IN THE COURT OF APPEALS OF IOWA

No. 1-592 / 10-0336
Filed August 24, 2011

DEMETRIUS L. DAVIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

A postconviction relief applicant alleges his trial and postconviction attorneys were ineffective in several respects. **AFFIRMED.**

Matthew C. Moore of Demichelis Law Firm P.C., Chariton, for appellant.

Demetrius L. Davis, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

A postconviction relief applicant, Demetrius Davis, alleges his trial and postconviction attorneys were ineffective in several respects. Because Davis has failed to prove either that counsel breached an essential duty or that prejudice resulted, his ineffective-assistance-of-counsel claims fail.

I. Background Facts and Proceedings.

On December 11, 2003, two men waylaid a pizza delivery person. The shorter of the men repeatedly hit the delivery man in the face, while the other rummaged in the victim's pockets. Demetrius Davis and his cousin Marco Johnson were jointly charged with the robbery. Davis admitted to police that he was present at the apartment on the night in question, admitted that he told the group at the apartment how his acquaintances used to steal from pizza delivery men, and admitted that he was behind Johnson as he walked up to the pizza man and began punching the delivery man until the man fell bleeding. Davis also admitted Johnson took the pizza and the two of them ate the pizza later that night. Johnson pleaded guilty prior to trial.

Davis's first trial ended in a hung jury. On retrial, he was convicted of first-degree robbery. This court affirmed his conviction on appeal. *See State v. Davis*, No. 05-1339 (Iowa Ct. App. June 27, 2007) (outlining evidence and rejecting claim the verdict was contrary to the weight of the evidence; finding constitutional claim related to in-court identification of Davis by the victim was not preserved; rejecting claim that certain witnesses' testimony was so inconsistent it

should have been excluded; and finding the denial of a spoliation jury instruction was not an abuse of discretion).

Davis then filed an application for postconviction relief asserting numerous claims of ineffective assistance of counsel. The district court denied postconviction relief and Davis appeals.

II. Scope and Standard of Review.

"The standard of review on appeal from the denial of postconviction relief is for errors at law." *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). We review ineffective-assistance-of-counsel claims de novo. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009).

III. Ineffective-assistance-of-counsel.

> To succeed on an ineffective-assistance-of-counsel claim, a defendant must show: "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). "[W]e measure counsel's performance against the standard of a reasonably competent practitioner." *Id.* (citing *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001)). In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy. *Fullenwider v. State*, 674 N.W.2d 73, 75 (Iowa 2004); *see also Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989) ("Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel.").
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> "To establish prejudice, a defendant must show the probability of a different result is 'sufficient to undermine confidence in the outcome.'" *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). "In determining whether this standard has been met, we must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003) (citing *Strickland*, 466 U.S. at 695–96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698). "Unlike the situation in which error has been preserved and the court presumes prejudice, in this case it is the defendant's

> burden to demonstrate a reasonable probability of a different result." *Reynolds*, 746 N.W.2d at 845 (citation omitted).

Everett v. State, 789 N.W.2d 151, 158 (Iowa 2010).

A. Failure to have Johnson testify. The district court first ruled Davis's trial attorney was not ineffective in failing to call Johnson to testify, writing:

> [Trial counsel] testified that he was aware, by letter, that Mr. Johnson was willing to testify on behalf of Mr. Davis. Approximately seven to ten days prior to the trial, wherein the petitioner was found guilty of robbery in the first degree, [trial counsel] contacted Mr. Johnson at the penitentiary. [Trial counsel] discussed the potential testimony with Mr. Johnson and with Mr. Johnson's counselor. Both Mr. Johnson and Mr. Johnson's counselor indicated that Mr. Johnson would not testify at the criminal trial. As a result, [trial counsel] did not call Mr. Johnson to testify and feared that given [sic] Mr. Johnson's unknown testimony, his long arrest history and the possibility of calling a witness who may commit perjury on the stand. [Trial counsel] insisted during his testimony that his client, the petitioner in this case, was made aware of this decision and concurred in the decision. [Trial counsel's] decision not to call Mr. Johnson to the stand was appropriate and ethical.

Upon our de novo review, we agree with the district court that Davis has failed to prove trial counsel's performance was deficient in failing to call Johnson. Johnson refused to testify at trial; Davis was informed of his refusal, and agreed to the decision that Johnson not be a witness for his defense.

In addition to trial counsel's testimony that Johnson refused to testify at trial, we note Johnson testified at the postconviction trial and admitted he initially told the investigating officer he was not involved in the robbery, that it was Davis who had committed it. Johnson stated at the postconviction trial that he was "lying back then." Given Johnson's questionable credibility and his prior

statements to police that it was Davis who committed the robbery, we also conclude Davis cannot establish prejudice.

B. Failure to challenge serious injury element of first-degree robbery. At trial, the victim testified that as a result of being hit in the face during the robbery he suffered an orbital fracture to his left eye, which required that a metal screw be implanted to hold his facial bones together. He also testified his vision has been permanently impaired.

The district court found trial counsel was not ineffective in failing to challenge whether the pizza delivery man suffered a serious injury (a necessary element of first-degree robbery as charged). Davis offers no argument or evidence that the victim did not in fact suffer these injuries. The district court found the injuries suffered by the victim were serious injuries as defined by law. *See* Iowa Code § 702.18 (defining "serious injury" as including a bodily injury that causes "serious permanent disfigurement" or "protracted loss or impairment of the function of any bodily member or organ"); *see also State v. Hanes*, 790 N.W.2d 545, 554 (Iowa 2010) (discussing serious injury as defined in section 702.18 and citing *State v. Phams*, 342 N.W.2d 792, 796 (Iowa 1983) ("We have recognized that the statutory definition of serious injury includes those injuries which leave the victim permanently scarred or twisted . . . , [in contrast to] a black eye, a bloody nose, and even a simple broken arm or leg." (citation and internal quotations omitted))). Counsel is not ineffective in failing to raise a meritless claim. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa 2009).

Trial counsel testified, "We were trying to make this about pizza, not so much about somebody's face that ended up looking like one." It was the defense theory that Davis ran from the scene prior to the assault and thus did not participate in the offense and was not present at the time of the assault. Davis argues in his pro se brief that "no 'reasonably competent attorney' would have tried to argue that Davis was not in the vicinity of the robbery given the weight of all the other evidence to the contrary."

> [W]e do not delve into trial tactics and strategy "when they do not clearly appear to have been misguided." *State v. Couser*, 567 N.W.2d 657, 659 (Iowa 1997). In other words, "we will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail." *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984) ("we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently").

State v. Ondayog, 722 N.W.2d 778, 786 (Iowa 2006). The question is whether the trial counsel performed competently "under the entire record and totality of the circumstances." *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). Defense counsel here was faced with a serious challenge given the state's evidence and Davis has not proved that counsel performed other than competently.

Some family members offered testimony (albeit inconsistent with statements to police officers) in support of Davis's defense. Defense counsel vigorously cross-examined witnesses and made the most of the available evidence. Given the options available, we cannot say that defense counsel's trial strategy was unreasonable.

C. Failure to "allow" Davis to testify on his own behalf. The district court rejected Davis's claim that his trial counsel was ineffective in not allowing him to testify on his own behalf. The court specifically found that trial counsel "allowed the defendant to decide whether to testify or not after providing him with sound advice." Davis himself testified he was the one that made the decision not to testify at the second trial. This claim is not supported by the record and is without merit.

D. Failure to preserve a constitutional challenge to photo line-up. On direct appeal from his conviction, Davis challenged the victim's in-court identification of him as one of the robbers based upon his claim the photo line-up was "constitutionally tainted." We concluded the issue was never ruled upon by the trial court and thus was not preserved for our review. *See Davis*, No. 05-1339 at 16. In his postconviction action, Davis contends trial counsel was ineffective in failing to preserve the issue. The district court wrote:

> The constitutional issue presented was whether the photographic lineup was unduly suggestive. . . . This Court had the opportunity to preside during the first trial which resulted in a hung jury. The Court recalls this case as it was unusual because Mr. Davis's picture was inadvertently in the photographic lineup when he was an unknown suspect at the time. The Court did not believe at the time of the first trial, nor does the Court believe at this point that the photographic lineup was unduly suggestive. The Court does not find that [trial counsel] was ineffective. Even if the Court did find [trial counsel to be ineffective], the Court does not believe that there is a reasonable probability that because of [trial counsel's] errors the result of the proceeding would have been different. There was ample evidence supporting Mr. Davis's involvement in this offense without the photographic lineup.

We find no reason to conclude otherwise. This court addressed the sufficiency of the evidence in the first appeal and concluded "there is more than

enough evidence for the jury to conclude that at a minimum Davis knowingly advised and encouraged the robbery and was aware of [Johnson's] specific intent to steal from [the victim]." We do not revisit the issue in this action. *See Armento v. Baughman*, 290 N.W.2d 11, 12 (Iowa 1980) ("A person is barred from relitigating in a postconviction proceeding any ground which was finally adjudicated on direct appeal.").

Davis now also argues "[n]o proper foundation was laid for [the victim] to be allowed to make an in-court identification" and "[f]ailing to move to suppress an unreliable identification constitutes ineffective assistance of counsel." These were not matters asserted or ruled upon below and we will not address them. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

E. Failure to have closing arguments recorded. Davis argues there "is no conceivable benefit to a defendant in Davis' position by waiving the recording of closing arguments." Even if we accept this statement, Davis has not proved counsel was ineffective in having done so. As the district court observed, "it was extremely uncommon for closing arguments to be reported in 2005" when Davis's case went to trial.[1] Davis has not proved counsel's performance was deficient in having waived closing arguments and points to no statement made in closing arguments that he alleges were unfairly prejudicial to his defense.

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[1] *See* 2010 Iowa Ct. Order 0012 (effective August 16, 2010) (amending Iowa R. Crim. P. 2.19(4) to require: "Opening statements and closing arguments shall be reported. The reporting of opening statements and closing arguments shall not be waived as provided in Iowa R. Civ. P. 1.903(2).").

F. Failure to provide updated case law in support of request for spoliation instruction. Davis argues counsel was ineffective in not providing updated case law in support of his request for a spoliation instruction. On direct appeal, this court rejected the claim that the district court erred in failing to give such an instruction and cited to the authority which Davis contends trial counsel should have provided. *State v. Davis*, No. 05-1339 (Iowa Ct. App. 2007); *see State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004) (concluding a spoliation instruction should be given if substantial evidence has been introduced on each of four elements: (1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged with its destruction; (3) the evidence "would have been admissible at trial"; and (4) "the party responsible for its destruction did so intentionally"). We determined there was not substantial evidence of the fourth element. *Davis*, No. 05-1339. Moreover, we concluded that even if the court erred in failing to instruct the jury as requested, Davis was not prejudiced. *Id.; see Hartsfield*, 681 N.W.2d at 633 (noting "[i]nstructional error is not reversible error unless there is prejudice"). Having failed to establish any prejudice resulted from trial counsel's failure to cite "updated case law," this claim of ineffective assistance fails.

G. Pro se claims.[2] In his pro se brief, Davis contends postconviction counsel was ineffective in failing to assert that his trial counsel allowed "false testimony to go uncorrected at trial." He also asserts there is insufficient evidence he caused serious injury (as opposed to Johnson) and postconviction

[2] We have already considered and rejected Davis's pro se claim that trial counsel was ineffective in failing to have Johnson or the defendant testify.

counsel was ineffective in failing to argue that this court improperly affirmed on a theory of aiding and abetting. Neither of these claims is properly before us as they were not presented to the district court. *See Meier*, 641 N.W.2d at 537.

IV. Conclusion.

We have considered all claims raised and, for the reasons stated above, we affirm the district court's denial of Davis's application for postconviction relief.

AFFIRMED.