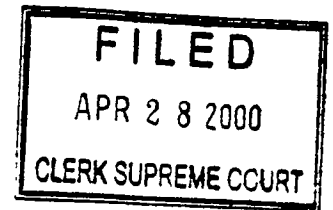


IN THE COURT OF APPEALS OF IOWA

No. 0-91 / 99-0381
Filed April 28, 2000



RICKY LEE WHITE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

White appeals from the grant of summary judgment dismissing his postconviction relief application. **AFFIRMED.**

James N. Daane of Buckmeier & Daane, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill R. Pitsenbarger, Assistant County Attorney, for appellee.

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

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HUTINK, P.J.

I. Background Facts and Proceedings.

White was convicted of first-degree burglary based on allegations that he entered Diana Dallen's home and assaulted Steve Tott. As a result, the district court sentenced him to a term of incarceration not to exceed twenty-five years.

On direct appeal we affirmed, citing the sufficiency of the evidence supporting White's conviction. See *State v. White*, No. 93-1706 (Iowa App. May 30, 1995). We rejected White's ineffective assistance of counsel claims premised on trial counsel's failure to challenge the jury panel, failure to object to a jury instruction, and failure to move for a mistrial following misconduct by the prosecution in final argument. White's ineffective assistance of counsel claim citing counsel's failure to call two defense witnesses was preserved for postconviction relief.

In White's postconviction relief petition he alleged:

Trial attorney failed to subpoena two witnesses, ANGIE PURCELL and KEVIN COUNTER. Trial attorney failed to object to incomplete jury instructions. These witnesses would have testified that applicant was invited to victims' premises and did not strike the victim. Furthermore, applicant's trial attorney failed to develop facts that victims requested charges against applicant be dropped.

The State denied White's allegations and moved for summary judgment. In its motion ~~the~~ **State** argued that all but one of White's ineffective assistance of counsel claims had been resolved on direct appeal. The State further claimed counsel's failure to call Purcell and Counter was a reasonable strategic decision and White's ineffective assistance of counsel claim accordingly failed as a matter

of law. The State's motion for summary judgment was supported by an affidavit from White's trial counsel. That affidavit provides, in relevant part:

The Woodbury County Public Defender's Office reviewed the testimony of the potential defense witness, Kevin Counter, who my client mentioned before trial.

The investigator for the Woodbury County Public Defender's Office, Elroy Fairbanks, interviewed Kevin Counter. Kevin Counter stated that he knew nothing of the incident as he was not present inside the residence. I also spoke with Kevin Counter and confirmed the same information. On September 20, 1993, Elroy Fairbanks related information he received from the investigator for the Woodbury County Attorney's Office, Dick Matousek. Elroy Fairbanks learned that Ricky Lee White had a telephone conversation with Kevin Counter and urged him to lie under oath on his behalf.

The name of Angie Purcell came up after the jury verdict, but before sentencing. Angie Purcell was a juvenile and a friend to the victim's family. The Woodbury County Public Defender's Office learned that Angie Purcell would confirm the victim's story and that Angie Purcell was not available for trial. Since Angie Purcell was a juvenile, our office would not discuss a criminal matter with a juvenile without parental consent. The Woodbury County Public Defender's Office could not obtain parental consent to speak with Angie Purcell.

Based on my review of the potential witnesses in White's case, I determined that all of the potential defense witnesses were either not helpful to White's case or were damaging to White's case. I also had reason to believe that calling Kevin Counter might subject Ricky Lee White to additional criminal prosecution. Because of these concerns, I decided not to call these witnesses.

I concluded that White's best defense was to attack the credibility of the State's witnesses and to raise a reasonable doubt as to whether Ricky Lee White entered the residence without permission. I believe that my decisions in regard to the admission of evidence and my decisions not to call defense witnesses were appropriate, given the law and this defense.

White resisted the State's motion claiming our decision on direct appeal was not controlling because the record on these issues was "so inadequate on direct appeal that a proper determination of those issues was impossible." White also argued counsel's affidavit was contradicted by affidavits from the

investigator for the public defender and Counter. According to White, these affidavits establish that the trial testimony of at least one witness, Kevin Counter, Jr., would have established that all of the State's witnesses were lying on numerous significant factual allegations in their testimony."

White's resistance included the additional allegation that counsel was ineffective in failing to make the necessary offer of proof to preserve the issue of suppression of the testimony of the "victims" request to the County Attorney to drop all charges against the Defendant. Significant factual issues also exist as to why this issue was not raised on Defendant's direct appeal.

The latter allegation referred to the district court's disposition of the State's pretrial motion in limine seeking to exclude evidence that the victims Diana Dallen and Steve Tott attempted to withdraw their complaints against White.

The district court concluded White's allegations of ineffective assistance raised and resolved on direct appeal provided no basis for relief in these proceedings. The court also concluded the disposition of the State's motion in limine was correct and neither trial nor appellate counsel was duty bound to pursue a meritless argument challenging that ruling.

Lastly, the district court rejected White's claims concerning the testimony of Kevin Counter, Jr. and Angie Purcell. The court concluded the content of Counter's affidavit failed to contradict the testimony of other witnesses in any material respect and disclosed the absence of any observations made at the time the offense was committed. Concerning Angie Purcell, the court concluded, "Nor is there anything to suggest that if Angie Purcell had testified that she would have testified differently from that of the other witnesses in the trial." The court

determined as a matter of law, White could not meet his burden to show either trial or appellate counsel was ineffective and dismissed White's petition for postconviction relief.

On appeal, White claims the summary judgment record was insufficient to resolve his ineffective assistance of counsel claims and the district court erred by concluding otherwise.

II. Standard of Review.

Postconviction relief proceedings are actions at law and are reviewed on error. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997). But when the postconviction applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). We apply the de novo review in claims of ineffective assistance of counsel. *Id.*

III. The Merits.

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). 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 convictions on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The court may grant summary judgment in a postconviction relief proceeding "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits" that there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See *Summage v. State*, 579 N.W.2d 821, 821 (Iowa 1998). Summary disposition is not proper if a material issue of fact exists. *Id.* The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa R. Civ. P. 237(e). A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa App. 1994).

A. Failure to Call Counter and Purcell as Defense Witnesses.

White claims the summary judgment record contains affidavits contradicting counsel's affidavit explaining why these witnesses were not called. We disagree. Although Counter's affidavit indicates he does not recall speaking with White's attorney and denies any allegation that White asked him to lie, it nevertheless confirms counsel's belief Counter was not present when the events resulting in the burglary charges against White occurred. Moreover, whether

White's attorney actually spoke to Counter or Counter was asked to lie does not present a material factual dispute when considered in the context of counsel's tactical or strategic choices. Similarly, our review of the summary judgment record fails to disclose any factual dispute concerning Angie Purcell's testimony or counsel's assessment of its value. The remaining issue then is the legal consequences flowing from the undisputed material facts revealed in the summary judgment record.

We conclude counsel's decision not to call either of these prospective witnesses at trial was based on investigative facts and conclusions then known to counsel. The summary judgment record clearly indicates counsel made a reasonable strategic choice based on these facts, and the State was accordingly entitled to judgment as a matter of law on this issue. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989) (reversal not warranted where counsel has made a reasonable decision concerning trial tactics and strategy.)

B. Motion in Limine.

As noted earlier, the motion in limine concerned the State's efforts to exclude evidence of the victims' efforts to drop all charges against White. The district court granted the State's motion in limine, stating:

And the reason for this ruling at this time, without knowing more specifically as to why this alleged request to dismiss was made on behalf of the victim or the victims, I find it would be a collateral issue with a tendency to mislead and confuse the jury without more specifics. So that's the basis as to paragraph two, the first portion thereof, which I believe was the only portion of the motion that was resisted by the defendant.

This issue implicates the effectiveness of both trial and appellate counsel. White argues trial counsel was ineffective for not preserving this issue for direct appeal by making the requisite offer of proof at trial. *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997) (any error resulting from ruling on motion in limine is not preserved without timely objection or offer of proof). White seeks to avoid waiver of this issue for failing to raise it on direct appeal noting appellate counsel's failure to challenge trial counsel's effectiveness on direct appeal. See Iowa Code § 822.8; *Osborn v. State*, 573 N.W.2d 917, 921-22 (Iowa 1998) (claim not properly raised on direct appeal cannot be litigated on postconviction relief absent showing of sufficient cause for not raising it on direct appeal). Ineffective assistance of appellate counsel or factual or legal matters excusably unknown at the time of trial may provide sufficient cause. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999); *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

The ineffectiveness of appellate counsel in this circumstance is measured by the same two-prong test governing ineffective assistance of trial counsel claims. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991). A heavy responsibility devolves upon an appellate attorney when it comes to assessing possible assignments of error. Of course error is waived if it is not assigned. On the other hand, most experienced appellate attorneys or judges will attest it is a tactical blunder, often devastating to an appellant to assign every conceivable complaint. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987).

In these proceedings the district court denied postconviction relief on this issue stating:

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~~The trial court~~ sustained the State's motion in limine. ~~The Court~~ ~~permitted~~ ~~to~~ ~~do~~ ~~so~~. Such testimony is not relevant. "In our criminal justice system, the decision whether to prosecute, and if so, what charges, is a matter ordinarily within the discretion of the duly elected prosecutor." *State v. District Court*, 568 N.W.2d 505, 508 (Iowa 1997).

White contends the district court's ruling fails to accommodate the legitimate use of this evidence to impeach the victims' trial testimony. He also claims appellate counsel's affidavit, stating appellate counsel did not recall why ineffectiveness of trial counsel was not raised as an issue on appeal, leaves disputed factual issues necessitating a trial on the merits of his postconviction petition.

White's argument is premised on the relevancy of the fact that one or more of the victims asked the county attorney to drop the charges. Neither the trial nor summary judgment record refers to any evidence of their motive other than the State's unsupported claim that they were offered money to do so. In the absence of evidence indicating why the request was made or specification of a related factual dispute in White's resistance to the State's motion for summary judgment, we are unable to say the district court's ruling on the motion in limine was incorrect or that either trial or appellate counsel had a duty to pursue this issue at trial or on appeal. In other words, White's general allegation concerning appellate counsel's affidavit is insufficient to sustain his burden to set forth specific facts showing a genuine issue for trial.

We, finding as a matter of law no breach of an essential duty by trial or appellate counsel, affirm on this issue.

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C. Remaining Issues.

All of White's remaining allegations were raised and resolved on direct appeal. They were accordingly precluded from the court's consideration in postconviction relief. See Iowa Code § 822.8.

The judgment of the district court is affirmed.

AFFIRMED.

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