IN THE COURT OF APPEALS OF IOWA

No. 3-537 / 11-1788
Filed July 10, 2013

LARRY CRUTCHER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

A plaintiff appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Jacob Van Cleaf of Van Cleaf & McCormack Law Firm, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee State.

Considered by Doyle, P.J., and Mullins, J., and Goodhue, S.J.*

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

GOODHUE, S.J.

An applicant, Larry Crutcher, appeals from a ruling entered October 20, 2011, denying his request for postconviction relief. The applicant's only issue presented on appeal is his claim of ineffective assistance of counsel in the postconviction relief proceeding.

I. Background Facts and Proceedings

The applicant was convicted by a jury trial on June 8, 2007, of possession of a controlled substance (crack cocaine) with intent to deliver, enhanced as a second or subsequent offender; possession of a controlled substance (marijuana); and possession of a controlled substance (more than ten grams of crack cocaine) with intent to deliver, enhanced as a second or subsequent offender; and failure to possess a tax stamp. The applicant appealed the conviction claiming, among other things, ineffective assistance of counsel. On appeal the conviction was affirmed; there was no finding of ineffective assistance of counsel. *State v*. *Crutcher*, No. 07-1307, 2009 WL 2424646, at *4 (Iowa Ct. App. Aug. 6, 2009).

The applicant filed a pro se petition requesting postconviction relief. Counsel was appointed and an amended petition was filed. Ineffective assistance of counsel was claimed again, and was again denied. The applicant's brief on appeal raises the sole issue of ineffective assistance of postconviction relief counsel.

On February 23, 2007, law enforcement observed a traffic violation. Officers stopped the vehicle. The applicant was the driver and the only occupant of the vehicle, but the passenger side window was open. The vehicle had been

observed swerving to the curb immediately prior to the stop. Drugs were found along the curb side of the street where the vehicle had swerved. In questioning the plaintiff, his residence was determined. A search warrant was obtained and a search of the residence conducted. Drugs were recovered as well as other miscellaneous items including a digital scale, a revolver, and a glass bottle and vial. Law enforcement made an unsuccessful test for fingerprints on the drugs and baggies containing the drugs. The other items seized were not fingerprinted.

The State prosecuted the case without fingerprint evidence. The items seized from the residence were located in a room which that evidence indicated was the applicant's room. The applicant testified he requested trial counsel to have other items fingerprinted, but it was not done. The applicant's postconviction relief counsel filed a motion to have certain of the other seized items fingerprinted. The applicant contends that if the prints of others and not his own prints were found on the seized items, it would tend to establish he was not occupying the room in which they were found. The State's witnesses testified that the other items seized and admitted at trial were items often possessed by drug dealers. The applicant also contends it would tend to prove that the other items said to be ordinarily possessed by drug dealers were not his.

Two hearings on the motion were held. The record submitted on appeal contains a lengthy discussion between the court and the applicant's counsel as to the foundation necessary before granting the motion and submitting the items for tests. The court was justifiably concerned that after the seizure, the handling of the exhibits, and the lapse of three-and-one-half years, the fingerprints would have been compromised from their original condition. The court made it clear

that it expected counsel to set out a chain of custody for the handling of the items over the three-and-one-half years that would limit the possibility of any contamination of the prints. The applicant's counsel argued that the court's concern should go to the weight of the evidence once the tests had been performed and not considered as a necessary foundation to perform the test.

The hearing was continued for a second hearing, and postconviction counsel advised the court she would let it know if she wanted to go forward or withdraw the motion. At the second hearing, counsel told the court she had placed a call to Division of Criminal Investigation (DCI) personnel to obtain testimony regarding the chain of custody, but had received no call back. She had subpoenaed Exhibit 7 from the trial proceeding, which was a sealed bag containing the glass bottle and vials. She then made an offer of proof by way of a professional statement that set out a presumed chain of custody.

The court did not rule, but the discussion that followed indicated counsel's efforts were not going to be considered adequate by the court. The hearing was again cancelled to allow counsel to provide an acceptable chain of custody. Soon thereafter, counsel withdrew the motion without a court ruling. The applicant contends his counsel provided ineffective assistance by failing to provide the suggested chain of custody and producing the necessary witnesses, and withdrawing the motion instead.

II. Standard of Review

Ineffective-assistance-of-counsel claims on a postconviction relief proceeding are a statutory right, but because of their constitutional nature, are reviewed de novo. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Discussion

To support an ineffective-assistance-of-counsel claim a proponent must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) this failure resulted in prejudice. *State v*. *Clark*, 814 N.W.2d 551, 567 (Iowa 2012). Counsel is presumed to be competent. *State v*. *Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006). The trial record alone will rarely be adequate to resolve a claim of ineffective assistance of on appeal. *State v*. *Straw*, 709 N.W.2d 128, 133 (Iowa 2006). As to the issue raised in this appeal, we conclude that the record is sufficient.

A. Counsel's Duty

The applicant contends that postconviction counsel failed to perform an essential duty by calling witnesses to provide the chain of custody which the court was requesting. The duty to investigate and call every potential witness is not unlimited. *Heaton v*. *State*, 420 N.W.2d 429, 431 (Iowa 1988). The duty to investigate must be judged in each case on its relationship to the underlying circumstances. *Schrier v*. *State*, 347 N.W.2d 657, 662 (Iowa 1984). The possibility of producing a chain of custody establishing that the fingerprints had not been compromised seems highly unlikely.

The "essential duty" requirement also becomes qualified by the prejudice requirement. The denied information must be material and helpful to the claimant. Counsel's duty does not ordinarily require testing which could be exculpatory or merely "potentially" helpful, but could also be damaging. *Thompson v*. *State*, 492 N.W.2d 410, 413 (Iowa 1992). In a sense the applicant has nothing to lose at this point since he has already been convicted.

Shifting the claim of ineffective assistance from trial counsel to postconviction counsel does not change the nature of the duty to decide to test. This decision was initially and necessarily made by trial counsel. The applicant has not appealed the district court's denial of his claim of ineffective assistance of trial counsel. The failure to argue or cite authority in support of an issue may be deemed waiver of that issue on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3). Therefore, the issue of ineffective assistance of trial counsel has already been decided and, by failure to brief, is not a part of this appeal.

B. Prejudice

Counsel's failure must have been so prejudicial to the applicant that but for the error, the result would have been different. *Dunbar v*, *State*, 515 N.W.2d 12, 15 (Iowa 1994). To be helpful to the applicant the fingerprint tests would have had to reflect fingerprints of others not in the chain of custody, and reflect no fingerprints of the applicant. Even in that best case scenario, the possibility that such evidence would have changed the outcome of this postconviction relief action or the underlying case is nonexistent. The evidence against the applicant in the underlying case is such that on direct appeal the court observed "there was overwhelming evidence for the jury to have found Crutcher guilty of the charged crime." *Crutcher*, 2009 WL 2424646, *4. That conclusion remains unchallenged and would remain unchallenged regardless of the results of the fingerprint testing.

AFFIRMED.