FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

213

ALLEN C. MILES,	)	
Petitioner-Appellant,	)	Filed August 27, 1986
vs.	)	
STATE OF IOWA,	)	6-185 85-839
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County (No. 315) - C. Edwin Moore, Senior Judge.

Defendant appeals the district court's denial of his motion for postconviction relief contending that he is entitled to postconviction relief on the ground the prosecutors in his 1982 murder trial suppressed exculpatory evidence and presented perjured testimony, on the ground of newly-discovered evidence, and on the ground his attorney in the 1982 criminal trial rendered ineffective assistance in several respects. **AFFIRMED.**

James P. Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and Catherine H. Thune, Assistant Polk County Attorney, for respondent-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J. 214

The petitioner was accused of the 1982 murder of Cheryl Kleinschrodt. At trial, the case was submitted to the jury on alternate theories of premeditation and felony murder. The petitioner was found guilty of first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1981). Post-trial motions were filed following the jury verdict. These motions were overruled and judgment and sentence were imposed. His conviction and sentence were affirmed on direct appeal by the Iowa Supreme Court. State v. Miles, 344 N.W.2d 231 (Iowa 1984).

On November 7, 1984, petitioner filed an Application for Postconviction Relief pursuant to chapter 663A of the Iowa Code in which he raised a number of issues supporting his request for a new trial. An evidentiary hearing was held on the application. Following submission of briefs, the postconviction court entered an order denying postconviction relief. Petitioner filed a timely notice of appeal.

Petitioner alleges first of all that the prosecution's failure to disclose the discovery of a purse in the vicinity where the victim's body had been found constituted a denial of his constitutional guarantees to a fair trial and due process in his criminal trial proceedings. This claim is based upon two theories. Under the first theory of error, the petitioner asserts that the testimony of two police officers at trial, both of whom testified that the victim's purse has not been found, constituted perjury and/or misrepresentation of evidence by the prosecution. Secondly, the petitioner contends that the existence of this purse constituted obviously exculpatory evidence which should have been revealed to the defendant prior to trial, despite the absence of a specific discovery request for exculpatory evidence. Because petitioner has alleged constitutional violations,

we review under the de novo or totality of circumstances standard. Kellogg v State, 288 N.W.2d 561 (Iowa 1980).

Petitioner contends under his first theory that the trial testimony of Sergeant Gerald Limke and that of Officer Jerry Jones, both of whom assisted in the investigation of the crime scene for evidence, constituted false testimony and/or a misrepresentation of evidence. The pertinent testimony of Sergeant Limke is as follows:

> Q. And did yourself or any other members of the police department that you know of actually go out there and search that area looking for other items of evidence? A. Yes, we did. I spent days out there.
>
> * * *
>
> Q. Do you ever remember finding a lady's purse that belonged to the victim in this case? A. No, sir.

The relevant testimony of Officer Jones was similar:

> *Q. And in your searching for a murder weapon* and for the victim's purse, did you ever find either one? A. No, we did not.

Petitioner's allegations of falsity and misrepresentation stem from the fact that at trial both Limke and Jones were aware that prior to trial a woman's purse, resembling in some respects that of the victim, had been found in the vicinity of the crime scene. Therefore, urges petitioner, the officers' trial testimony was either false or misrepresented facts and evidence.

In support of his argument, petitioner invokes principles enunciated by the United State Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), and adopted by the supreme court of this state in Hamann v. State, 324 N.W.2d 906 (Iowa 1982). Under the guidelines delineated in those cases, evidence undisclosed to the defense until after trial may mandate a new trial where the "undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution

knew, or should have known, of the perjury." Agurs, 427 U.S. at 103, 96 S. Ct. at 2397, 49 L. Ed. 2d at 349-50; Hamann, 324 N.W.2d at 909. A conviction based on such evidence cannot be allowed to stand if there exists any reasonable likelihood that the false testimony would have affected the judgment of the jury. Id.

The court in Hamann summarized the requirements for finding a constitutional violation in such a context. First, the prosecution must either introduce or fail to correct false testimony, misrepresent evidence to the jury, or enhance false evidence in jury argument. This requirement is not met where the prosecution presents evidence or fails to contradict evidence relevant to a question upon which reasonable minds could differ. Nor does perjury or use of false evidence occur where questions are vague or equivocal, and, taken in context, the witness truthfully could have given the answers he or she did. Second, ordinarily the false or perjured testimony must be given at trial. Third, the prosecution must know that the testimony is false. This knowledge may be the actual knowledge of the trial prosecutor or it may be imputed from another government attorney within the prosecutor's office or from the police within the prosecutor's jurisdiction. Fourth, standards of materiality must be met, even when perjured testimony is used. The court on review must examine the importance of the perjured testimony and the weight of the independent evidence of guilt to determine the effect the perjured testimony had on the trial. This standard is more stringent than the normal harmless error rule. Finally, the defendant waives his or her right to complain of perjured testimony on appeal or collateral attack if at trial he or she had reason to know such testimony was being used. Hamann, 324 N.W.2d at 909-10. We are convinced that the petitioner's situation does not fall within the ambit of cases governed by these principles.

217

Our initial problem with petitioner's argument is his characterization of the officers' testimony as false or as a misrepresentation of evidence. The purse was found approximately one-and-one-half miles from the spot where the body had been found. While similar in color to the victim's purse, the purse found by the police was significantly smaller. The purse contained nothing of value. After the purse was found, it was shown to the victim's husband who carefully checked it and its contents before stating it was not the victim's purse. In light of this fact, we decline to find the officers' testimony to be either false or a misrepresentation of evidence. Consequently, we need not evaluate the situation under the remaining four Hamann standards.

Alternatively, petitioner contends that the State wrongfully suppressed material evidence when it failed to reveal the discovery of this unidentified purse to the petitioner. Our criteria for evaluating this claim were discussed in State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983):

> A new trial is warranted if the evidence is wrongfully suppressed and is material. "In order for materiality to exist it must appear that the suppressed evidence affected the outcome of the trial." But "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense."

(emphasis in original), quoting Fryer v. State, 325 N.W.2d 400, 407 (Iowa 1982). We pass over the requirement, outlined in Whitsel, that the evidence be wrongfully suppressed, because we are convinced that its co-requirement, that the evidence be material, has not been met. We think it clear that the nondisclosure of the unidentified purse had no effect on the outcome of the trial. Petitioner argues that the disappearance of the victim's purse was of major importance to one of the State's theories of petitioner's liability, felony murder. Therefore, contends petitioner, the existence of the unidentified purse was material to the outcome

of the case. Even were we to assume, however, that the unidentified purse may have belonged to the defendant, its discovery, some distance from the victim's body, emptied of any contents of value, does not lessen the State's theory that a robbery occurred. The unidentified purse was clearly not material and accordingly no new trial is warranted on this ground.

Petitioner's second claim asserts that he is entitled to a new trial because of the post-trial discovery of new material evidence. The evidence in question tends to show that the victim was married to two men at the time of her death. Petitioner argues that this evidence would be relevant to his defense that the victim was the aggressor, to the victim's general law-abiding character or lack of such, and would rebut testimony concerning the victim's character and current marital relationship.

Under Chapter 663A of the Iowa Code, a convicted person may secure postconviction relief if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interests of justice." Section 663A.2(4), The Code, 1985. To establish an entitlement to relief under this section, the postconviction relief applicant must satisfy four requirements: (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to an issue in the case and not merely cumulative or impeaching; and (4) the evidence would probably change the result if a new trial is granted. Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982). Motions for new trial on the basis of newly-discovered evidence are not favored, should be closely scrutinized, and sparingly granted. Whitsel, 339 N.W.2d at 156. The burden is on the postconviction applicant to establish the satisfaction of the elements laid out above by a preponderance of the evidence. Jones, 316 N.W.2d at 907. The postconviction court's order denying a new trial deter-

mined that petitioner had failed to show that the evidence would probably change the result if a new trial was granted. We agree.

Even assuming the evidence tending to show the victim's bigamy is pertinent to the petitioner's claim that the victim was the aggressor, a nexus not at all obvious to us, the link has certainly not been shown by petitioner to be so strong that a new trial would probably end in a different result on the strength of this evidence. A similar analysis leads us to disagree with petitioner's allegations that the evidence in question would cast new light on the nature of the victim's law-abiding character, her character in general, and the nature of her current marital relationship. Even assuming materiality and admissibility, no showing has been made persuading us that a new trial would have a different result. As we have noted above, it is the burden of the petitioner to satisfy this element by a preponderance of the evidence. This the petitioner has not done.

The postconviction court did not err in denying petitioner's motion for a new trial on this ground.

Finally, petitioner argues that he was denied effective assistance of counsel as secured by the sixth amendment. Petitioner argues that his trial counsel failed to thoroughly investigate and call witnesses who could explain incriminating evidence and did not move to suppress pretrial statements to police.

As the petitioner is asserting that his constitutional right to counsel was violated, we make an independent evaluation of the totality of the circumstances, the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

The person claiming that his trial attorney was ineffective, depriving him of his sixth amendment right to counsel, must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Petitioner has the burden to prove

both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Taylor, 352 N.W.2d at 685. Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94 (1984). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

We deal, first of all, with petitioner's claim that his trial counsel failed to investigate and call two witnesses whose testimony, petitioner asserts, could have explained incriminating State's evidence. Specifically, petitioner argues that Les James' testimony would have explained why rabbit hair had been found on his coat (the victim had been wearing a rabbit fur coat on the day of her death), and Mike Madison's testimony would have explained why sand had been found on petitioner's car (the victim's body had been found at a gravel pit).

The record shows, and the petitioner concedes, that these two witnesses were interviewed prior to trial by petitioner's trial counsel. Trial counsel's testimony at the postconviction hearing revealed that counsel's decision not to call Madison was based upon Madison's statement during the interview that he had not remembered his potentially exculpatory testimony until the defendant had called him from jail and told him of it. We credit counsel's testimony. His decision not to call Madison as a witness was safely within the range of normal competency.

Similarly, with respect to counsel's decision not to call James as a witness, we cannot say that petitioner has overcome the presumption that his trial counsel

was competent. James' testimony, as revealed at the postconviction hearing, was to the effect that petitioner had owned a rabbit at the time of the crime. While this evidence may have been relevant, we cannot say that in light of the entirety of the record counsel's decision not to pursue it was a violation of any essential duty.

Petitioner also urges that he was denied effective assistance of counsel due to his trial counsel's failure to move for suppression of petitioner's pretrial statements to police. Petitioner's counsel stated at postconviction hearing that his decision not to move to suppress petitioner's statements was based upon the absence of any claim in support of such a motion. Counsel stated that there was nothing in either his conversations with the petitioner or in the interview context in which the statements were made which would support a claim that the statements were involuntarily made. Petitioner has not directed our attention to anything contrary to that conclusion. Counsel's decision was made with sufficient knowledge of the applicable legal principles. Unless we are resolved to impose a duty to move to suppress evidence upon defense counsel in all situations notwithstanding their professional judgment and discretion, petitioner's counsel here was well within the range of normal competency.

We are not so resolved.

AFFIRMED.