

IN THE COURT OF APPEALS OF IOWA

No. 3-635 / 12-0899
Filed October 2, 2013

ROBERT J. WHITE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Robert White appeals the district court order denying his application for
postconviction relief. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for
appellant.

Robert White, Des Moines, appellant pro se.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, John Sarcone, County Attorney, and Mark Taylor, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Robert White appeals the district court ruling denying his application for postconviction relief. White argues his trial counsel was ineffective for failing to depose or question the affiant of a search warrant and for failing to effectively cross-examine a key witness. Because we find counsel was not ineffective, we affirm.

I. Background Facts and Proceedings

On September 23, 2008, Robert White was charged with conspiracy to deliver a controlled substance as a second offender, possession of a controlled substance with intent to deliver, and failure to possess a drug tax stamp, each with the sentencing enhancement of being a habitual offender. A jury convicted him of all three charges and being a habitual offender. White was sentenced to an indeterminate forty-five-year prison term.

Following his conviction White appealed and challenged the district court's denial of his motion to suppress and motion in limine.¹ See *State v. White*, No. 09-1463, 2011 WL 22587, *2 (Iowa Ct. App. Jan. 20, 2011). On direct appeal we held White had failed to show the alleged inaccurate statements in the search warrant were made knowingly or with a reckless disregard for the truth. His application for postconviction relief raises similar arguments and attempts to remedy his failure on direct appeal.

The facts underlying White's conviction stem from a conspiracy between White and Sam Herrera to transport drugs from El Paso, Texas to Des Moines,

¹ White also challenged the sufficiency of the evidence. His appeal was unsuccessful on all grounds.

Iowa. The conspiracy began when Herrera was given a suitcase containing marijuana. Herrera purchased a ticket and boarded a bus, transporting the drugs to Denver, Colorado, and then boarded a subsequent bus to Des Moines. Along the way Herrera and White communicated about Herrera's travels. The men agreed to meet at the Des Moines bus station.² While the bus was stopped in Omaha, Nebraska, Herrera's suspicious behavior drew the attention of law enforcement who received permission to search Herrera's bag and discovered marijuana. After agreeing to assist law enforcement, Herrera was given the bag with a smaller quantity of marijuana and transported to a rest stop where he was reunited with the bus. Herrera then phoned White and informed him he was nearing Des Moines. Upon arriving Herrera located White's vehicle and placed the bag containing the marijuana inside. He then told White he needed to use the restroom, and following law enforcement directions, left the vehicle. Law enforcement then arrested White. Officers obtained a search warrant for White's home where they discovered a large quantity of cash, jewelry, and a currency counter.

Prior to trial White filed a motion to suppress based upon alleged defects in the warrant application used to search his home. White argued the application contained two inaccuracies. First, the warrant stated Herrera told White "here it is" when he placed the bag containing the marijuana in White's vehicle. Second, the warrant stated White took control of the bag and moved it within the vehicle after Herrera departed. The district court determined the warrant was supported

² The two men had engaged in a similar plot in the past.

by probable cause even if the alleged untrue statements were excluded from the application. On appeal, we determined it was unnecessary to examine probable cause because White had failed to show the falsities were knowing or reckless. *White*, 2011 WL 227587 at *2. White now argues his counsel was ineffective for failing to question the affiant, a possible method of determining whether the falsities were knowing or reckless.³

II. Standard of Review

Applications for postconviction relief are reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). Applications which present the issue of ineffective assistance of counsel, however, raise constitutional issues and are reviewed de novo. *Id.*

III. Discussion

“A defendant has the right to representation that is within the normal range of competency.” *State v. Hopkins*, 576 N.W.2d 374, 379 (Iowa 1998). A claim of ineffective assistance of counsel requires the defendant to demonstrate counsel failed to perform an essential duty and the failure prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice requires a showing the result of the proceeding would have been different but for counsel’s unprofessional errors. *Hopkins*, 576 N.W.2d at 378.

³ White also filed a pro se brief which restates his arguments based upon falsities in the warrant application as well as an argument based upon probable cause.

A. Failure to question the affiant.

To succeed on his first argument, White must show his counsel was required to question the affiant with regards to the search warrant, and the failure prejudiced him in some way.

The United States Supreme Court has established the proper procedure when a defendant claims a false statement was included in a search warrant affidavit. See *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). A hearing is not required on the effect of the falsity until the defendant makes a substantial preliminary showing the statement was made knowingly and intentionally, or with a reckless disregard for the truth. *Id.* The defendant may not rely upon mere allegations, but must give an offer of proof on the deliberateness or recklessness. *Id.* at 171-72.

White claims his counsel's failure to question or depose the affiant precluded him from making this showing. White has presented no testimony or evidence to show any alleged false statements in the warrant were presented intentionally or recklessly. Absent this showing, White cannot demonstrate prejudice and his ineffective-assistance-of-counsel claim must fail.

We are further convinced by the fact the district court ignored the alleged false statements in the warrant application during the suppression hearing. The district court determined probable cause existed independent of any alleged false statements. The best White could hope for during a *Franks* hearing would be a finding the falsities were intentional. If the warrant was supported by probable cause independent of the falsities, counsel's alleged error carried no prejudice.

B. Failure to cross-examine a witness

White also argues his counsel was ineffective for failing to effectively cross-examine Herrera on the stand. White believes counsel did not sufficiently highlight inconsistencies in Herrera's statements to law enforcement.

During the postconviction relief trial, White's criminal trial counsel, Roger Owens, testified he asked Herrera about several inconsistencies between his testimony and prior statements but discontinued the questioning when he observed signs the jury was sympathetic to Herrera. Upon our review of the criminal trial transcript, Owens questioned Herrera at length about inconsistencies in his testimony. Owens's decision to conclude the line of questioning based upon his experience observing the demeanor of jurors is a reasonable trial strategy. Assuming without deciding this strategy was misguided, we find the rule that "[m]iscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel" applies. *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). We find Owens questioned Herrera on the inconsistencies in his testimony to a degree that would place Herrera's credibility into question, the goal of cross-examination. Owens was not ineffective by failing to question Herrera on every possible inconsistency which might have existed.

C. Probable Cause

White filed a pro se brief on appeal that raised one argument in addition to those briefed by his counsel. In it White argues his trial counsel was ineffective for failing to file a motion to suppress based upon a lack of probable cause.

White's argument is without merit. His trial counsel filed a motion to suppress, which was duly considered by the district court. In addition, the trial court considered the warrant and supporting documents on the basis of probable cause and found probable cause existed independently of any alleged falsities in the warrant application. White received what he now claims he did not.

AFFIRMED.