FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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MOUSSA M. NASSAR,	)	
Applicant-Appellant,	)	
vs.	)	
STATE OF IOWA,	)	9-205 88-712
Resister-Appellee.	)	

Appeal from the Iowa District Court for Webster County (53053), Newt Draheim, Judge.

The defendant appeals from the district court's adverse ruling granting the State's motion for summary judgment and dismissing his application for postconviction relief following his conviction for delivery of a controlled substance. **AFFIRMED.**

Kevin A. Fors, of Parker & Fors, Ft. Dodge, for applicant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Cynthia Goins, Assistant County Attorney, for resister-appellee.

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

OXBERGER, C.

Applicant-appellant Moussa M. Nassar appeals from the district court's denial of his postconviction petition by granting the State's motion to dismiss and motion for summary judgment.

In 1982 a jury found defendant Nassar guilty of delivery of a controlled substance to undercover police agents. At trial defendant contended a woman named Cheryl Steif actually made the sale in question. On direct appeal of conviction, defendant alleged he was denied due process because the State failed to produce exculpatory evidence material to the outcome of the trial in the form of taped conversations. State v. Nassar, No. 3-292, (Iowa App. Feb. 21, 1984). In that appeal, which was not taken on further review, the court held even if there was no access to the tape prior to trial, it was produced at trial and played to the jury, and a new trial was not necessary. Id. at p. 2.

In Nassar v. Sissel, 792 F.2d 119, 120 (8th Cir. 1986), this same defendant argued he should be given a new trial because the prosecutor failed to produce an August 24, 1981 taped conversation the defendant had with an undercover agent, Daniel Raemaker. The court found he was given access to this tape and was aware of its existence prior to trial because defendant testified about it at trial. Id.

at 121. Again the court held even if he was not given access prior to trial, it was eventually produced at trial. Id. at 122.

Defendant Nassar's present postconviction petition alleges a taped conversation, during which Ms. Steif offered to sell drugs to agents, was not produced prior to trial or during trial. The State's answer to interrogatories filed August 31, 1987, show four tapes existed (1) numbers "1" and "2" contained the same conversations with loud background music and three identifiable voices of Cheryl Steif and agents Phil Creek and Dan Raemaker. Only tape 1 was in the State's possession, (2) number "3" tape contained two conversations between Dan Raemaker and Nassar and number "4" containing a conversation between Nassar and Raemaker. Both of these tapes were introduced at trial.

Our review of specific pretrial rulings convinces us defendant was aware of the existence of all four tapes prior to trial, and the tapes were available to defendant so he or his attorney could listen to them. The March 12, 1982 pretrial ruling appears to specifically discuss the tape in question which the State contended in a pretrial motion was inaudible due to background music. The tapes involving Cheryl Steif were mentioned during the trial as well. Furthermore, it appears defendant had a copy of one March 28, 1981 taped conversation involving Cheryl Steif.

As the district court noted in its summary judgment ruling below, Iowa Code section 663A.8, which deals with postconviction relief, states in part:

> . . . Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

We conclude summary judgment disposition was proper in this case. Iowa Code § 663A.6 (1987); State v. Dryer, 342 N.W.2d 881, 883 (Iowa App. 1983). Defendant has failed to carry his burden to prove sufficient cause for not raising the issues regarding the tapes earlier, given his knowledge of their existence. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). We find defendant waived this issue. Defendant has also failed to show the prejudice resulting if the tapes had not been made available to him prior to trial. Ms. Steif's conversation with the agents and later arrest for making drug sales was part of the trial testimony. The tape which was in the possession of the State was apparently of very low quality.

The trial court's sustaining of the State's motion for summary judgment is affirmed.

AFFIRMED.