132, 135 (Iowa App. 1992).

III. Newly Discovered Evidence. Stratton contends the postconviction trial court acted improperly by refusing to grant his motion for new trial based on newly discovered evidence. Specifically, Stratton claims Stalkfleet's medical records from the University of Iowa Hospital are newly discovered evidence which tend to prove Stalkfleet gave a history to medical care providers of being in a pickup truck at the time of the wreck; and Stalkfleet sustained a chest injury consistent with his body's impact against the steering wheel of the car.

To succeed in a motion for new trial based on newly discovered evidence, Stratton must show, by a preponderance, the evidence in question: (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of the trial. *See State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997).

Stratton contends the medical records from the University of Iowa would have changed the outcome of the trial because they tend to prove Stalkfleet was the driver at the time of the crash; and because they constitute powerful impeachment evidence that Stalkfleet admitted to medical personnel he had no recollection of the incident and gave an incorrect history of being in a pickup truck at the time of the wreck. The parties agree Stratton's trial counsel exercised due diligence in attempting to get all of Stalkfleet's medical records before trial.

"Newly discovered evidence" is evidence of a new material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause after the rendition of a verdict or judgment therein. *State v. Adamson,* 542 N.W.2d 12, 14 (Iowa App. 1995) (citations omitted). Evidence that is unavailable at trial does not become newly discovered evidence upon becoming available when the witness decides to cooperate. *See Jones v. State,* 479 N.W.2d at 274; *see also Jones v. Scurr,* 316 N.W.2d 905, 910 (Iowa 1982). Stalkfleet did not give consent for the parties to receive his University of Iowa records until after the verdict and appeal in this case. Both Stratton and the prosecution knew Stalkfleet had been treated at two hospitals and knew the records existed. However, neither the State nor trial counsel were able to compel their production because they were privileged. *See Stratton,* 519 N.W.2d at 405. Stalkfleet's post-appeal decision to produce the records does not render them "newly discovered" for the purposes of Stratton's postconviction relief proceeding. The medical records were known to exist before trial. The fact the contents of the records were unavailable to Stratton during trial is not dispositive on this issue, just as the unavailability during trial of the witnesses in *Jones v. State* and *Jones v. Scurr* were not sufficient to make their testimony "newly discovered." *See Jones v. State,* 479 N.W.2d at 274; *Jones v. Scurr,* 316 N.W.2d at 910. The district court did not abuse its discretion in finding the University of Iowa medical records were not newly discovered evidence.

The third consideration is whether the evidence is material and not merely cumulative. We find Stalkfleet's University of Iowa medical records to be merely cumulative. Although Stratton claims the new records support his defense theory he was not the driver, he presented other evidence at trial indicating he was a passenger rather than a driver. Stratton presented expert testimony he had a diagonal bruise two inches wide from the right side of his neck down to his left chest area consistent with trauma inflicted by a passenger side seat belt. Stratton also presented evidence at trial that Stalkfleet sustained a head injury tending to indicate he was the driver of the vehicle rather than a passenger. We conclude Stalkfleet's records from the University of Iowa were cumulative of other evidence presented during the jury trial.

Lastly, we must consider whether the new evidence would have changed the result of the trial. A witness at trial testified she observed Stratton getting in on the driver's side of his car just before he, Stalkfleet, and Rasmussen left the party. Stratton admitted to a trooper he had been driving at the scene of the accident. He made similar admissions to the physician in the emergency room and to Rasmussen's mother. Given the evidence presented at trial, it is unlikely Stalkfleet's medical records would have changed the result of Stratton's trial. Consequently, considering the above listed factors, we find the district court did not abuse its discretion in denying Stratton's application for postconviction relief based on newly discovered evidence.

IV. Ineffective Assistance of Counsel. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). A defendant shows ineffective assistance of counsel by proving (1) the defense attorney failed in an essential duty and (2) prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook,* 565 N.W.2d 611, 614 (Iowa 1997).

In proving the first prong of this test, Stratton must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *See State v. Hildebrant,* 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong, Stratton must establish prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of he proceeding would have been different." *State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Query,* 594 N.W.2d 438, 444-45 (Iowa App. 1999). With these principles in mind, the court will now consider Stratton's specific allegations of ineffective assistance of counsel.

A. Failure to Keep Stratton's Driving Record From the Jury. Stratton asserts his trial counsel was ineffective for allowing evidence of his driving record to be

presented to the jury. Witnesses testified regarding Stratton's driving record to support the charge of driving while revoked, but the record itself was not admitted into evidence after the department of transportation's calculation error was discovered by defense counsel. The charge was dismissed when it became clear Stratton's license had not been revoked at the time of the accident. Trial counsel's failure to check the department of transportation's certified calculation of the period of revocation did not result in ineffective assistance of counsel. Additionally, we are not persuaded, on de novo review of the record, Stratton was prejudiced by trial counsel's failure to discover the revocation computation error prior to trial.

B. Failure to Request Jury Instruction on Intervening Cause. Stratton also asserts trial counsel was ineffective in not requesting an instruction on intervening or superseding causes based on Rasmussen's failure to wear a seat belt. However, the failure of a victim to wear a seat belt or other restraint is not a superseding cause of injuries or death so as to preclude the imposition of criminal responsibility. *State v. Hubka,* 480 N.W.2d 867, 870 (Iowa 1992). Therefore, we find trial counsel was not ineffective for failing to request an instruction on superseding causes. We therefore affirm the district court's denial of Stratton's application of postconviction relief based on ineffective assistance of counsel.

V. District Court's Review of the Transcript. Stratton contends the district court erred by not reviewing the entire trial transcript. Since this assignment does not assert a constitutional claim, review of this contention is for correction of errors at

law. *Whitsel*, 525 N.W.2d at 862. The district court's ruling on postconviction was based upon a review "of the entire record." The record shows no error on the part of the district court in its review of the trial transcript.

AFFIRMED.