IN THE COURT OF APPEALS OF IOWA

No. 0-2000 / 97-1735
Filed March 15, 2000

JOSEPH H. WHITE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

On appeal from the denial of his postconviction relief application, appellant contends his trial counsel was ineffective in failing to object to prejudicial remarks made by the prosecutor during closing arguments. **AFFIRMED.**

Robert A. Wright, Jr., of the Wright Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

Hindsight does not alter the facts of an event but only our perception of that event. Joseph White alleges in hindsight that both his trial and appellate counsel were ineffective on various grounds. The facts surrounding those specific allegations of misconduct demonstrate White did not suffer any identifiable prejudice as a result of his counsels' alleged ineffectiveness. His convictions, therefore, are affirmed.

I. Background Facts & Proceedings.

Shortly before 7 p.m. on November 29, 1992, a young black man entered the crowded Drake Diner in Des Moines. He approached the manager, Cara McGrane, and abruptly shot her in the head with a large caliber handgun. He ordered another Drake Diner employee standing nearby to open the cash register. Tim Burnett, another manager, ran from the back of the restaurant toward the front counter. The gunman turned, shot Burnett, and fled the diner with over $1400. McGrane and Burnett died instantly.

Descriptions of the killer varied from witness to witness. Three witnesses saw the gunman closely and worked with police in developing a composite picture of the gunman. In the following weeks, tips regarding possible suspects began to flood the Des Moines Police Department. An unidentified party claimed Joseph White and his cousin were involved in the shooting. Police also determined the weapon used in the Drake Diner shootings was a rather rare Grizzly .44 magnum, semi-automatic pistol. The police linked a Grizzly .44 magnum to White both prior to and following the November 29 shootings.

Witnesses saw White with a similar gun a few days before the Drake Diner incident. Police recovered and matched shell casings ejected from the murder weapon with an earlier crime scene weapon where White was present. Witnesses also saw White with a similar gun approximately twenty-four hours after the Drake Diner shootings when he accidentally discharged the gun at a house party. This shell casing was recovered and linked to the shell casings left behind at the diner. The three witnesses from the diner all identified White as the gunman after viewing a photo array. White was arrested and charged with robbery and two counts of murder.

There was strong evidence linking the murder weapon to White. The .44 Grizzly was stolen from a residence in Fall City, Washington, in October of 1992. During that same time period, White lived in Kent, Washington, approximately thirty miles from Fall City, and had visited the residence from which the gun was stolen. The weapon had been fired in White's Washington apartment in the weeks following the weapon's theft. A Kent police officer seized a .44 magnum shell casing in a rain gutter on the roof of White's apartment, a .44 caliber ammunition clip, another spent shell casing, and a harness for a shoulder holster during a search of White's apartment. These shell casings were also shown to have been ejected from the murder weapon.

White filed a motion to suppress the evidence seized from his Kent apartment and a motion to change venue. The trial court denied both motions. At trial, five witnesses identified White as the man who shot McGrane and Burnett. The jury found White guilty of robbery and two counts of murder. White

filed a motion for a new trial on the basis of newly-discovered evidence claiming the State had withheld exculpatory evidence regarding a witness, Jodi Guill. Guill had reported to police she was driving near the Drake Diner around the time of the shooting. She stated a young black man wearing a dark jacket and a hooded sweatshirt with a stocking cap or ski mask ran into the street in front of her car. Guill was shown the photo array and identified someone other than White as the man she saw. White received a police report recounting Guill's statement but no information regarding her failure to identify White. The trial court overruled White's motion for new trial, finding although the State had withheld exculpatory evidence the evidence was immaterial because Guill was not credible. White was sentenced to a term of life imprisonment.

White appealed his conviction asserting seven independent claims of error. This court in *State v. White*, 530 N.W.2d 77 (Iowa App. 1994) affirmed the conviction, but preserved his claim of ineffective assistance of counsel for postconviction relief. White filed a petition for postconviction relief in Polk County District Court alleging his trial counsel was ineffective for failing to object to the closing remarks of the State and that his appellate counsel was ineffective in failing to properly posit the issue of (1) the exculpatory evidence withheld from defense counsel, (2) trial counsel's handling of White's motion for change of venue, and (3) trial counsel's failure to timely file White's motion to suppress. The district court denied White postconviction relief finding he failed to show any identifiable prejudice from the alleged errors. White now appeals the district court's finding.

II. Standard of Review.

Normally, a trial court's denial of an application for postconviction relief is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). If, however, the applicant asserts violations of constitutional safeguards, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

III. Ineffective Assistance of Counsel.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. With regard to the first prong, White must prove the performance of both trial and appellate counsel was not within the normal range of competence. *State v. Grant*, ___ N.W.2d ___ (Iowa 1999). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). 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). Therefore, we may affirm White's conviction based on his failure to prove

prejudice without deciding whether his counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). Armed with these principles, we now address each of petitioner's assignments of error.

IV. The State's Closing Remarks.

In closing arguments, White's trial counsel made the following statement:

> And it's, basically, the State's theory that, of course, Mr. White brought that gun to the State of Iowa. That's not in controversy. And that's tremendous police work that disclosed that fact. And had that not been disclosed by good police work, you and I both know that Joe White, Jr., would not have admitted to bringing that gun to the state of Iowa.

In response to that statement the prosecutor replied,

> And Mr. Wellman tells you with absolute candor that you know darn well when Joe White took the witness stand, if Mr. Ramey hadn't been able to absolutely prove that the gun came from Washington with Joe White he would have lied to you about that. That's what he told you just a few minutes ago, folks. I'll admit it to you; if my client hadn't known that that son of gun from the government over there could prove a case against him, he would have lied. That's just what he just told you. And if Mr. Ramey can't prove it, by George, we'll lie about it. That's what he told you. Mr. Wellman tells you: "We'll lie if they can't prove it to an absolute fact."

With that final retort, defense counsel audibly scoffed at the prosecutor's statements. The prosecutor replied to defense counsel's unrestrained laughter by stating,

> I'm glad your amused, Mr. Wellman; I'm not. I am disgusted that an attorney would stand up here and tell you that: that if I can't prove it to you, I'll lie. He is not your government, thank goodness. You all ought to thank goodness.

White claims a more appropriate response to the prosecutor's disparaging comments would be an objection, and counsel's failure to do so resulted in ineffective assistance of trial counsel.

For White to succeed on his claim of ineffective assistance of counsel, he must show his trial counsel's failure to object was outside the normal range of competency. Counsel, however, would have no grounds for objection unless the government's comments could support a claim for prosecutorial misconduct. Therefore, White must first show prosecutorial misconduct. Failure to do so is fatal to his overarching claim of ineffective assistance of counsel.

To support a claim of prosecutorial misconduct, White must show (1) misconduct on the part of the State and (2) prejudice so grave that he was denied his constitutional right to a fair trial. *See State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997). A factor important to determining prejudice is the strength of the evidence supporting a defendant's guilt. *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). "If the evidence is strong, an inappropriate comment by a prosecutor is unlikely to contribute to a conviction." *State v. Escobedo*, 573 N.W.2d at 277 (citation omitted).

Because the remarks of the State do not support a claim for prosecutorial misconduct, we cannot conclude trial counsel failed to perform an essential duty. There is little doubt the melodramatic rantings of the prosecutor were improper. Besides wrongly characterizing defense counsel's statement, the prosecutor inexcusably attacked defense counsel's character and credibility. But given the strength of the evidence supporting White's guilt, we find the comments did not likely contribute to the jury's verdict. The evidence established White possessed the murder weapon before, during, and after the murders. No less than five witnesses identified White as the person who entered the Drake Diner and shot

Cara McGrane and Tim Burnett. Several days before the murders defendant did not have any money, but immediately after he was able to rent a luxury hotel room and purchase pizza for friends. The evidence is too overwhelming to support a claim for prosecutorial misconduct. We cannot fault trial counsel for failing to make an objection that would have no practical bearing on the trial.

V. Exculpatory Evidence.

White next claims his appellate counsel was ineffective for failing to properly posit the issue of the exculpatory evidence withheld from defense counsel. He does not articulate, however, what essential duty appellate counsel failed to perform or how the issue should have properly been asserted. Yet, even if we were to extrapolate from White's broad claim some identifiable deficiency on the part of appellate counsel, this court has previously held White did not suffer any prejudice from the State's withholding of evidence. *See State v. White*, 530 N.W.2d at 84-85. As the crux of this issue had previously been decided adverse to petitioner, his claim of ineffective assistance of appellate counsel must fail as he cannot show prejudice.

VI. Change of Venue.

White's third claim of error alleges appellate counsel was ineffective in failing to properly present the issue of trial counsel's failure to timely move for a change of venue. White moved for a change of venue outside the forty-day time limitation provided by Iowa Rule of Criminal Procedure 10(4). Upon agreement of defense counsel, the State, and the court, the motion was heard on the merits. The trial court later denied the motion. On direct appeal, White alleged his

motion for change of venue was improperly denied. The State countered by arguing the issue was waived, as the motion was untimely. White's appellate counsel failed to apprise this court of the agreement, and we ruled the issue waived. *See id.* at 85. White claims counsel's failure to respond constitutes ineffective assistance of appellate counsel.

To succeed on this claim, White must show that but for appellant counsel's failure to respond to the waiver argument, there is a reasonable probability this court on direct appeal would have found the trial court abused its discretion in denying the change of venue, reversed the conviction, and remanded the case for new trial.

Pretrial publicity warrants a change of venue when "such a degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county." Iowa R. Crim. P. 10(10)(b). Prejudice is evidenced by attendant trial publicity so pervasive and inflammatory that prejudice must be presumed. *State v. Voelkers*, 547 N.W.2d 625, 629 (Iowa App. 1996). Whether publicity rises to the level of being presumptively prejudicial depends on the nature, tone, and accuracy of the articles; their timing in relation to the trial; and the impact of the publicity on the jurors as revealed through voir dire. *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990).

We find the district court did not abuse its discretion in denying White's motion for change of venue. While there was substantial pretrial publicity surrounding these events, the resulting media coverage was primarily factual and

accurate in nature. Furthermore, the vast majority of the media coverage was aired or published prior to White's arrest. Of the forty-six articles submitted by White in support of his motion only four identified White. Finally, a substantial period of time had passed between the height of the media coverage and the time of trial. Because the trial court did not abuse its discretion in denying White's motion for a change of venue, White cannot show the requisite prejudice to support his claim of ineffective assistance of appellate counsel.

VII. Motion to Suppress.

White's final claim of error alleges appellate counsel was ineffective in failing to properly present the issue of trial counsel's failure to timely file a motion to suppress. White sought to suppress evidence gathered at his apartment in Washington outside the forty-day time limitation provided by Iowa Rule of Criminal Procedure 10(4). Trial counsel in his postconviction testimony alleged the State agreed to waive the timeliness of the filing and the motion was heard on the merits. The trial court later denied the motion. On direct appeal, White alleged the trial court improperly denied his motion to suppress. The State countered by arguing the issue was waived as the motion was untimely. We ruled the issue waived. *See id.* at 85.

For White to succeed in proving the prejudice prong of his ineffective assistance of appellate counsel claim, he must show this court would have probably overturned the trial court's denial of his motion to suppress on direct appeal. Because we can resolve this issue based solely on the prejudice prong

of ineffective assistance of counsel, we will address the merits of White's motion to suppress.

While White was living in Washington, the manager of the apartment complex where he lived with his mother called the Kent Police Department and reported a gun had recently been fired at the complex. An officer went to the apartment complex to investigate. The discharge of a firearm within city limits was illegal under city ordinances. The complex manager said a "large firearm" had probably been fired on the roof of one of the apartment buildings. The person who reported the shot also heard the sound of a shell casing falling into a rain gutter. Based on the proximity of the reported discharge and the officer's previous dealings with White, the officer began his investigation by going to White's apartment. With the consent of White's mother, the officer searched the apartment and the roof area immediately outside White's bedroom. The officer seized a .44 caliber shell casing in the rain gutter immediately outside White's bedroom window, a .44 caliber ammunition clip, another spent shell casing, and a harness for a shoulder holster in White's bedroom. White does not claim the officer's presence was improper, but that the items seized were not clearly evidence of a crime.

The Fourth Amendment does not protect against all searches and seizures; its protection extends only to those that are unreasonable. "A search and seizure without a valid warrant is per se unreasonable unless it comes within a recognized exception such as consent, search incident to arrest, probable cause and exigent circumstances, or plain view." *State v. Manna*, 534 N.W.2d

642, 644 (Iowa 1995). "The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Washington v. Chrisman*, 455 U.S. 1, 5-6, 102 S. Ct. 812, 816, 70 L. Ed. 2d 778, 784 (1982). It is axiomatic that officers have a right to be in a home or an apartment if the homeowner or tenant grants them consent to search the premises. *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996).

The evidence seized by the officer was clearly incriminating. The officer received information that a large caliber handgun had been fired on a roof near White's apartment building. The officer was properly in White's apartment as he was granted permission to search the premises. He located a spent shell casing on the roof of White's apartment building.[1] The officer found a similar shell casing, an ammunition clip containing the same caliber of bullets as the shell casing, and a harness for a shoulder holster. The officer clearly had probable cause to believe the evidence pertained to the illegal discharge of the firearm. Because the trial court properly denied White's motion to suppress, his claim of ineffective assistance of appellate counsel must fail, as he cannot demonstrate prejudice. The convictions are affirmed.

AFFIRMED.

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[1] The seizure of this shell casing does not implicate the Fourth Amendment, as White did not have a reasonable expectation of privacy in the gutter of his apartment building. *See United States v. Arboleda*, 633 F.2d 985, 991 (2d Cir. 1980) (ruling defendant had no expectation of privacy in drugs placed on the fire escape outside his apartment window).