IN THE COURT OF APPEALS OF IOWA

No. 3-704 / 12-0932
Filed October 2, 2013

BOBBY JOE STOUFFER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Bobby Joe Stouffer appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Christine E. Branstad of Branstad Law, PLLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.*

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

DOYLE, J.

Bobby Stouffer appeals from the district court's denial of his application for postconviction relief (PCR). He claims his trial counsel and appellate counsel were ineffective. We affirm.

***I. Background Facts and Proceedings*.**

Following a 2007 jury trial held at the Neal and Bea Smith Law Center Legal Clinic Courtroom at Drake University Law School ("LCC"), Stouffer was convicted of second-degree murder, in violation of Iowa Code sections 707.1 and 707.3 (2005). He was sentenced to a term of imprisonment of no more than fifty years. The relevant facts relating to his claims asserted in his PCR application are as follows.

On January 2, 2007, the Polk County Board of Supervisors adopted a resolution pursuant to the terms and conditions set forth in a Memorandum of Understanding between Polk County, Drake University Law School, and the Fifth Judicial District of Iowa, designating the LCC as an official place of holding court pursuant to Iowa Code section 602.1303(1)(a) (2007). The Chief Judge of the Fifth Judicial District subsequently entered an administrative order designating the LCC as an official place for holding court pursuant to section 602.6105.

After Stouffer was charged with second-degree murder in 2006, the district court, in its order dated January 18, 2007, ordered Stouffer's trial be held on February 12, "at the designated court room at the [LCC]." At unreported hearings held on February 2 and 5, Stouffer objected to his trial being held at the LCC, but the court denied his objection. On February 7, Stouffer filed a motion requesting the court reconsider its ruling, setting forth eleven reasons for his request,

including that "the environment at [the Legal Clinic] is potentially hostile and would make a spectacle of [Stouffer] and the evidence against him," his "right to a fair trial would be prejudiced by conducting the trial at [the LCC]," the "case is not about the education of law students or the experience of a real trial: it is about [Stouffer's] right to receive a fair trial with impartial jurors," and "filling up the amphitheater with students required to attend denies [Stouffer] his constitutional right to a fair and public trial."

A hearing on Stouffer's motion was held. There, Stouffer's trial counsel explained that the sum and substance of her motion was that having Stouffer's trial at the LCC as part of a trial practicum for the law students "denies [Stouffer] his rights to a fair and public trial with an impartial jury." She stated:

> I think the atmosphere creates a—will put pressure on the jury to perhaps convict, when they ordinarily wouldn't, or to find my client guilty of a more heinous crime than the evidence proves.
>
> I think with a pair of 150 or 200 students' eyes looking at you, the entire ambience is pressure. And for the other reasons stated, that it is—it's for the students, not for the public. It's really not for my defendant.

The State resisted, and it presented the testimony of Russell Lovell, the associate dean of Drake University Law School. Dean Lovell explained that the school's LCC was very nice, possessed high-tech capabilities, and provided room for over 110 persons to observe the trial. He testified the school offered use of its LCC to the Fifth Judicial District to hold trials there, and after the district accepted, the school in 1998 began its First-Year Trial Practicum. Dean Lovell testified that since that time, there had been nine trials held at the LCC, five involving criminal matters, including a murder trial. Of those criminal trials, he testified that one had resulted in an acquittal. Dean Lovell testified there was

room in the LCC for anybody who wanted to come and watch the case, including general family members and the public, explaining "[i]t is a public proceeding, and the public is allowed freely to participate." Among other procedures taken in preparing for a trial at the LCC, Dean Lovell testified:

> We educate the students in terms of courtroom etiquette. They certainly realize it is a privilege to have the opportunity to observe the trial. With that goes the responsibility to have the respect for the court, the jurors, and the parties. And that in a criminal case in particular, a person's liberty is at stake, and that absolutely requires a fair, impartial, professional, and secure trial.

Dean Lovell acknowledged that none of the prior trials held at the LCC had been held over the objection of one of the parties; rather, in all of the other cases, "everyone, the prosecutors, the client, and the defendant, agreed" to their trials being held at the LCC. The court denied Stouffer's motion to reconsider, finding there was no prejudice to Stouffer by having his trial at the LCC as opposed to a courtroom in the county courthouse.

At the same hearing, the court took up Stouffer's pending motion to continue. Stouffer requested the trial be continued until one of the State's witnesses, Terance Edgington, was sentenced on federal felony charges to which he had recently pled guilty. Stouffer's trial counsel explained that Iowa's "impeachment rules provide that I can impeach someone with felony convictions, only convictions, and he has not yet been convicted of those charges. And I wanted to be able to ask him if he has been convicted of federal child pornography and three felony counts of sexual assault." The State resisted, noting the witness had pled but had not yet been sentenced. The State argued that because the witness had not yet been

> convicted of a felony . . . it would be improper for [the court] to continue the case in order for him to be sentenced so [Stouffer] can now use that as an impeachable crime.
>
> . . . .
>
> [I]t is not . . . proper grounds for impeachment. But if [the court] feel[s] somehow there is a prejudice that inures to [Stouffer], then, at the very most, [Stouffer] could inquire of [the witness], "Have you pled to a felony in federal court," and leave it at that. And that's a big gift on [the State's] part because the rules of evidence don't even provide for that.

The court agreed with the State and denied Stouffer's motion to continue, stating:

> I don't think there [are] any grounds for [a] continuance, to wait to see if a key witness actually has a conviction for impeachment purposes. But . . . I will accept the State's gift on behalf of [Stouffer]. I will allow, although I really, seriously, question whether the rules provide for that because it does say conviction. To make sure we are abundantly fair to [Stouffer] and his attorneys, they will be allowed to ask [the witness] if he has pled guilty to four felony offenses and awaiting sentencing on those matters, but not get into . . . the subject matter of those felony offenses.

A jury trial followed. Among other witnesses, the State called Edgington to testify. On direct examination, the State asked Edgington if he had pled guilty to a federal felony offense, and Edgington answered in the affirmative. Edgington testified as a jailhouse informant that he was in jail at the same time as Stouffer, and Stouffer told him and other inmates that Stouffer had shot the victim on purpose and gave details of the murder as well. On cross-examination, Stouffer asked and Edgington confirmed that in addition to the federal felony to which he pled guilty, he had also pled guilty to three state felonies and had a state felony crime of dishonesty for burglary.

Stouffer did not testify in his defense. The jury ultimately found Stouffer guilty as charged. We subsequently affirmed his conviction and sentence on

appeal. *See State v. Stouffer*, No. 07-0693, 2008 WL 5234353 *1 (Iowa Ct. App. December 17, 2008).

On July 6, 2009, Stouffer filed an application for PCR. Stouffer asserted his appellate and trial counsel were ineffective in numerous respects, including his appellate counsel failed to challenge on direct appeal that Stouffer was denied his rights to a fair and public trial with an impartial jury because the trial was held at the LCC, trial counsel failed to inform him of the benefits of testifying so he could make an informed, intelligent, and voluntary decision on whether or not to testify, and trial counsel failed to adequately argue and use admissible impeachment evidence at trial.

Stouffer's trial counsel testified via deposition that the theory of defense in Stouffer's case was whether the shooting was accidental or unintentional, and Stouffer was on board with that strategy. She testified that she had discussions with Stouffer about his right to testify and that she explained those rights to Stouffer. She testified her opinion was that Stouffer should not testify, and she noted Stouffer had given at least five different versions of what had happened to the police and different law enforcement. She stated Stouffer was "kind of a loose cannon" and recollected Stouffer did not want to testify at all until after trial was over. She testified that Stouffer's decision not to testify was an informed and intelligent decision, and she noted the parties and the court made an extensive record on the subject. She also testified the jurors were polled after trial, and "the jurors found Edgington and [the other jailhouse informants] to be totally incredible. They didn't believe one of them."

Stouffer's appellate counsel testified at the PCR trial. He testified he believed the claims he raised on appeal on Stouffer's behalf were Stouffer's only viable claims. Appellate counsel testified he believed the issue of holding the trial at the LCC was a potential issue, but he found no support in the law supporting holding the trial at the LCC denied Stouffer a right to a fair and public trial with an impartial jury. On April 24, 2012, the PCR court entered its ruling denying Stouffer's PCR application.

Stouffer now appeals. He contends his appellate counsel was ineffective for failing to raise on direct appeal that holding the trial at the LCC over his objection violated his "constitutional right to a public trial," and he claims that both his trial and appellate counsel failed to adequately research and argue the denial of his constitutional right to a public trial. Additionally he claims his appellate counsel was ineffective for failing to assert on direct appeal that his trial counsel was ineffective because trial counsel failed "to advise him of the benefits of testifying at trial" and because trial counsel failed "to recognize that a guilty plea may be used to impeach a witness, and that the failure to use that impeachment evidence resulted in prejudice to Stouffer. We address his arguments in turn.

II. Discussion.

We normally review PCR proceedings for errors at law. *See Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when a PCR application raises an issue of constitutional scope, such as ineffective assistance of counsel in violation of the Sixth Amendment, our review is de novo. *Id.*

To prevail on his ineffective-assistance-of-counsel claims, Stouffer must show (1) counsel failed to perform an essential duty and (2) prejudice resulted.

See id. at 158. The first prong requires proof that counsel did not act as a "reasonably competent practitioner" would have acted. *State v*. *Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). We presume the attorney performed competently and avoid second-guessing and hindsight. *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Id.* Additionally, "[c]ounsel has no duty to raise an issue that has no merit." *State v*. *Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). To show prejudice under the second prong, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Everett*, 789 N.W.2d at 158. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* at 159.

A. Trial Location.

The Iowa Constitution states: "[I]n all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a . . . *public trial* by an impartial jury." Iowa Const. art. I, § 10 (emphasis added). To that end, "[a]ll judicial proceedings shall be *public*, unless otherwise specially provided by statute or agreed to by the parties." Iowa Code § 602.1601 (emphasis added). "Public" is defined as "[o]pen or available for all to use, share, or enjoy." Black's Law Dictionary 1242 (7th ed. 1999). Iowa Code section 602.6105 provides that court "shall be held at the places in each county maintaining space for the district court *as designated by the chief judge of the judicial district* . . . ." (Emphasis added.) The determination of whether a room

designated for court is "public" "is not whether the courtroom is large enough to seat everyone who wants to attend, but whether the *public has freedom of access to it*." *State v*. *Jones*, 281 N.W.2d 13, 17 (Iowa 1979) (emphasis added).

Here, the PCR court held that there was "no evidence that Stouffer was denied the right to a public trial with an impartial jury," and we agree. Although Stouffer makes much of the fact that Drake University Law School is a private institution, there is simply no evidence he was denied a public trial. The LCC is a place designated by the Chief Judge of the Fifth Judicial District as a place to hold court, as authorized by the legislature in section 602.6105.[1] Dean Lovell testified the LCC was open to the public, and there is no evidence that anyone was prevented from attending or was denied access to Stouffer's trial. Because Stouffer was not denied a public trial, his appellate counsel had no duty to raise the issue on direct appeal. *Fountain*, 786 N.W.2d at 263. Similarly, because Stouffer was not denied a public trial, his trial and appellate counsel did not breach their duty by not doing more research on the subject.

At oral argument, the thrust of Stouffer's argument was that, with auditorium seating filled with law students, the LCC did not have the "typical court

[1] Section 602.6105(1) states in relevant part:

> Courts shall be held at the places in each county maintaining space for the district court as designated by the chief judge of the judicial district, except that the determination of actions, special proceedings, and other matters not requiring a jury may be done at some other place in the district *with the consent of the parties*.

(Emphasis added). Although the statute does not expressly require a defendant's consent to hold a criminal jury trial at another location as designated by the chief judge, it is our opinion that obtaining such consent would be a better practice. In any event, Stouffer does not challenge his lack of consent to holding his trial at the LCC, and we do not address it further.

atmosphere."[2] We are not directed to any authority guaranteeing a constitutional right to a "typical court atmosphere." Furthermore, there is nothing in the record to indicate the decorum of Stouffer's trial was lacking or any different than could be encountered in a courtroom at the Polk County Courthouse.

We agree with the PCR court that Stouffer failed to establish his appellate and trial counsel were ineffective concerning the trial's location at the LCC, and we affirm on this issue.

B. Decision Not to Testify.

Stouffer next argues his trial counsel was ineffective for failing to properly counsel him concerning his right to testify. He contends that trial counsel and the district court did not inform him of the "positive aspects" of testifying or about "evidence which was only available through Stouffer's testimony," and, had trial counsel presented "both sides" to Stouffer, a court "should believe it [was] at least reasonably probable that the fact finder would have found reasonable doubt." The PCR court found no merit in this argument, and we agree.

Although Stouffer testified at the PCR trial that he had only "the one [conversation] right there at trial" with his trial counsel about his testifying in his defense, a very detailed colloquy with Stouffer about his decision not to testify made by the district court at trial evidences otherwise:

> THE COURT: Mr. Stouffer . . . I can't imagine your [trial] counsel would not have discussed with you your right to testify in your own behalf or not. Would that be a fair statement?
>
> [STOUFFER]: Yes, it would, Your Honor.
>
> THE COURT: Now, you understand you have a right to testify if you want to.

[2] In his reply brief, Stouffer states: "He was on his own stage in front of an audience of legal scholars."

> [STOUFFER]: Yes, I do.
>
> THE COURT: You have a right to tell the Court that you don't want to testify.
>
> [STOUFFER]: That's correct, Your Honor.
>
> THE COURT: You discussed this matter thoroughly with your attorneys; is that correct?
>
> [STOUFFER]: Yes, I have, Your Honor.
>
> THE COURT: And with that discussion, all you have to answer is yes or no, have you and your attorneys reached a decision as to whether, you know, it is in your interest or not to testify?
>
> [STOUFFER]: Yes, we have.
>
> THE COURT: Now, you understand, also, that if you did testify, you are opening yourself up to cross-examination on all relevant matters by the State. You understand that.
>
> [STOUFFER]: Yes.
>
> THE COURT: You understand that if you—if you don't testify, I will, only if you request, I will give the jury an instruction that basically informs them that you have exercised your right not to testify and that they cannot hold that against you. The State is required to prove the State's case beyond a reasonable doubt. But I can only give that instruction if you and your lawyers request it. Do you understand that?
>
> [STOUFFER]: Yes, I do.
>
> THE COURT: Okay. . . .
>
> [STOUFFER'S TRIAL COUNSEL]: . . . We have gone over this several times. And my client concurred with my advice for him not to testify.
>
> THE COURT: Is that right, Mr. Stouffer?
>
> [STOUFFER]: That's correct, Your Honor.
>
> THE COURT: All right. Thank you.
>
> [THE STATE]: Your Honor . . . [t]here is actually a little more record that I would ask the Court or counsel to make with Mr. Stouffer, because . . . I want the record to be clear that he's opting not to testify because he doesn't want to testify, not because of the environment [at the LCC] . . . .
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> [STOUFFER'S TRIAL COUNSEL]: . . . I think [Stouffer] elects not to testify in any environment. Is that correct, ...?
>
> [STOUFFER]: That's correct.

This colloquy makes it abundantly clear that Stouffer's trial counsel discussed in great detail with him his rights concerning testifying at trial. Stouffer himself admitted on the record that "he discussed this matter thoroughly with [his] attorneys." Stouffer has failed to establish his trial counsel breached an essential

duty in not informing him of his rights concerning testifying at trial and consequently failed to show trial counsel rendered ineffective assistance. Because his appellate counsel had no duty to raise this meritless issue on direct appeal, Stouffer's appellate counsel was not ineffective concerning this issue. We therefore affirm on this issue.

C. Impeachment Evidence.

Iowa Rule of Evidence 5.609 provides that, "[f]or the purpose of attacking the credibility of a witness," that witness's criminal conviction can be admitted into evidence at trial, subject to the limitations set forth in the rule. Stouffer contends his trial counsel was ineffective for failing to "adequately argue and use admissible impeachment evidence at trial," specifically for not citing and arguing the rule correctly. He further argues his appellate counsel was ineffective for failing to raise the issue on direct appeal. The PCR court stated in its ruling that it appeared that Stouffer's trial and appellate counsel erred in interpreting rule 5.609, but it found Stouffer had failed to establish the requisite prejudice.

Upon our de novo review, we agree that, even assuming without deciding Stouffer's appellate and trial counsel breached their duty in not properly interpreting and arguing the rule, Stouffer failed to establish there was a reasonable probability that result of his proceeding would have different. Here, Edgington was not the lone witness in the case; rather, in addition to law enforcement officials, Edgintron was one of three jailhouse informants testifying as the State's witnesses. The credibility of Edgington was impeached by both the State and Stouffer's trial counsel by establishing his numerous criminal convictions. Additionally, we agree with the PCR court that Stouffer's trial

counsel vigorously cross-examined Edgington and the other two jailhouse informants concerning their motives for testifying, and counsel raised questions as to those witnesses' credibility. As this court previously found, "[b]ased on the nature and location of [the victim's] injury, the location of [the victim's] body, and Stouffer's concealment activity, we conclude Stouffer's multiple admissions/confessions to the police and jailhouse inmates were sufficiently corroborated," *see Stouffer*, 2008 WL 523435 at *6, and we do not find on our review here that Stouffer has shown the outcome of his trial would have been different if his trial counsel had further impeached Edgington and if his appellate counsel asserted this issue on direct appeal. Because Stouffer failed to establish the requisite prejudice, he has not established his trial or appellate counsel rendered ineffective assistance. We therefore affirm on this issue.

III. Conclusion.

Because we conclude Stouffer failed to establish his trial or appellate counsel rendered ineffective assistance of counsel, we affirm the ruling of the PCR court denying his PCR application.

AFFIRMED.