IN THE COURT OF APPEALS OF IOWA

No. 6-845 / 05-1855
Filed December 28, 2006

DEROME ROBERTSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Derome Robertson appeals from the district court's ruling denying his application for postconviction relief. **AFFIRMED.**

Philip B. Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Harold Denton, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee State.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Derome Robertson appeals from the district court's ruling denying his application for postconviction relief. We affirm.

I. Background Facts and Proceedings

On November 14, 1996, two men with ski masks over their faces entered a Kum & Go store in Cedar Rapids, threatened the clerk with a gun, took money from the cash register, and fled. Within minutes of the robbery report, police found Robertson, Christopher Kibler and Terrianna Harris sitting in a parked car approximately four blocks from the convenience store. After removing the three from the vehicle, police conducted a search and discovered dark clothing, a ski mask, a stocking cap with eye holes cut out of it, latex gloves, a sawed-off shotgun, and eighty-two dollars in cash consisting of one ten-dollar bill, eleven five-dollar bills, and seventeen one-dollar bills. Shoeprints in and around the convenience store were consistent with Kibler's and Robertson's shoes.

Robertson and Kibler were arrested and charged with first-degree robbery and possession of an offensive weapon. Robertson's attorneys filed a motion to suppress the evidence found in the car, arguing the officers did not have reasonable suspicion to stop and search the car. The district court denied the motion.

Following a joint trial, jurors found Robertson and Kibler guilty as charged. The court sentenced Robertson to a term of imprisonment not to exceed twenty-five years on the robbery offense and up to five years on the possession offense, to be served concurrently. On direct appeal, Robertson argued the district court erred in overruling the motion to suppress. The court of appeals rejected his

claim and affirmed the conviction. *State v. Robertson*, No. 97-0877 (Iowa Ct. App. Aug. 28, 1998).

Robertson filed an application for postconviction relief, raising claims of ineffective assistance of trial and appellate counsel. Following a hearing on the merits, during which Robertson's trial and appellate attorneys testified, the district court denied the application. Robertson appeals, raising the same ineffective-assistance-of-counsel claims he raised in the district court:

> 1. Trial counsel was ineffective in not objecting to certain impeachment testimony.
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> 2. Trial counsel was ineffective in failing to seek the severance of Robertson's trial from Kibler's trial, and appellate counsel was ineffective in failing to preserve this issue for the postconviction proceedings.
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> 3. Appellate counsel was ineffective in failing to argue on appeal that the instruction for extortion should have been given as a lesser included offense, as error had been preserved at the district court on this issue.
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> 4. Appellate counsel was ineffective for failing to correct a statement of fact made by the State, and relied upon by the court of appeals in its opinion, in an application for further review.

We will present additional facts as they relate to the issues raised on appeal.

II. Standard of Review

Generally, we review postconviction relief decisions for errors at law. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). However, when the applicant raises a constitutional issue, such as ineffective assistance of counsel, our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We give weight to the district court's findings regarding witness credibility. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We apply the same standards to trial and appellate counsel in resolving ineffective assistance claims. *Cox v. State*, 554 N.W.2d 712, 715 (Iowa Ct. App. 1996). "[T]here is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss*, 648 N.W.2d at 64. We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984); *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

III. Failure to Object to Impeachment

After removing Robertson, Kibler, and Harris from their car, officers asked Robertson to come to the police station voluntarily and make a statement about the incident. Robertson said "he was not willing to do that." After he had been arrested and taken to the station, Robertson was advised of his rights and said he did not wish to make any statements.

Prior to trial, the trial judge granted a motion in limine prohibiting evidence that Robertson had exercised his right to remain silent and declined to give a statement after he was arrested. Robertson testified at trial that he was not one of the robbers. He claimed that two unknown men ran past, jumped in a nearby car, and threw a gym bag containing a shotgun, clothes, and ski masks out of the car as they drove past. Robertson further claimed he had won the money found

by police at a dice game earlier in the day. On cross-examination, the prosecutor questioned Robertson as follows:

> Q. When the police ordered you out of the car and during the time you were there with the police, didn't there come a time when they told you they were investigating an armed robbery at the Kum & Go store? A. Yes.
>
> Q. Did you ever tell the police that, hey, we just found this stuff, it was thrown from the bag from a blue car that just left the area? Did you ever tell the police that? A. I made no statements to the police, no.
>
> Q. Well, if this really happened the way you're claiming, it would have been a very easy thing to tell the police that this all came from two men in a blue car, wouldn't it have been, if that was the truth? A. Probably, but it depends on the situation. If the police would believe me, man, plus I had a gun in the car and I doubt if they would have believed me.
>
> Q. Well, you had two witnesses, didn't you? A. Yes.
>
> Q. They didn't say anything like that, did they? A. No.
>
> Q. You just decided, oh, I'll just keep it a secret? A. No.

Robertson alleges trial counsel was ineffective in not objecting to this testimony, and appellate counsel was ineffective for failing to raise the issue on direct appeal.

We conclude, as the district court did, that any failure of duty by trial counsel did not prejudice Robertson, because exclusion of the challenged line of questioning "would not have negated the overwhelming evidence against" him. We agree with the State's assertion that Robertson's story "was so inherently implausible that the prosecutor's questioning could hardly render it any less credible than it would have been even without that questioning." Moreover, the story did not explain the fact that prints consistent with Kibler's and Robertson's shoes were found in and around the store. There is no reasonable probability the verdict would have been different if Robertson's trial counsel had objected to the prosecutor's questioning. *DeVoss*, 648 N.W.2d at 64 (to show prejudice, a

defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (citation omitted)).

IV. Failure to Request Severance

Robertson claims his trial attorneys were ineffective in failing to move for severance of Robertson's and Kibler's trials, and that appellate counsel was ineffective in failing to raise an ineffective assistance of trial counsel claim on that basis. He argues the joint trial prejudiced him because a statement given by Kibler to the police, and introduced through an officer's testimony at trial,[1] failed to corroborate Robertson's testimony at trial.

Generally, defendants charged jointly may be tried jointly if a joint trial will not result in prejudice to one of the parties. Iowa R. Crim. P. 2.6(4)(*b*). Severance may be warranted by any of the following factors:

> (1) if admission of evidence in a joint trial would have been inadmissible and prejudicial if a defendant was tried alone, (2) if a joint trial prevents one defendant from presenting exculpatory testimony of a codefendant, (3) if consolidation will produce a trial of such complexity and length that the jury will be unable to effectively compartmentalize the evidence against each defendant, and (4) if defenses presented by different defendants conflict to the point of being irreconcilable and mutually exclusive.

State v. Williams, 525 N.W.2d 847, 849 (Iowa 1994).

Robertson's trial attorneys testified at the postconviction hearing that they considered asking the court to sever the trials of Robertson and Kibler, but decided not to do so because they did not believe the grounds for severance existed. In addition, they believed certain statements by Kibler tended to

[1] Kibler told officers Robertson "just happened by" while he and Harris were walking, and was going to give them a ride to Iowa City, where they both lived.

exculpate Robertson, and they did not expect Robertson or Kibler to testify. Robertson and his trial attorneys had discussed whether he would testify; all agreed he would not do so. Robertson changed his mind late in the trial, and did not tell his attorneys what he planned to say until just before he testified.

In assessing claims of ineffective assistance of counsel, we must examine a defendant's conduct as well as that of his attorney. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). Robertson cannot complain of his counsels' alleged breach of duty caused by his own failure to disclose in a timely manner his plan to testify. Additionally, the grounds for severance did not exist at the time a motion for severance could have been filed. Robertson's attorneys had no duty to file a motion which had no basis. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) ("[C]ounsel has no duty to raise an issue that lacks merit.").

V. Failure to Raise Jury Instruction Issue on Appeal

Robertson's trial attorneys asked the trial court to submit a jury instruction for extortion as a lesser-included offense of the first-degree robbery charge. The court denied the request. Robertson's appellate attorney did not raise the trial court's failure to give an extortion instruction on appeal. In this postconviction proceeding, Robertson alleges his appellate counsel was ineffective for failing to raise the jury instruction issue on appeal. The district court denied postconviction relief on this ground, concluding

> Because the elements for second-degree robbery (an instruction given to the jury) coincide with the elements for extortion, it was unnecessary to provide the additional instruction for extortion to the jury. There is no evidence that providing the jury with an instruction for extortion would have led them to consider finding [Robertson] guilty of second-degree robbery, or applying identical elements, extortion.

We agree with the district court's conclusion.

The jury was instructed it could convict Robertson of the lesser-included offense of second-degree robbery if it found (1) Robertson had the specific intent to commit a theft, and (2) to carry out his intent, he committed an assault upon another. *See* Iowa Code § 711.1(1) (1995). An assault was defined for the jury as "(a) an act which intentionally places another in fear of immediate physical contact which will be injurious or offensive; and/or (b) intentionally pointing a firearm at another or displaying a firearm in a threatening manner." The elements of the assault alternative of second-degree robbery are similar to the elements of extortion as defined in Iowa Code section 711.4(1) (defendant threatens to inflict physical injury on some person, or to commit any public offense, with the purpose of obtaining anything of value). Because the jurors refused to convict Robertson of second-degree robbery, there is no reason to believe they would have convicted him of extortion, a crime similar to it. *See State v. Carberry*, 501 N.W.2d 473, 476-77 (Iowa 1993) (holding that the failure to submit a lesser-included offense was harmless error where the jury was instructed on, and rejected, a lesser offense "sufficiently similar" to the unsubmitted offense). In addition, Robertson's defense was not based on the possibility of a verdict on a lesser-included offense. Robertson did not claim the crime was something other than first-degree robbery; rather, he claimed he had nothing to do with the crime.

Any error by the trial court in failing to instruct the jury on extortion was harmless. *See id.* Robertson's appellate counsel was not ineffective for failing to raise the issue on appeal.

VI. Failure to Correct Misstatement of Facts on Appeal

Robertson's appellate counsel raised the suppression issue on appeal, arguing police did not have reasonable suspicion to stop and search the vehicle. Robertson argues in this postconviction action that his appellate counsel was ineffective for failing to correct the State's recitation of certain facts in its brief on appeal; facts upon which the court of appeals relied in its opinion.

Robertson claims the State's brief "misstated" facts related to the newspaper carrier's account of the direction Robertson's vehicle was traveling at the time of the incident in question. However, Robertson also admits the State's factual assertions came from trial testimony. In effect, he contends the court of appeals should have relied solely on testimony from the suppression hearing in its consideration of the suppression issue; and that the State's inclusion of trial testimony in its recitation of facts related to the stop of the vehicle somehow misled the court. The appellate court, however, is free to consider evidence presented during the suppression hearing as well as that presented at trial when reviewing the district court's ruling on a suppression motion. *See State v. Orozco*, 573 N.W.2d 22, 24 (Iowa 1997); *State v. Astello*, 602 N.W.2d 190, 195 (Iowa Ct. App. 1999). Accordingly, the State's recitation of the facts, which properly included testimony from the suppression hearing and the trial, was not a "misstatement" of fact. Robertson's appellate counsel was not ineffective for failing to raise a meritless issue. *Taylor*, 689 N.W.2d at 134.

VII. Conclusion

We affirm the district court's ruling denying Robertson's application for postconviction relief.

AFFIRMED.