IN THE COURT OF APPEALS OF IOWA

No. 3-330 / 10-2079
Filed May 30, 2013

YANCEY RUSSELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Applicant seeks postconviction relief from his conviction for possession of a simulated controlled substance with intent to deliver. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Steve Bayens, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Danilson, J., and Miller, S.J.*

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

MILLER, S.J.

I. Background Facts and Proceedings

On September 26, 2007, three police officers were travelling in an unmarked vehicle in Des Moines, Iowa, when Yancey Russell flagged them down near the corner of 21st Street and University Avenue. Russell attempted to sell them a rosary, and one of the officers stated, "We're looking for something a little harder than that." Russell offered to sell them two rocks of crack cocaine. He briefly showed them a baggie containing a brown substance. A later search of Russell, however, revealed only a small bag of peanuts.

Russell was charged with possession of a simulated controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(3) (2007), and delivery of a simulated controlled substance, in violation of section 124.401(1)(c)(3). Trial was initially set for January 16, 2008. On December 31, 2007, Russell filed pro se motions to dismiss his court-appointed attorney and for the discovery of evidence. After a hearing, the court granted the motion to dismiss counsel. New court-appointed counsel was appointed on January 8, 2008.

On the day set for trial, the parties discussed whether "the two counts" would merge. Defense counsel argued that they would merge, but stated, "I haven't had time to research it as thoroughly as I would like." No resolution of the merger issue was made at that time. The trial was continued to February 20, 2008.

On February 12, 2008, Russell filed a notice of intent to take depositions. The State resisted on the ground that the notice was untimely under Iowa Rule of Criminal Procedure 2.13(6) because it was filed more than thirty days after arraignment. After a hearing, the district court denied Russell's late request to take depositions, finding he had not shown good cause for extending the time for depositions.

The case proceeded to a jury trial. A jury found him guilty of possession of a simulated controlled substance with intent to deliver and delivery of a simulated controlled substance.

At the sentencing hearing, defense counsel and the prosecutor agreed that the "sentences" for the two charges would merge. The district court sentenced Russell to a term of imprisonment not to exceed ten years on each charge, and ordered that the sentences merge. Russell appealed, claiming that not only the sentences, but also the convictions should merge. The Iowa Court of Appeals agreed, and the case was remanded to the district court. *State v. Russell*, No. 08-0497, 2009 WL 1067324 (Iowa Ct. App. Apr. 22, 2009). On remand, Russell's two convictions were merged into one conviction for the greater offense.[1] He was sentenced to a term of imprisonment not to exceed ten years.

On August 28, 2009, Russell filed an application for postconviction relief, claiming he received ineffective assistance from both his first and second

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[1] The district court's order on remand does not make clear which of the two convictions remained after the merger. Russell's application for postconviction relief states he was convicted of possession of a simulated controlled substance with intent to deliver, and we will assume this is correct.

defense counsels. Russell claimed his first defense counsel should have deposed the police officers. He claimed his second defense counsel should have realized the two convictions would merge.

A postconviction hearing was held on September 10, 2010. The first defense counsel testified Russell never asked him to conduct depositions. He stated the prosecutor informed him that the plea offer would be withdrawn if he conducted depositions. The first defense counsel also stated, "It just appeared to me that at the time doing depositions wasn't going to get me anything, wasn't going to get Mr. Russell anything, any new information."

The second defense counsel noted the question of merger of the "two charges" was discussed at the hearing on January 16, 2008. He stated, "I know that my belief throughout the entire case was that they would eventually merge." The second defense counsel stated he discussed the issue of merger with Russell. He also stated he had discussions with the prosecutor about the issue of merger and attempted to get a better plea offer for Russell.

The district court denied Russell's application for postconviction relief. The court found Russell had not shown either counsel failed to perform an essential duty. The court also found Russell had not shown he was prejudiced by counsel's performance. The court concluded he had not shown he received ineffective assistance of counsel. Russell appeals.

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 the 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 there is a reasonable probability that, but for counsel's breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

III. Ineffective Assistance

A. Russell contends he received ineffective assistance from his first defense counsel due to his failure to depose the police officers. He claims that if the officers had been deposed he would have been able to bargain for a more favorable plea agreement. He asserts that if the officers had been deposed he would have had a better understanding of what they would say at trial, as well as a better understanding of which defense to employ.

The district court found, "there has been no showing made by Mr. Russell as to what the depositions could have further provided that would have been beneficial to any defense or argument made by Mr. Russell." We agree with the district court's conclusion. Russell has failed to provide any showing of what information would have been available if depositions had been taken that was not available to him at the time of trial. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (noting an applicant failed to show he received ineffective assistance when he did "not propose what an investigation would have revealed or how

anything discovered would have affected the result obtained below"). We note that the officers' testimony did not substantially differ from the minutes of evidence.

We further note that at the postconviction hearing defense counsel gave specific reasons for his decision not to take the depositions of the officers. Defense counsel testified that he understood that if he had sought depositions, the plea offer from the prosecutor would have been withdrawn. In general, "strategic decisions made after [a] 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010) (citation omitted).

In addition, Russell has failed to show how he was prejudiced by counsel's action. He has not shown how any potential information obtained from depositions would have assisted his defense. He has also not shown that if depositions had been taken the State would have been moved to offer him a better plea offer, or that he would have agreed to plead guilty to a different plea offer. *See State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002) (noting a party must show that but for counsel's error, the party would have made a different decision about going to trial).

We conclude Russell has failed to show he received ineffective assistance because his first defense counsel did not take the depositions of the police officers involved in this case.

B. Russell claims he received ineffective assistance because his second defense counsel did not realize that the two offenses in this case would

merge. He claims his second defense counsel should have raised an argument about merger to bargain for a better plea agreement.

The record is clear that the second defense counsel did believe that the offense of possession of a simulated controlled substance with intent to deliver would merge with the offense of delivery of a simulated controlled substance. In the hearing on January 16, 2008, the second defense counsel argued to the court that the "two counts" would merge. At the postconviction relief hearing, in discussion regarding the "two charges," he testified, "I know that my belief throughout the entire case was that they would eventually merge." He also stated that he discussed the merger issue with Russell, pointing out that the State's plea offer was thus not very valuable.

The second defense counsel also testified at the postconviction hearing that based on his belief the offenses would merge anyway, he sought a better plea agreement for Russell. We further note that there is no indication in the record that the prosecutor had any inclination to offer a better plea deal to Russell, and there is also no indication that Russell would have accepted a different plea offer. We conclude Russell has not shown he received ineffective assistance on the ground that his second defense counsel did not realize the two offenses charged in this case would merge.

We conclude the district court properly denied Russell's application for postconviction relief.

AFFIRMED.