IN THE COURT OF APPEALS OF IOWA

No. 2-654 / 10-1755
Filed August 22, 2012

ANTONIO SHELEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

An applicant for postconviction relief appeals a district court decision denying his request for relief from his conviction for first-degree robbery. **AFFIRMED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Devin Kelly, Legal Intern, John Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Bower, J., and Miller, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts and Proceedings

On September 20, 2007, Katie Ramaeker was working at the front desk at the Holiday Inn in Des Moines when Antonio Sheley came in and asked for a job application. Ramaeker gave him a form to fill out. Sheley quickly returned with the form, on which he had written, "Give me all the money." Ramaeker said, "No." Sheley then told her to give him the money. He started to pull something out of his pocket, which Ramaeker believed was a gun. She gave him the money she had on the counter, and he walked out.

The robbery was caught on videotape. From the videotape police officers were able to track down Sheley. A search of his home was conducted on September 25, 2007. Officers found tennis shoes and a sweat suit that matched that of the robber in the descriptions of witnesses and their own viewing of the videotape. A gun was not found.

Sheley was charged with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2007). A few days before the trial, the State offered a plea bargain that would have permitted Sheley to plead guilty to second-degree robbery as an habitual offender, but he would have been taken into immediate custody. Sheley and his attorney viewed the videotape of the robbery. The prosecutor made clear that was the last date on which the plea offer was available to Sheley. Sheley thereafter decided not to accept the plea bargain, stating he wanted to spend the weekend with his mother and he was not emotionally ready to go to prison at that time.

Trial commenced on February 11, 2008. Sheley stipulated that he had committed the robbery, but did not stipulate that he had been armed with a dangerous weapon. Ramaeker testified that her father was a police officer and she had learned how to handle a weapon starting when she was seven years old. She also stated she joined the military when she was seventeen. She testified she was familiar with handguns, and believed Sheley pulled the butt end, or hand grip portion, of a handgun out of his pocket. Detective Kurt Bender testified he had viewed the videotape frame by frame, and he believed it looked like Sheley had the grip or butt end of a handgun in his hand.

A jury found Sheley guilty of first-degree robbery. He was sentenced to a term of imprisonment of no more than twenty-five years. Sheley's appeal was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 6.1005.

On August 28, 2009, Sheley filed an application for postconviction relief, claiming he received ineffective assistance because defense counsel did not take depositions of the witnesses. The postconviction trial was held in September 2010. After initially testifying somewhat differently, Sheley testified that if he had known of Ramaeker's familiarity with firearms he would have accepted the plea bargain and pled guilty to second-degree robbery.

When questioned by the prosecutor, defense counsel testified:

> The police report indicated that the woman at the desk said that she saw a gun. So if I take a deposition, all we're going to do is reconfirm what she's indicating. You were willing at that point to offer a Robbery Second based upon the videotape and based at least upon the police reports. If we take a deposition, not only does it solidify the witness's statement, but it solidifies potentially the State's strength of its case and then that plea offer may possibly

> have gotten pulled and you would have gone ahead and said we're going to convict you, you know, all or nothing on this robbery.
>
> And so taking depositions wasn't going to alter what we already knew the facts were, that she alleged there was a gun and that's what the statement in the police report was and that you had charged this as a Robbery One, so the taking of the deposition at least of that witness wasn't relevant because we already knew the fact of the gun and we could see that something came out of his pocket.

Defense counsel also testified that he would not change his decision about depositions if he had known Ramaeker had extensive experience and knowledge in weapons because a person did not need an extensive background to know whether something was a gun when it was about a foot and a half away from the person.

The district court denied Sheley's application for postconviction relief. The court found defense counsel's failure to take depositions did not fall below the standard of a reasonably competent attorney. The court found defense counsel had a trial strategy in this case not to take depositions. The court determined, "[k]nowing now that the witness had more experience with guns than known then does not make the trial strategy unsound." The court also determined that Sheley was not credible in his claim that he would have pleaded guilty to second-degree robbery if he had been aware of Ramaeker's knowledge of firearms. Sheley now appeals the decision of the district court.

II. Standard of Review

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 unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

III. Ineffective Assistance

Sheley contends he received ineffective assistance because defense counsel failed to take depositions prior to trial. He claims defense counsel had an obligation to investigate the case. He also claims defense counsel could not properly advise him regarding the plea offer because he did not have all of the information needed to assess the strengths and weaknesses of the case. At the postconviction trial Sheley ultimately testified he would have accepted the plea offer if he had known of Ramaeker's familiarity with firearms.

There may be sound reasons for an attorney to decide not to depose witnesses before a criminal trial. *See State v. Williams*, 341 N.W.2d 748, 752 (Iowa 1983) (noting defendant's appearance at depositions would have given a witness the opportunity to reinforce his identification of defendant); *Kellogg v. State*, 288 N.W.2d 561, 564 (Iowa 1980) ("We recognize the use of discovery depositions can be a valuable tool in the preparation of criminal trials. We cannot say, however, that it is an absolute requirement for preparation."); *Bizzett v. Brewer*, 262 N.W.2d 273, 276 (Iowa 1978) (finding "in a given situation

depositions may be unnecessary or bad strategy or be inadvisable for other reasons").

In this case, however, we do not need to determine whether defense counsel failed to perform an essential duty because the case may be decided on the element of prejudice. *See State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999) (noting we may bypass consideration of the first prong if there is no showing of prejudice). Sheley cites in his brief, *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1173 (N.D. Iowa 1999), which states:

> [W]hen the claim of ineffective assistance involves rejection of a plea bargain, "after rejecting the proposed plea bargain and receiving a fair trial, [the claimant] may still show prejudice if the plea bargain agreement would have resulted in a lesser sentence," *and* the claimant shows that "but for counsel's advice, he would have accepted the plea." The claimant must make the latter showing with something more than "non-conclusory evidence" that he would have agreed to the plea bargain "if properly advised."

(Citations omitted). A subjective standard is used to determine whether a defendant would have accepted a plea offer and received a lesser sentence, but for the ineffective assistance of counsel. *Kirchner v. State*, 756 N.W.2d 202, 206 (Iowa 2008).

At the postconviction hearing, Sheley was asked by the prosecutor, "You said to Mr. Boles in front of me, I'm not ready to go to jail. I'm not taking the plea today. And I said, today is your last chance. And you said, no," and Sheley responded, "That's correct." Defense counsel also testified,

> Mr. Sheley indicated that he was not interested in taking that plea, that he wanted to remain free for the weekend. His specific case was that he wanted to spend the weekend with his mother and that he was emotionally not ready to do that and he wanted to be free through the weekend.

Defense counsel's testimony was supported by a letter he gave to Sheley on the morning of the criminal trial, acknowledged by Sheley's signature at that time, stating Sheley had rejected the plea offer against the advice of counsel, and "you chose to spend the weekend with your mother at home."

When first asked at the postconviction hearing if he had been aware of Ramaeker's background, training, and knowledge prior to trial whether that would have affected his decision to accept the plea agreement, Sheley responded, "that's a two-sided question that I could answer. I mean, I could answer, yes, and no." When later questioned, however, whether he would have accepted the plea offer if he had been aware of Ramaeker's knowledge of handguns and military training, Sheley stated, "Yeah, I would have accepted it."

The district court found Sheley's statement that he would have pleaded guilty to robbery in the second degree if he had been aware of Ramaeker's knowledge of firearms was not credible. We agree with the court's conclusion. Sheley offered no evidence except his self-serving statement that he would have accepted the plea offer. *See id.* at 206 (noting that for an ineffective assistance claim, prejudice must be shown by something more than a self-serving statement). The evidence shows Sheley did not accept the plea offer because he wanted to spend the weekend with his mother, and he was not emotionally ready to go to prison at that time.

Thus, Sheley has not shown prejudice because he has not shown that he would have accepted the plea offer, even if defense counsel had conducted

depositions. We conclude he has not shown he received ineffective assistance of counsel.

IV. Pro Se Issues

Sheley filed a pro se asking us to "[r]eview and decide all issues which my attorney didn't raise in her brief." Sheley does not further specify his arguments, or cite any authority. "Failure to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 6.903(2)(g)(3). We do not address Sheley's undeveloped claims.

We affirm the decision of the district court denying Sheley's application for postconviction relief.

AFFIRMED.