IN THE COURT OF APPEALS OF IOWA

No. 2-361 / 11-1033
Filed August 22, 2012

MICHAEL NAVARRO JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

A postconviction relief applicant raises several ineffective-assistance-of-counsel claims. **AFFIRMED.**

Leslie M. Blair III and Christopher Welch of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Michael Navarro Jones, Clarinda, appellant pro se.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

This is an appeal from the denial of a postconviction relief application that raised several ineffective-assistance-of-counsel claims.

I. Background Facts and Proceedings

A man entered a store in Waterloo, pointed a gun at one of the employees, and said, "You know what this is . . . [t]his is a stick up." The man ordered the employee to remove money from the cash register, grabbed the bills, and left.

Police apprehended Michael Jones in connection with the incident. A jury found him guilty of first-degree robbery and being a felon in possession of a firearm as a habitual offender. On direct appeal, this court affirmed his judgment and sentence and preserved several ineffective-assistance-of-counsel claims for postconviction relief. *State v. Jones*, No. 08-1917, 2009 WL 4842500, at *1 (Iowa Ct. App. Dec. 17, 2009).

Jones filed a postconviction relief application raising the preserved claims. Following an evidentiary hearing, the district court denied the application in its entirety.

On appeal from the denial, Jones argues his trial attorney was ineffective in failing to (1) interview and elicit testimony from a witness, (2) question three jurors and request their removal from the panel for cause, (3) object to the use of prior convictions to impeach an alibi witness, (4) request a jury instruction defining the term "theft," (5) object to claimed prosecutorial misconduct based on the presentation of purportedly false testimony, and (6) seek dismissal of the trial information based on a claimed destruction of exculpatory evidence.

Jones also asserts his attorney on direct appeal was ineffective in failing to (1) challenge the composition of the jury panel following the removal for cause of two African-American jurors, (2) challenge his trial attorney's failure to submit an instruction on lesser-included offenses, and (3) challenge his absence from the discussion on jury instructions.

Jones finally asserts his attorney at the postconviction hearing before the trial court was ineffective in failing to (1) preserve error for possible habeas review, (2) raise claims of prosecutorial misconduct, and (3) raise a violation of his Fourth Amendment protection against unreasonable searches and seizures.

II. Analysis

To prevail on his ineffective assistance of counsel claims, Jones had to show his attorneys (1) breached an essential duty and (2) prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). We may affirm, if either of the two elements was not met. *See State v*. *McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Our review is de novo. *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

A. Claimed Ineffective Assistance of Trial Counsel

1. Failure to Interview and Elicit Testimony from a Witness

Jones contends his attorney should have interviewed and called a witness who worked near the site of the robbery and who saw a man attempt to enter her store first. In his view, this witness would have named another individual as a suspect in the robbery.

Jones's trial attorney testified that she reviewed a police summary of an interview with this witness and made a strategic decision not to question the

witness. The police summary included this witness's description of the person who committed the robbery. The description, down to the color and style of the man's shirt, matched a description proffered by an employee of the store that was robbed. Jones's attorney testified that the fact the witness did not specifically identify her client as the person who robbed the store "was to our advantage, and I wanted to leave it alone." The attorney made a "reasonable professional judgment" not to further investigate this witness or call her to testify at trial. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001). She did not breach an essential duty.

2. Failure to Request Removal of Three Jurors

Jones next asserts that three jurors should have been stricken for cause. The standard for determining whether there is cause to strike a juror is "'whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.'" *State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990) (quoting *State v. Johnson*, 318 N.W.2d 417, 421–22 (Iowa 1982)). This standard was not satisfied with respect to any of the three jurors.

The first juror stated she read about the case in the newspaper. When asked whether her knowledge would make it difficult to be fair and impartial, she responded, "I don't believe so." When asked whether she could set aside anything she had heard about the case outside the courtroom, she said, "Probably." These responses were equivocal. However, the juror was later asked, "Do you believe that you could be a fair and impartial juror despite having

heard anything about this trial or this case?" She unequivocally responded, "Sure. Yep."

The second juror said she previously served on a jury where she felt pressured into finding the defendant guilty. She stated she regretted her decision and she was not 100% sure what she would do in this situation. Her statements do not reflect a fixed opinion about Jones's guilt or innocence. If anything, her angst about the previous trial suggests a willingness to keep an open mind in this trial.

The third juror stated he was robbed while working at a gas station. Despite his own victimization, he told the prosecutor that he thought he could be a fair juror.

Because the three jurors did not articulate fixed opinions about Jones's guilt or innocence, we conclude Jones's trial attorney did not breach an essential duty in failing to challenge them for cause.

3. Use of Prior Convictions to Impeach Alibi Witness

Jones's brother testified as an alibi witness on behalf of Jones. On cross-examination, the prosecutor impeached him with evidence of prior convictions. Jones contends his trial attorney should have objected to this impeachment evidence. *See* Iowa R. Evid. 5.609 (authorizing a party to attack the credibility of a witness with evidence of a prior conviction, subject to certain restrictions). While counsel arguably had legal grounds to object, we are not convinced she breached an essential duty in failing to do so, as this witness's relationship to Jones already made his testimony suspect. Additionally, his alibi testimony was less than air-tight, as he acknowledged he was not with his brother on the day of

the robbery. In substance, the witness stated Jones left for Chicago two days before the robbery and returned to Waterloo one or two days after. The jury had ample grounds to discredit this testimony, with or without the impeachment evidence.

4. Failure to Request a Jury Instruction Defining "Theft"

The marshaling instruction for first-degree robbery included a reference to "theft," which was not defined. Jones contends his trial attorney should have objected to the instruction on this ground.

At the postconviction relief hearing, Jones's attorney testified she did not object because she did not wish to get sidetracked with ancillary issues that would detract from her alibi defense. The postconviction court accepted this reasoning, and so do we. *See State v*. *Blackford*, 335 N.W.2d 173, 178 (Iowa 1983) ("In arguing over what elements should be included in a marshalling instruction, defense counsel's primary concern will necessarily be those elements which are essential to the theory of the defense which is being advanced in the particular case."). As the postconviction relief court stated:

> No issue existed at the time of the trial herein as to whether a robbery had occurred. The issue raised by defendant and tactically chosen as the sole issue in the trial was whether petitioner was the person who committed the robbery. The court is not required to instruct the jury on matters that are not an issue in the trial.

We find no breach of an essential duty in counsel's failure to challenge the instruction.

5. Failure to Object to Claimed Prosecutorial Misconduct Regarding Claimed False Testimony

Jones next asserts the State presented perjured testimony at his trial and his attorney should have objected to the testimony. He cites the statements of an officer who stopped his vehicle for a claimed seatbelt violation shortly after the robbery. He asserts the claimed violation was a mere ruse to effectuate the stop.

We begin by noting that Jones challenged the validity of the stop in a pre-trial motion to suppress and both the district court and this court affirmed the validity of the stop. The district court found that the officer's stated reason for the stop was pre-textual. The court nonetheless determined that the officer could be imputed knowledge about the robbery based on the knowledge of his fellow officer, and this imputed knowledge was sufficient to uphold the stop. This court similarly noted that the State was not limited to the reasons given by the investigating officer and the knowledge imputed to him justified the stop. *Jones*, No. 08-1917, 2009 WL 4842500, at *2.

In light of the district court's ruling on Jones's motion to suppress, the validity of the stop was no longer an issue at trial. Jones's attorney said as much at the postconviction relief hearing, stating "the stop wasn't the main issue at trial" and was not "what our focus was." She also testified that she perceived the issue concerning the stop as one of witness credibility rather than prosecutorial misconduct.

Because Jones called the validity of the stop into question before trial, his attorney had no duty to muddy the waters by again raising the issue at trial.

6. Failure to Seek Dismissal of the Prosecution Based on Claimed Destruction of Exculpatory Evidence

Jones finally asserts that his trial attorney was ineffective in failing to move for dismissal of the charges. He premises this claim on an officer's failure to preserve identifying information concerning a man who was detained and released shortly after the robbery. He contends this police omission amounted to a bad faith destruction of potentially exculpatory evidence. *See State v*. *Craig*, 490 N.W.2d 795, 796 (Iowa 1992).

On our de novo review, we cannot discern bad faith. An officer testified that a person initially detained by police did not match the description of the person who robbed the store, as revealed by a videotape inside the store. In particular, the detained person's facial structure and clothing differed from the facial structure and clothing of the person in the video. Based on this testimony, Jones's trial attorney had no duty to assert a claim based on destruction of exculpatory evidence.

B. Claimed Ineffective Assistance of Appellate Counsel

1. Failure to Challenge Jury Panel

Jones argues his attorney on direct appeal was ineffective in failing to pursue a challenge to the composition of the jury, following the removal for cause of two African-Americans.

The Sixth Amendment "entitles a criminal defendant to a jury panel designed to represent a fair cross-section of the community." *State v*. *Jones*, 490 N.W.2d 787, 792 (Iowa 1992). "A systematic exclusion of 'distinct' segments of the community violates the constitutional requirement." *Id.*

Jones presented no evidence that the underrepresentation of African-Americans on the panel was due to the systematic exclusion of this group from the jury selection process. *See State v*. *Fetters*, 562 N.W.2d 770, 776–77 (Iowa Ct. App. 1997) (describing evidence used to establish systematic exclusion). Accordingly, he cannot establish that counsel was ineffective in failing to challenge the composition of the jury.

2. Failure to Submit Lesser-Included Offense Instructions

Jones argues his trial attorney did not secure his agreement to pursue an "all or nothing" defense—that is, to seek an acquittal on first-degree robbery and decline to give the jury the option of finding guilt on a lesser-included offense. While Jones contends he objected to this strategy, he does not cite to the portion of the record containing such an objection and, on our de novo review, we cannot find such an objection. Notably, Jones was present during the formal jury instruction conference at which the court discussed whether the attorneys wished to have lesser included offense instructions submitted. The court stated, "The record should confirm that the parties have agreed that no lesser included offenses would be submitted. Is that correct . . .?" The prosecutor and defense attorney responded in the affirmative and Jones did not voice any opposition. We conclude Jones's attorney made a "deliberate" decision not to seek lesser-included offense instructions which was "well within the range of acceptable professional competence." *Sallis v*. *Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982) (holding that a decision to pursue an all-or-nothing defense fell within the normal range of professional competency).

Jones also asserts that trial counsel failed to fully inform him or give him advice concerning the decision not to submit lesser included offense instructions, and appellate counsel was ineffective in failing to raise this issue on direct appeal. In *State v Wallace*, 475 N.W.2d 197 (Iowa 1991), the Iowa Supreme Court held that the right to a jury instruction on lesser-included offenses in noncapital cases was not a fundamental right and "[c]ounsel's professional statement to the trial court that the defendant waives such instruction is enough." *Wallace*, 475 N.W.2d at 201. The court further stated the "trial court may properly assume from this professional statement that counsel has informed the defendant of the defendant's right to such instructions, what the consequences might be if they are waived, and that the defendant elected to waive them." *Id.* This holding is dispositive. Appellate counsel was not ineffective in failing to raise the issue.

3. Failure to Raise and Argue the Issue of the Defendant's Claimed Absence During Jury Instruction Conference

Jones contends he was not present during an informal discussion regarding jury instructions, and appellate counsel breached an essential duty in failing to challenge his absence.

As noted above, Jones was present during the formal jury instruction conference. While it appears that this formal conference was preceded by an off-the-record discussion and it is unclear whether Jones was present for this discussion, his presence during the formal conference cured any harm flowing from his earlier absence, if he was indeed absent. As the postconviction court stated, "[T]he court's recitation of the informal discussions on the record in

defendant's presence removes any hint of prejudice from such informal discussions." *See Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010) ("[B]ecause we can resolve this issue on the prejudice prong, we need not determine whether the failure to ensure a defendant's presence during consideration of a jury question would always constitute a breach of an essential duty."); *see also State v. Brogden*, 407 S.E.2d 158, 163 (N.C. 1991) (holding defendant's absence from in-chambers discussion about jury instructions was harmless error where discussion was subsequently entered into record in open court, with defendant present, and defense counsel had opportunity to make legal arguments and objections).

C. Claimed Ineffective Assistance of Postconviction Counsel

1. Failure to Preserve Error on Issues for Possible Habeas Review

Jones argues that postconviction counsel in the district court was ineffective "in failing to preserve error and federalize issues for possible habeas review." He raises no independent grounds under this subheading. Accordingly, we assume this is a catch-all argument and we rely on the balance of our opinion, which addresses the individual arguments.

2. Failure to Raise Claims of Prosecutorial Misconduct

Jones contends postconviction counsel was ineffective in failing to make several claims of prosecutorial misconduct. *See State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (defining prosecutorial misconduct).

a. Attempt to offer rebuttal evidence. Jones first takes issue with the prosecutor's attempt to offer rebuttal evidence to highlight inconsistencies in a

State witness's trial testimony and her earlier interview with police. The trial court did not allow the State to present this evidence, but Jones appears to argue that the prosecutor introduced the evidence through his closing arguments.

On our de novo review, we do not discern a backdoor introduction of this prohibited evidence. During his closing argument, the prosecutor pointed out inconsistencies in the witness's testimony, but the facts underlying these inconsistencies were mentioned during trial. For that reason, we find no prosecutorial misconduct and no breach of an essential duty in counsel's failure to raise the issue.

b. Alleged misconduct during closing argument. Jones next takes issue with the prosecutor's reference to him as a "robber" during closing arguments. Even if these references could be considered disparaging, they were isolated references that did not compromise the fairness of the trial. *Cf. Graves*, 668 N.W.2d at 876, 880 (concluding that prosecutorial misconduct related to a critical issue in the case and compromised the fairness of the entire trial).

c. Prosecution presentation of allegedly false testimony. Jones asserts that a store employee who observed the robbery described the gun that was used differently during trial than he did in pretrial statements. Jones attributes the inconsistencies to the prosecutor's decision to show the witness the gun prior to trial, and characterizes the presentation of the inconsistent trial testimony as prosecutorial misconduct.

The record does indeed reveal inconsistencies in the witness's testimony about the gun. Jones's attorney was aware of these inconsistencies and thoroughly cross-examined the witness about them. For that reason, we

conclude she did not breach an essential duty in failing to also raising a claim of prosecutorial misconduct based on the inconsistencies.

3. Failure to Assert Violation of Jones's Fourth Amendment Protection Against Unreasonable Searches and Seizures

Jones finally contends postconviction trial counsel should have challenged the stop of his vehicle. As noted, this issue was litigated before the district court and was raised and addressed on direct appeal. *See Jones*, No. 08-1917, 2009 WL 4842500, at *2. Because the issue was decided, postconviction counsel had no duty to raise it again. *See* Iowa Code § 822.8 (2009) (stating any ground finally adjudicated in a prior proceeding cannot be the basis of a subsequent application for postconviction relief); *Snyder v. State*, 262 N.W.2d 574, 578 (Iowa 1978) (stating that postconviction relief proceedings cannot be used to relitigate issues already decided in a previous appeal).

III. Disposition

We conclude the district court appropriately denied Jones's ineffective-assistance-of-counsel claims. Accordingly, we affirm the denial of his postconviction relief application.

AFFIRMED.