IN THE COURT OF APPEALS OF IOWA

No. 2-957 / 11-0786
Filed January 9, 2013

KEVIN N. JOHNSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his convictions for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. **AFFIRMED.**

Felicia M. Bertin Rocha of Bertin Rocha Law Firm, Urbandale, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert DiBlasi, Assistant County Attorney, for appellee State.

Considered by Doyle, P.J., Mullins, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

I. Background Facts & Proceedings.

On September 23, 2008, Officer Kevin Wright of the Des Moines Police Department responded to a request to go to the scene of a car accident. One of the people involved in the accident was Kevin Johnson. In investigating the accident, Officer Wright discovered Johnson had an outstanding warrant for his arrest. Officer Wright gave Johnson a pat-down search for weapons, handcuffed him behind his back, put him in his patrol car, and transported him to jail. After Johnson was out of the vehicle, Officer Wright discovered a plastic bag containing a white powdery substance on the floorboard near where Johnson had been sitting in the back of the patrol car. Officer Wright had personally inspected the vehicle before starting his shift, and he had not transported any other people in the patrol car that day.

Johnson was charged with possession of a controlled substance (cocaine base) with intent to deliver, in violation of Iowa Code section 124.401(1)(b) (2007), a class "B" felony;[1] and failure to affix a drug tax stamp, in violation of section 453B.12, a class "D" felony. After a trial, the jury found Johnson guilty of possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp.

[1] Johnson had originally been charged with possession of a controlled substance (cocaine salt hydrochloride) with intent to deliver, in violation of section 124.401(1)(c), a class "C" felony. A laboratory report later showed the substance was cocaine base, not cocaine salt hydrochloride. On the morning of the trial, the State sought to amend the trial information. The district court granted the motion to amend. The court indicated it would grant a motion to continue if Johnson requested, but Johnson stated he did not want a continuance.

On March 3, 2009, Johnson was sentenced to a term of imprisonment not to exceed twenty-five years and a term not to exceed five years, to be served consecutively. The sentences were suspended, and Johnson was placed on probation for a period of three years. On August 28, 2009, Johnson's probation was revoked, and his original sentence was reinstated.[2]

On June 28, 2010, Johnson filed an application for postconviction relief, claiming he had been subjected to prosecutorial misconduct and received ineffective assistance of counsel. The district court found: (1) the trial information was properly amended to charge Johnson under the statute pertaining to cocaine base; (2) Johnson did not show he was prejudiced when the prosecutor commented on the credibility of witnesses in closing arguments; (3) defense counsel adequately cross-examined Officer Wright; (4) defense counsel was not ineffective for failing to have the controlled substance retested; and (5) Johnson did not show he received ineffective assistance of appellate counsel. Johnson appeals the decision of the district court denying his request for postconviction relief.

II. Prosecutorial Misconduct.

To the extent a claim of prosecutorial misconduct raises an issue of due process, our review is de novo. *State v. Boggs*, 741 N.W.2d 492, 508 (Iowa 2007). In order to prevail on a claim of prosecutorial misconduct, a defendant must show misconduct and that the misconduct resulted in prejudice to such an extent he was denied a fair trial. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa

[2] Johnson appealed pro se on April 7, 2010. The Iowa Supreme Court treated his notice of appeal as a request for a delayed appeal and denied the request. Procedendo was issued June 25, 2010.

2006). We consider the severity and pervasiveness of the misconduct, the significance of the misconduct to the central issues of the case, the strength of the State's evidence, the use of a cautionary instruction, and whether the defense invited the misconduct. *Id*. at 755.

Johnson claims that during the State's rebuttal in closing arguments the prosecutor improperly stated, "But the reality is when you look at the evidence and you look at the more credible witnesses, then it's very clear to me this defendant is guilty as charged." The prosecutor also stated, "And here's why I would tell you that the defendant is not credible and neither was his girlfriend." Johnson claims he was prejudiced by the statements.

In general, a prosecutor may not express his or her personal beliefs during closing arguments. *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003). The prosecutor's statements were improper under this standard. We turn then to the issue of whether Johnson was prejudiced. We consider "whether there is a reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *Id*. at 877. We must determine whether the fairness of the trial was compromised. *Id*. at 880.

In considering this issue the district court found:

> In this case, the court cannot conclude that a single personal opinion, expressed in the final minutes of rebuttal argument, resulted in sufficient prejudice to Johnson so as to award a new trial. Unlike the misconduct in *Graves*, the actions of the prosecutor in the present case were not pervasive or part of a central theme that tainted the entire proceeding. The comments are best described as isolated in nature and, in comparison to the strength

> of the remainder of the State's case against Johnson, insufficient to grant postconviction relief.

(Citation omitted). We concur in the district court's conclusions. The statements were isolated and were not the central focus of the prosecutor's arguments to the jurors. We conclude Johnson has not shown he was prejudiced by prosecutorial misconduct.

III. Ineffective Assistance.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

A. Johnson first claims he received ineffective assistance because his defense counsel failed to object to prosecutorial misconduct based on the prosecutor's statements during closing arguments. We have already determined Johnson has not shown he was prejudiced by prosecutorial misconduct, and therefore, we also find he has failed to show ineffective assistance due to counsel's failure to object to these statements. *See State v. Griffin*, 691 N.W.2d

734, 737 (Iowa 2005) (noting counsel has no duty to raise an issue that has no merit).

B. Johnson asserts he received ineffective assistance because defense counsel failed to adequately inquire during the trial into factual disparities surrounding the discovery of the controlled substance in Officer Wright's patrol car. He notes that an exhibit referred to Unit 345, while other evidence referred to the patrol car as Unit 2750, and Johnson asserts there is a factual issue as to whether the controlled substance was found in the patrol car used to transport him.

During the postconviction hearing Officer Wright testified that Unit 345 refers to the third shift, beat forty-five—thus referencing only the time of day and area of Des Moines where he was working that day. He testified the only reference to the vehicle number was Unit 2750. Johnson offered no evidence to support his claim that Unit 345 referred to a different patrol car. Johnson has not shown he was prejudiced by counsel's failure to raise these questions during the trial. *See State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012) (noting a defendant must show a substantial likelihood the result of the proceeding would have been different but for counsel's actions).

C. Johnson claims defense counsel should have pursued a chain-of-custody issue concerning the controlled substance found in the patrol car. He claims defense counsel should have pursued mistakes in Officer Wright's report as to the racial identity of the defendant and the date when the plastic bag was found in his patrol car. He also points out that Officer Wright did not see the

plastic bag when Johnson got out of the patrol car, but observed it when he returned to the vehicle.

A review of the criminal trial transcript shows defense counsel raised all of these issues during the cross-examination of Officer Wright, although it was not described as a chain-of-custody issue. As the district court noted in the postconviction ruling, Officer Wright was extensively questioned by defense counsel. Johnson has not shown that calling these issues by a different name would result in a different outcome in his case. *See id.*

D. Johnson claimed he received ineffective assistance because defense counsel did not have the substance retested to determine whether the substance in question was cocaine base and not cocaine salt hydrochloride.[3] Cocaine base is sometimes referred to as crack cocaine, and it is generally found in the form of rocks. In this case, the substance in question was a white powder, which laboratory testing by the Iowa Division of Criminal Investigation determined was cocaine base.[4]

As the district court noted, Johnson did not present any credible evidence to support a claim the substance was cocaine salt hydrochloride rather than cocaine base other than the evidence it was a white powder. At the postconviction hearing, evidence was presented that cocaine base could be crushed or ground down to create a white powder that had a different chemical

[3] On appeal, Johnson does not raise this issue within the context of a claim of ineffective assistance of counsel, although it was raised as an ineffective assistance issue at the time of the postconviction hearing. Because the district court addressed this as an issue of ineffective assistance of counsel, we will do so as well.

[4] Based on the laboratory report, the State moved to amend the trial information to charge Johnson with violating section 124.401(1)(b), a class "B" felony, rather than violating section 124.401(1)(c), a class "C" felony.

composition than cocaine salt hydrochloride. Furthermore, Johnson's defense was the controlled substance did not belong to him, and claims regarding the exact nature of the controlled substance did not fit within that strategy. We conclude Johnson has not shown he received ineffective assistance based on a failure to retest the controlled substance.

E. Johnson claims he received ineffective assistance because defense counsel did not file a timely appeal on his behalf. The district court determined Johnson had not shown he received ineffective assistance because the issues he stated he wished to have raised on appeal, which were later raised in this proceeding, would have been denied on the merits. *See Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998) (noting a party claiming ineffective assistance of appellate counsel must show prejudice). We agree with the district court's conclusion Johnson failed to show he received ineffective assistance of appellate counsel.

IV. Other Issues.

On appeal, Johnson raises issues that were either not raised before the district court or were not decided by that court. He claims there was insufficient evidence in the record to show he had constructive possession of the illegal drugs. He also claims there should be a distinction in the penalties under section 124.401(1)(b)(3) for possession of crack cocaine, which may be smoked, and other forms of cocaine base, which are not smoked.

Section 822.8 provides, "All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application." Generally, if a postconviction claim has not been raised

before the district court, it has not been preserved unless a party claims ineffective assistance of postconviction counsel. *See Lamasters v. State*, ___ N.W.2d ___, ___ (Iowa 2012); *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994); *but see Hannan v. State*, 732 N.W.2d 45, 50 n.1 (Iowa 2007) (noting that as a pragmatic matter a court may decide to address an issue raised for the first time on appeal in a postconviction relief proceeding).

Furthermore, "any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error." *Everett*, 789 N.W.2d at 156. A claim of ineffective assistance of counsel provides an exception to this traditional error preservation rule. Iowa Code § 814.7; *Everett*, 789 N.W.2d at 156. Here, Johnson does not raise these issues as a claim of ineffective assistance of defense counsel or appellate counsel. We conclude he has not preserved error on these issues.

We affirm the decision of the district court denying Johnson's request for postconviction relief.

AFFIRMED.