IN THE COURT OF APPEALS OF IOWA

No. 1-621 / 10-1302
Filed September 8, 2011

LARRY PERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glen E. Pille, Judge.

Larry Perry appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee State.

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

DANILSON, J.

Larry Perry appeals the district court decision denying his application for postconviction relief. Perry alleges his trial counsel was ineffective in: (1) failing to resist a continuance of the trial that was granted because of the State's late discovery of a patrol car recording of Perry and co-defendant Watson's conversations; (2) failing to seek exclusion of the foundational witness and the patrol car recording from evidence due to the State's untimely notice of its intention to use the recording and the foundational witness at trial; and (3) failing to move to suppress evidence of the crack cocaine found in the car. Upon our review, we conclude Perry received effective assistance of counsel as the district court had discretion to grant a continuance whether or not it was resisted, and the continuance permitted Perry's attorney to be fully prepared at trial for the State's newly discovered evidence. We therefore affirm the postconviction court's order denying Perry's application for postconviction relief.

I. Background Facts and Proceedings.

Perry was arrested after police executed a warrant on a vehicle driven by Cecil Watson. Perry was a passenger in the vehicle. Our January 22, 2009 ruling on Perry's direct appeal in *State v. Perry*, No. 08-0448 (Iowa Ct. App. Jan. 22, 2009), contains a factual and procedural background, which we reiterate in part:

> On August 30, 2007, police officers obtained a warrant to search Cecil Watson's residence and person. Watson was not at home when officers arrived to search his residence. Later that day, officers received a tip that Watson would be driving to CiCi's Pizza and waited for him in unmarked vehicles. When Watson pulled into the parking lot, officers blocked in the vehicle driven by Watson and

converged on the vehicle to execute the warrant. Several officers removed Watson from the car, handcuffed him, and searched him.

Officers also approached the passenger side of the car where Larry Perry was seated. When an officer ordered Perry to show his hands, Perry raised his right hand but refused to show his left hand. Lieutenant Eric Nation testified that he saw Perry throw a baggie containing a white substance onto the empty driver's seat vacated by Watson. This baggie was later found to contain a 29.18 gram rock of crack cocaine. After officers removed Perry from the vehicle, they found another baggie containing 1.69 grams of crack cocaine on the left side of the passenger seat, near the area Perry's hand was located when he refused to show it. Officers found a third baggie containing 5.66 grams of crack cocaine inside a brown paper sack on the driver's seat. Officers found no money, drug paraphernalia, or other indicia of drug involvement on Perry's person. The amount of cocaine found in the vehicle was consistent with drug dealing, as it was an amount greater than would be held for personal use. No tax stamps were affixed to the crack cocaine.

While officers searched the vehicle, they left Perry and Watson alone in the back seat of a patrol car with a video camera that, unbeknownst to them, was recording their conversation. Perry and Watson discussed the story they would tell police and tried to identify the person who had notified the police of their location. The recording primarily consists of Perry talking and Watson mumbling in agreement.

The State charged both Perry and Watson with conspiracy to deliver crack cocaine in excess of ten grams in violation of Iowa Code section 124.401(1)(b)(3) (2005); possession of crack cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(b)(3); and failure to possess a tax stamp in violation of Iowa Code sections 453B.3 and 453B.12.

. . . .

Perry and Watson were both convicted of all three charges against them.

Perry's conviction was affirmed on direct appeal. *See State v. Perry*, No. 08-0448 (Iowa Ct. App. Jan. 22, 2009). On June 22, 2009, Perry filed an application for postconviction relief, alleging ineffective assistance of trial and appellate counsel. On July 27, 2009, the State filed a motion for summary disposition. On January 27, 2010, Perry, through counsel, filed a resistance and

an amended application. Following a hearing on August 3, 2010, the district court denied Perry's application. Perry now appeals.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.907 (2009); *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Those claims concerning alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Merits.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam*, 745 N.W.2d at 721. We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate

representation. *Millam*, 745 N.W.2d at 721. It is not enough for a postconviction applicant to assert that defense counsel should have done a better job. *Dunbar v. State,* 515 N.W.2d 12, 15 (Iowa 1994). Ineffective assistance of counsel claims:

> involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001).

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143. A reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722. To establish prejudice, the defendant must "state the specific ways in which counsel's performance was inadequate and how competent representation would have changed the outcome." *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000) (quoting *Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999)).

In this case, Perry's trial was scheduled to begin on Wednesday, December 5, 2007. On Thursday, November 29, 2007, the State's case agent examined the evidence in preparation for trial, and discovered a patrol car recording of Perry and Watson's conversation, which had been placed with the evidence, rather than the case file. The prosecutor immediately notified the respective defense counsel for Perry and Watson. The prosecutor received the recording on Friday, November 30, and asked that copies be made for the

defense. On Monday, December 3, the defense counsel received and reviewed copies of the recording, but were not able to play them for Perry or Watson. On Tuesday, December 4, the State filed a notice of additional witnesses, stating its intent to call Polk County deputy sheriff Brian Johns to establish the foundation for the admission of the recording.

A pretrial conference was held that same day. The prosecutor noted it had received the patrol car recording "[o]n Friday of this past week," and had learned of the existence of the recording on Thursday. The prosecutor suggested it would be appropriate to continue the trial to allow defense counsel time to review the recording with Perry and Watson and consider how it would affect their defenses. The prosecutor stated the court could treat its suggestion as a motion to continue. Watson and Watson's counsel resisted the motion. Perry also opposed the motion and insisted on going to trial the next day. Perry's counsel, Jason Dunn, admitted Perry was "not happy" about the idea of a continuance, but stated that his job was "to ensure that he gets a good and fair defense," and "[t]here's a lot of stuff in this tape that we have to go over, we have to figure out what we're going to do with." As Dunn explained:

> This tape contains a lot of information, most of it coming from my client. It completely changes my strategy for this trial. It completely—perhaps there will be other motions forthcoming depending upon my further review of the tape. I think, quite honestly, it would be ineffective of me and I would be doing Mr. Perry a disservice if I went to trial tomorrow on this having received the information that I have received within the last 24 hours.

The court continued the trial to January 7, 2008, the last day within the speedy trial deadline. The court stated:

> We want to make sure everybody has a chance to have a fair trial, both sides, and has sufficient time to prepare for this trial.
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> . . . .
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> I appreciate, Mr. Perry and Mr. Watson, that this is disappointing, but I think that's the fairest thing to do for everyone so that we can—everybody has a chance to fully prepare and resolve the case and be ready to go. I think it would be prejudicial to go ahead tomorrow with the new evidence without having the attorneys—and the defendants haven't even seen the tapes to make sure they aren't walking into a minefield—know what they're getting into and how they're going to address that tape with the jury. So I think that's the fairest thing for everybody.

At trial, Perry and Watson objected to the admission of the recording, arguing it was hearsay, would be unduly confusing to the jury, and that its admission would violate their right to confrontation. The court characterized the argument as an untimely motion to suppress and refused to address it. The recording was played for the jury. Perry re-raised these contentions on direct appeal, and this court affirmed his convictions. *See State v. Perry*, No. 08-0448 (Iowa Ct. App. Jan. 22, 2009).

On direct examination at the postconviction hearing, Dunn testified that the patrol car recording was critically important evidence against Perry:

> Q. Would you agree that the audio/videotape was an important piece of evidence in the State's case? A. I do. I completely agree with that.
>
> Q. It was the evidence. A. It was the most damning evidence for Mr. Perry, I felt.

On cross-examination, Dunn explained that he did not object to the State's motion to continue because he "wanted to look at the videotape to see what information it contained, because I didn't know at that point whether it helped or hurt Mr. Perry." Dunn also testified that he thought the recording would have been admissible whether he had objected or not. Further, he did not object to

the timeliness of production, because he thought the recording would be admitted regardless. And particularly, as Dunn explained, once trial was continued, he believed a timeliness objection would have been fruitless.

Perry argues his trial counsel was ineffective in: (1) acquiescing to the continuance of the trial rather than resisting the continuance upon the State's discovery of a recording of Perry and co-defendant Watson's conversations in the patrol car six days prior to trial; (2) failing to try to exclude the foundational witness and the patrol car recording from evidence due to the State's untimely notice of its intention to use the recording at trial; and (3) failing to move to suppress evidence of the crack cocaine found in the car.[1]

As an initial matter, the State contends Perry's pro se claim was not preserved for our review. We agree. In his pro se claim, Perry contends his attorney was ineffective in failing to move to suppress evidence of the crack cocaine found in the car on the theory that officers obtained the cocaine in violation of his right to be free of illegal searches and seizures because he was stopped without a warrant or probable cause. Perry argued this claim at his postconviction hearing. However, the court did not address the claim, and Perry did not request the court to enlarge or amend its findings. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (finding that a party must request a ruling from the district court to preserve error for appeal on an issue presented

[1] Perry's third assignment of trial counsel's error was raised in his pro se brief. Perry's pro se brief also mentions the privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment; these passing statements are insufficient to bring any claim for our review. *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *State v. Sayles*, 662 N.W.2d 1, 3 n.1 (Iowa 2003) (same).

but not decided). "[W]e will only review an issue raised on appeal if it was first presented to and ruled on by the district court." *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008). Accordingly, we determine that error was not preserved on Perry's pro se claim.

We turn to Perry's remaining claims that were raised through counsel. We have carefully reviewed the briefs of the parties, the entire record, including the postconviction proceedings, and the testimony of defense counsel Dunn. Under our de novo review, we find the district court addressed the issues Perry now raises regarding ineffective assistance of trial counsel, and we agree with the district court's conclusions.

Specifically, we find Dunn's preference to take time to review the recording with Perry, when faced with a situation in which he was unsure whether the recording "helped or hurt" Perry's defense, and may change his trial strategy, was completely reasonable. As Dunn stated, "[I]t would be ineffective of me and I would be doing Mr. Perry a disservice if I went to trial tomorrow on this having received the information that I have received within the last 24 hours." In no way did Dunn's tactical decision in this situation constitute ineffective assistance of counsel. We find Dunn's testimony that he believed the recording would be admitted whether or not he objected to be reasonable given the circumstances of the State's prompt notification to defense counsel upon the late discovery of the recording. Although the additional minutes notifying defense counsel of the

foundational witness necessary to introduce the recording were untimely filed,[2] in such instances, the court:

> may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 2.19(3). Thus, even if the continuance was resisted, the court had the authority to order the continuance. We also note that our record does not suggest the court would have taken different action if Dunn had resisted the continuance. Moreover, once the motion for continuance was granted, counsel had no duty to raise a timeliness objection at trial because it would have been meritless. *See State v. Musser*, 721 N.W.2d 734, 752 (Iowa 2006).

Another difficulty with Perry's argument is that even if defense counsel had resisted the continuance, and the court imposed the severe remedy of exclusion, if the defendant had testified the State may still have been able to use the foundational witness and recording as rebuttal evidence. *See State v. Nelson*, 153 N.W.2d 711, 714 (Iowa 1967) (observing that rebuttal witness need not be identified prior to trial and the trial court has discretion to permit a rebuttal witness that should have been offered in the case in chief). Inasmuch as Dunn argued at hearing that the recording would change his trial strategy, the recording and foundational witness could have been appropriate rebuttal evidence.

[2] Prosecuting attorney must give notice to the defendant of all prosecution witnesses at least ten days before trial. *See* Iowa R. Crim. P. 2.19(3).

Under the circumstances of this case, Perry has not presented "an affirmative factual basis establishing inadequate representation" by Dunn. *See Millam*, 745 N.W.2d at 721. Dunn's performance was competent and constituted "reasonable professional assistance" to Perry. *See DeVoss*, 648 N.W.2d at 64. Perry's failure to prove defense counsel failed to perform an essential duty is fatal to his claim of ineffective assistance. *See Polly*, 657 N.W.2d at 465. Accordingly, we affirm the postconviction court's order denying Perry's application for postconviction relief.

AFFIRMED.