

IN THE COURT OF APPEALS OF IOWA

No. 9-388 / 88-1216

FILED

JAN 25 1990

CLERK SUPREME COURT

TERRY HARRINGTON,

Appellant,

vs.

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STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Harrington appeals from a district court judgment denying his application for postconviction relief following his conviction and sentencing for first-degree murder.

AFFIRMED.

James P. Cleary, Phoenix, Arizona, for appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; E.A. Westfall, Pottawattamie County Attorney; and Drew Kouris, Assistant County Attorney, for appellee.

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

HABHAB, J.

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Appellant Terry Harrington appeals from the denial of postconviction relief following his conviction and sentencing for first-degree murder. We affirm.

Appellant was convicted of first-degree murder for the killing of a nighttime security guard. On direct appeal, appellant's conviction was affirmed. See State v. Harrington, 284 N.W.2d 244, 245 (Iowa 1979).

The evidence introduced at trial disclosed the following facts. On July 22, 1977, appellant, Kevin Hughes, and Curtis McGhee met at a parking lot in Omaha, Nebraska. Their criminal design for the evening was the theft of an automobile. The three young men, all juveniles, then drove to Council Bluffs and parked adjacent to the McIntyre Oldsmobile-Cadillac lot.

McIntyre, along with several other businesses, employed John Schweer as a nighttime security guard. Upon their arrival, appellant removed a shotgun from the trunk of his car and concealed it within his jacket. He and McGhee then proceeded into the car lot to further their plan while Hughes stayed behind at appellant's vehicle. Several moments later, Hughes heard a shot; appellant and McGhee raced back to the car. When Hughes asked what had transpired in the car lot, appellant told him he had "shot a cop." The three men then beat a hasty retreat to Omaha. The next morning John Schweer was found dead from shotgun wounds near the car dealership.

At appellant's trial, the principal prosecution witness was Kevin Hughes. Hughes denied at trial that he had received any plea bargains or concessions in return for his testimony; nor did he disclose by way of testimony that he had been charged with conspiracy in the underlying car theft. Appellant now contends that he was denied due process by Hughes' failure to reveal at trial certain "plea concessions" stemming from charges in Nebraska and further that he was denied due process and a fair trial because of Hughes' failure to testify concerning the conspiracy charge against him.

Ordinarily, our review of postconviction proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, because appellant asserts constitutional due process violations, we review under the totality of the circumstances. This is the equivalent of de novo review. Id.

As we noted in Nims v. State, 401 N.W.2d 231 (Iowa App. 1986):

In a collateral attack upon a state court conviction an applicant for post-conviction relief must show not only "cause" for failure to challenge the alleged error in the trial court or on direct appeal, but also must show actual and substantial prejudice resulting from alleged errors of which he now complains.

Id. at 233 (emphasis original). Appellant's stated reason for not raising these issues previously is that they were only recently discovered. We will assume for the purposes

of this appeal that appellant has shown sufficient cause for his failure to raise these issues on direct appeal and will address ourselves to the merits of appellant's application for postconviction relief.

I.

The gist of appellant's claim is that "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349-50 (1976). In order to prevail on his claim, appellant must prove each of the following five prongs: (1) that the prosecution must either introduce or fail to correct false testimony, misrepresent evidence to the jury or enhance false evidence in arguments to the jury; (2) that the false or perjured testimony is given at trial; (3) that the prosecution knew the testimony to be false; (4) that the tainted evidence was material to the outcome of the case; and (5) that defendant did not have reason to know perjured testimony was being used at trial. See Hamann v. State, 324 N.W.2d 906, 909-10 (Iowa 1982).

Appellant first asserts that Hughes falsely testified at trial concerning concessions and plea bargains he received in return for his testimony. Upon our review of the evidence, we can discern no such concessions nor plea bargains were provided to Hughes in return for his

testimony. While it does appear that Hughes did mistakenly state that two Nebraska charges had not been dismissed pursuant to a plea bargain when in fact they had been, the record is devoid of evidence showing that the prosecutor knew or should have known that this testimony was false. The Nebraska charges which had been the subject of the plea agreement were totally unrelated to the Iowa murder. Furthermore, no request had been made by Iowa authorities on behalf of Hughes for the plea bargain.

II.

Appellant also asserts that Hughes failed to disclose the fact that he had been charged with conspiracy in the underlying automobile theft. Appellant's claim here too is without merit. Hughes correctly answered questions put to him by the State concerning whether he had been charged with murder. Neither the prosecution nor defense counsel inquired into related charges currently pending in Iowa. That being the case, we can find no falsity in Hughes' testimony in regard to the pendency of related charges.

AFFIRMED.