IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 5-074 / 93-1882

ANTHONY LAMONT JOHNSON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Applicant appeals the denial of his application for postconviction relief. **AFFIRMED.**

Robert E. Weinberg of Wells, McNally & Bowman, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Realff H. Ottesen, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

DONIELSON, C.J.

Anthony Johnson was accused of committing first-degree burglary, second-degree sexual abuse, and first-degree robbery on January 11, 1989. Following his conviction for these offenses, he appealed. In his direct appeal Johnson raised two issues, the composition of his jury panel and the imposition of consecutive sentences. The supreme court affirmed his conviction. *State v. Johnson*, 476 N.W.2d 330 (Iowa 1991). Johnson filed an application for postconviction relief in which he claimed the ineffective assistance of trial and appellate counsel. His application was denied. He now appeals the denial of postconviction relief, and we affirm.

I. POSTCONVICTION RELIEF - APPLICABLE STANDARDS.

Johnson asserts a violation of his constitutional rights and our scope of review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on a claim of ineffective assistance of counsel, Johnson must prove, by a preponderance of the evidence, his counsel failed to perform an essential duty and prejudice resulted. *Id.* Johnson must overcome the strong presumption counsel was competent, and he must prove counsel's error worked to his actual and substantial disadvantage, creating a reasonable probability that but for the error the trial result would have been different. *Id.*

If a defendant fails to raise the issue of ineffective assistance of trial counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). The ineffective assistance of appellate counsel may provide sufficient reason to permit the issue of ineffective assistance of trial counsel to be raised for the first time in postconviction proceedings. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). Johnson argues the ineffective assistance of his

appellate counsel constitutes sufficient reason for his failure to have earlier raised many of the issues presented in his postconviction action.

II. EXCULPATORY EVIDENCE.

Johnson argues the State's failure to disclose material exculpatory information entitles him to a new trial. He asserts his trial counsel was not provided a police report indicating three of the victims' neighbors had identified a composite drawing as resembling a man who drove a yellow car and visited the victims several times a week. Johnson contends that had this information been available to his trial counsel he would have been able to present three witnesses who could have impeached the identification testimony of the victims.

Johnson is correct in asserting a defendant is entitled to the State's exculpatory evidence. *State v. Johnson*, 298 N.W.2d 293, 294 (Iowa 1980). However, Johnson has not carried his burden to establish the information in question was suppressed.

During the postconviction proceedings, Johnson's trial counsel was asked if the county attorney's office had an "open file" by which he was able to review all of the State's police reports. Counsel responded that, to the best of his recollection, the prosecutor's office had made their files available to him as "they're generally very free with making those things available to the defense attorneys."

When asked if he could actually recall having read all the police reports in the three cases involving Johnson, defense counsel testified, "Many reports were made available to me; whether I read all of them, I wouldn't be able to say." Defense counsel could not specifically recall whether he had the information about the canvas of the neighborhood prior to trial. He testified, "Frankly, I don't recall either having had it or not having had it, although I think if I had had it I might have made some use of it, I imagine."

Johnson had the burden to establish exculpatory evidence had not been disclosed. The testimony of Johnson's trial counsel was too vague and indefinite to establish the police report had been suppressed. The district court properly denied this claim for postconviction relief.

III. COMPOSITION OF JURY POOL.

Johnson claims his trial counsel was ineffective for failing to object to the alleged discriminatory composition of the jury pool prior to jury selection. Johnson's trial counsel raised a challenge to the jury pool in his motion for a new trial, and appellate counsel pursued the issue on appeal. The Iowa Supreme Court did not reach the merits of this issue because the defendant had not timely objected to the jury selection process and the issue was not preserved for appellate review. *State v. Johnson*, 476 N.W.2d 330, 33-34 (Iowa 1991).

In his brief, Johnson claims it is clear his trial counsel's failure to timely object to the jury selection process was prejudicial to his right to a fair trial. However, he sets forth no specific objections to Scott County's jury selection procedures. Instead, he merely makes the broad and unsubstantiated allegation that there was a "substantial probability" he was subjected to discriminatory prejudices because there were no African-Americans on the jury panel. Johnson failed to establish statutory or constitutional defects in Scott County's jury selection process, and postconviction relief on this issue was properly denied.

IV. PERJURED TESTIMONY.

Johnson argues his trial counsel was ineffective for failing to demonstrate the State used perjured testimony at his trial. This allegation relates to the testimony of witness Paulette Hicks. Hicks testified in Johnson's trial that Johnson and her fiance,

Kenny Campbell, had access to a gun which was believed to have been used by Johnson to commit the January 11, 1989, offenses. In her testimony in Campbell's subsequent trial on unrelated charges, Hicks again testified Johnson had possession of the gun, but she denied Campbell had ever had it in his possession.

Johnson raised the issue of Hick's allegedly perjurious testimony in a motion for a new trial. He claims his trial counsel was ineffective in pursuing this issue because he merely introduced transcripts of Hick's testimony in the two trials and did not call Hicks or any of the officers who interviewed her as witnesses. The premise of Johnson's argument appears to be that had Hicks or the officers been called to testify, he would have been able to establish the State knew, or should have known, of her allegedly perjurious testimony.

There are several considerations relevant to an allegation of the use of perjured testimony by the State. *See State v. Todden*, 364 N.W.2d 1195, 198-99 (Iowa 1985). One of those considerations is whether the testimony was material. *Id.* We find Hick's conflicting testimony regarding whether Campbell ever had access to the gun was not material to Johnson's prosecution.

During both trials Hicks consistently testified Johnson had possession of the gun. In light of the fact the victims identified Johnson as the perpetrator on at least three different occasions (photo array, live lineup and at trial) and that Johnson's fingerprint was found inside the victims' apartment, Hicks' testimony regarding Johnson's possession of the gun was not material. Since Hick's testimony was not material, Johnson's defense counsel did not breach an essential duty in not calling witnesses to address the issue of perjurious testimony.

V. FAILURE TO MOVE FOR MISTRIAL.

Johnson contends his counsel was ineffective in failing to move for a mistrial when the prosecutor made improper closing remarks during his rebuttal argument. While closing arguments were not recorded, the trial judge made a record in which she summarized what had occurred and what ameliorative steps she had taken in response. Both the prosecution and defense counsel were given the opportunity to state their agreement with her characterization of what had occurred and to supplement the description in the record.

A key aspect of Johnson's defense had been his criticism of the State for failing to conduct DNA tests on semen found on a blanket. In its rebuttal argument the State indicated if the defendant thought there was something worth analyzing on the blanket he could have had it analyzed himself. At that point the trial judge interrupted the proceedings and informed the jury the defendant had absolutely no responsibility to introduce any evidence and the last statement of the county attorney should be totally disregarded.

Despite the strong admonishment given by the trial court, Johnson now claims his trial counsel was ineffective for failing to move for a mistrial. This argument is without merit. A prosecutor may properly comment upon a defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify. *State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992); *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986).

The prosecution's rebuttal comment did not implicate the defendant's fifth amendment right not to testify. Defense counsel had no duty to move for a mistrial on the basis of this comment, and postconviction relief was properly denied.

VI. FAILURE TO OBTAIN DNA EVIDENCE FROM BLANKET.

Johnson claims his trial counsel was ineffective in failing to obtain DNA evidence from the blanket. Trial counsel's testimony and his contemporaneous records reflect this matter was discussed at length with Johnson prior to trial. Johnson approved a trial strategy by which he would forgo the risk of obtaining possibly incriminatory DNA test results, and would instead attack the State for failing to test the semen on the blanket. Johnson claims he did not concur in this strategy, but we agree with the postconviction court that the record strongly indicates he did.

Improvident trial strategy and miscalculated tactics do not necessarily amount to ineffective assistance of counsel. *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992). A defendant who elects to forgo the risks of nearly conclusive DNA testing is bound by his elected strategy. *See id.* Postconviction relief was properly denied on this issue.

VII. FAILURE TO OBJECT TO ADMISSION OF BLANKET, GUN AND FINGERPRINT CARDS.

Johnson claims his trial counsel was ineffective in failing to move under Iowa Rule of Evidence 403 to object to the admission of the blanket, a gun and fingerprint cards at trial. Johnson's counsel testified that at the time of trial he probably thought foundation had been properly established for each of the items and any objection to their admission would be futile and might tend to irritate the jury who would see such objections as obstructionist in nature.

Trial counsel's reasons for not objecting to the admission of these exhibits were reasonable and supported by the record. The blanket, gun and fingerprint cards all related directly to the offenses committed and/or the crime scene. The evidence was highly probative and Johnson presents no argument as to how the exhibits could have

been excluded as unfairly prejudicial under rule 403. Postconviction relief was properly denied on this issue.

VIII. FAILURE TO MOVE TO SUPPRESS EVIDENCE.

Finally, Johnson claims his trial counsel was ineffective for failing to move to suppress evidence obtained as a result of his being taken to the Davenport police station and photographed. The officers who took Johnson to the station testified he went voluntarily and was cooperative with their investigative efforts. Johnson denies this and contends he was unlawfully arrested.

The district court found the officer's testimony in this regard to be more credible than Johnson's version of the events. The record supports this conclusion. Under these circumstances there was no basis for trial counsel to move to suppress evidence, and postconviction relief was properly denied.

In conclusion, upon our de novo review of the record, we find Johnson's trial and appellate counsel breached no essential duties and all of Johnson's claims of ineffective assistance of counsel were properly denied.

AFFIRMED.