IN THE COURT OF APPEALS OF IOWA

No. 2-739 / 11-1586
Filed October 3, 2012

ANTONIO DANTZLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Antonio Dantzler appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Antonio Dantzler appeals the district court's denial of his application for postconviction relief (PCR). He asserts on appeal the district court erred in rejecting his claim that his appellate counsel on direct appeal was ineffective in failing to challenge the sufficiency and weight of the evidence of his identity as the perpetrator. He also asserts his PCR counsel was ineffective in failing to raise trial counsel's ineffectiveness for (1) not challenging or rebutting the DNA evidence, (2) not insisting on separate trials for the two robbery charges, and (3) not challenging a prospective juror. We affirm the district court's denial of his PCR application.

I. BACKGROUND AND PROCEEDINGS.

On June 11, 2008, two armed robberies occurred in Waterloo. One occurred at 1:00 p.m. at the Prime Mart and the other one occurred at 5:15 p.m. at the Dollar General. In both robberies, witnesses testified to seeing the perpetrators leave in a black SUV. Store surveillance video from both robberies showed the suspects wore the same clothing and used a silver-colored handgun to demand money from the clerks and a customer. A high speed police chase ensued following the Dollar General robbery. The black SUV eventually lost control in a residential neighborhood and crashed, with both the driver and passenger fleeing the scene. The driver of the SUV was apprehended hiding in the closet of a nearby house. Dantzler was arrested sitting on the porch of another house when the owner of the home indicated to police that she did not know the man sitting on her front steps.

Dantzler was charged with two counts of robbery, assault while participating in a felony, and possession of a firearm as a felon. The trials of Dantzler and his co-defendant were severed, but the court consolidated Dantzler's two robbery charges for trial. Dantzler was found guilty on all charges and sentenced to serve consecutive twenty-five-year terms in prison for the robbery charges and concurrent five-year sentences for the assault and firearm convictions. Dantzler's convictions were affirmed on direct appeal. *State v. Dantzler*, No. 09-1363, 2010 WL 3155229, at *5 (Iowa Ct. App. Aug. 11, 2010).

Dantzler filed a PCR application in January 2011, which came on for trial on September 28, 2011. The district court denied the application finding in part, "[w]hile it is true that a victim did not specifically identify [Dantzler] as the perpetrator, vast circumstantial evidence confirmed his identify as the perpetrator." Dantzler now appeals the district court's denial asserting the court erred in finding sufficient evidence to support the conviction and also asserting his PCR counsel was ineffective in a number of ways.

II. SCOPE AND STANDARD OF REVIEW.

While we normally review PCR actions for correction of errors at law, when the applicant raises claims of ineffective assistance of counsel, our review is de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

"To succeed on an ineffective-assistance-of-counsel claim, a defendant must show: (1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Id*. at 158. If either element is lacking, the claim will fail. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To prove the first prong, Dantzler must

rebut the presumption that his attorney performed as a reasonably competent practitioner. *See id.* Prejudice is established if Dantzler shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id*. at 143.

III. INEFFECTIVE ASSISATNCE OF APPELLATE COUNSEL.

In this first claim, Dantzler asserts his appellate counsel was ineffective in failing to raise on direct appeal that the evidence was insufficient to prove he was the person who perpetrated the robbery. Dantzler claims appellate counsel should have challenged the district court's denial of his motion for a judgment of acquittal and his motion for a new trial on this ground.

The trial court in the PCR ruling found Dantzler could not prove prejudice as a result of appellate counsel's failure to challenge the sufficiency of the evidence. The evidence at trial showed the black SUV arriving at the Dollar General two separate times on the morning of June 11, hours before the robbery. Each time, three African-American males were seen arriving and departing the store together. After Dantzler was arrested, he was found to be in possession of two receipts from the Dollar General, matching the times the three men were observed on the store surveillance.

He was also found in possession of $577, which was damp and one bill was tinted pink. The customer victim at the Dollar General robbery asserted the perpetrator, wearing a black-hooded sweatshirt with a white piece of cloth over his face and caring a hand gun, took between five hundred and six hundred dollars from her. The money was damp because she had recently been in a

flood. She had washed off the money, and let it dry on pink paper which turned the bills pink. Dantzler asserts the money found on him was pink because he had it in the pocket of his red pajama pants, the same pants he was wearing when arrested and the same pants seen on the Dollar General surveillance video the morning before the robbery. While the red pants could explain the color on the money, it does not explain the dampness of the bills.

The same black SUV was seen in the area of the Prime Mart robbery. One of the perpetrators of that robbery was seen on store surveillance wearing a black-hooded sweatshirt and a piece of white cloth covering his face.

After the police chase following the Dollar General robbery, the hooded-sweatshirt and white cloth were found in the SUV, along with the gun and other items of clothing matching the description of the other suspects seen on the surveillance video. Dantzler was found on the porch of a nearby house, not wearing a shirt, but wearing pants and shoes matching the description of witnesses and the surveillance video. The resident of the house, who was watching the police search unfold, indicated to police she did not know who he was.

The white cloth was tested for DNA and the test found that Dantzler was a possible contributor to the profiles found. The test concluded, "Assuming more than one contributor, approximately 1 out of 100,000 unrelated individuals for [the first sample] and 1 out of 8,000 unrelated individuals for [the second sample] would be included as possible contributors to these mixture of profiles."

While there was no eye witness that testified Dantzler was one of the robbers, we agree with the district court's assessment that the "vast circumstantial evidence confirmed his identity as the perpetrator." *See also State v. Williams*, No. 09-0155, 2010 WL 446532, at *1–5 (Iowa Ct. App. Feb. 10, 2010) (rejecting Dantzler's co-defendant's sufficiency of the evidence claim on direct appeal). Because we find there was sufficient evidence to withstand Dantzler's motion for judgment of acquittal and his motion for a new trial based on the weight of the evidence, we find Dantzler cannot establish the result of his direct appeal would have been different had appellate counsel raised the issue. Thus, we find Dantzler cannot establish prejudice and this claim must fail.

IV. INEFFECTIVE ASSISTANCE OF PCR COUNSEL.

Next, Dantzler claims his PCR counsel was ineffective in not alleging his trial attorney was ineffective in (1) not rebutting the DNA evidence, (2) not insisting on separate trials for the two robbery charges, and (3) not challenging a prospective juror.

A. DNA Evidence. At trial, the State entered into evidence the report of the DNA findings of the criminalistics laboratory. Defense counsel did not object to the admission. The technician authoring the report did not testify and defense counsel did not offer its own DNA expert to rebut or explain the information contained in the report. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (holding the defendant had the right under the Confrontation Clause to confront the analyst who made the certification in the State's blood-alcohol analysis report unless the analyst was unavailable and the defendant had the

opportunity, pre-trial, to cross-examine the analyst); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (holding the analysts' affidavits, asserting the seized substance was cocaine, were testimonial, the analysts were witnesses for the purposes of the Confrontation Clause, and absent a showing of unavailability and a prior opportunity to cross-examine, the defendant was entitled to be confronted with the analysts). Dantzler asserts his PCR counsel was ineffective in failing to argue that trial counsel erred by not challenging the report on Confrontation Clause grounds and not rebutting the report with a defense expert.

The State claims Dantzler's trial counsel may have made a reasonable strategic decision to not challenge the report on Confrontation Clause grounds and to not call a defense expert, judging it safer to "bury" the issue rather than meet it head on. The State further claims the report was only one of the many pieces of circumstantial evidence pointing to Dantzler as the perpetrator of the crime, and a more vigorous attack on the report would not have greatly weakened the State's case. Therefore, the State asserts Dantzler has failed to prove the result of the trial would have been different.

As the record on appeal is inadequate to address Dantzler's claim that his PCR counsel was ineffective in failing to assert trial counsel's ineffectiveness for not challenging or rebutting the State's DNA evidence, this claim must be preserved for possible future postconviction relief proceedings. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) (holding a court addressing an ineffective-assistance-of-counsel claim raised for the first time on appeal must

either decide the claim if the record is adequate or preserve the claim when the record is inadequate).

B. Severance of Charges. Next, Dantzler argues his PCR counsel was ineffective in not asserting that trial counsel was ineffective for not asking for the charges for the two robberies be severed. He asserts the two robberies were committed hours and miles apart and had no similarity of identification. He also asserts the jury would have found it difficult to compartmentalize the evidence of the two offenses.

The State points out that the trial court record indicates Dantzler and his attorney specifically agreed at a pre-trial conference to "joint trials" on the two robbery charges. Dantzler cannot now complain that his attorney failed to insist on severing the charges, when he agreed to have the charges tried together. Even if Dantzler had not agreed to have the charges tried together, we find there was no reasonable probability that the court would have severed the charges had trial counsel made the motion. The temporal relationship between the crimes, along with the similar facts (the suspect's clothing, transportation, weapon, and objective), indicate to us that any motion to sever the charges would have been denied under Iowa Rule of Criminal Procedure 2.6(1).[1] "Counsel has no duty to

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[1] Iowa Rule of Criminal Procedure 2.6(1) provides in part:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

raise a meritless issue." *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009).

C. Juror Challenge. Finally, Dantzler asserts his PCR counsel was ineffective in not challenging his trial attorney's failure to object to a prospective juror during voir dire. He asserts a prospective juror informed the judge she was an employee of one of the businesses robbed. Dantzler claims the court made inquiry of the prospective juror in chambers, asking whether she was at work at the time of the robbery, whether she talked to anyone about the robbery or whether she formed an opinion about the robbery. The juror allegedly answered "no" to these questions, and counsel did not object her being seated as a juror.

A review of the trial court record indicates voir dire was not reported and no record was made of this alleged in chambers discussion. Dantzler does not request that we resolve this claim on appeal, but instead preserve it for further postconviction relief actions. As the record in this appeal is not adequate to address this claim, we preserve it. *See Johnson*, 784 N.W.2d at 198 (holding when the record is inadequate on direct appeal to address the claim of ineffective assistance of counsel, the claim must be preserved).

AFFIRMED.