

IN THE COURT OF APPEALS OF IOWA

No. 7-227 / 06-0492
Filed June 13, 2007

VANICE HEATH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Vanice Heath appeals the dismissal of his application for postconviction
relief. **AFFIRMED.**

Rockne Cole of Cole, Vondra, & Thompson, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney
General, Harold Denton, County Attorney, and Todd D. Tripp, Assistant County
Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Vanice Heath appeals the dismissal of his application for postconviction relief. He alleges he received ineffective assistance of both trial and appellate counsel. We affirm.

I. Background Facts and Proceedings

Heath was convicted of first-degree murder on February 14, 1996. This court affirmed the conviction and sentence. See *State v. Heath*, No. 96-318 (Iowa Ct. App. July 30, 1997). Further review was denied on October 3, 1997. *State v. Heath*, No. 96-318 (Iowa Oct. 3, 1997).

Heath's conviction resulted from an incident in March 1995 when Heath and three other individuals, Carlos Montford, Eddie Appleton, and an unidentified man, were observed assaulting Kevin Eatman. The record indicates the fight occurred after Eatman or a man with Eatman called Montford a "GD killer." Montford and the unidentified man, who are members of the Gangster Disciples gang, reportedly took offense to the remark. Eatman and the man accompanying him were members of the Mickey Cobras gang. Heath and Appleton, both members of the Gangster Disciples, arrived on the scene after the alleged remark, and joined in the confrontation. During the scuffle, Eatman was shot. Witnesses later identified Heath as the shooter. Montford was convicted of voluntary manslaughter. Appleton was allowed to plead to lesser charges in exchange for a statement that Heath was the shooter. Appleton later testified, however, that Montford was the shooter.

At Heath's trial, the trial court allowed the State's alleged gang expert, Sam Black, to testify to historical conflict between the Gangster Disciples and the

P-Stones gang, a progenitor of the Mickey Cobras. Black also testified about gang-related riots in the Fort Madison prison. Black testified these riots resulted in killings that were reprisals against gang members who were allegedly going to testify against their fellow gang members.

Defense counsel objected to Black's testimony, arguing it was irrelevant, hypothetical, prejudicial, and an improper comment on another witness's testimony. He admitted in postconviction testimony he thought some gang testimony would be helpful to the defense strategy of implicating Montford as the triggerman. Appellate counsel did not pursue the challenge to Black's testimony. He stated he did not remember why he did not raise the issue, but claimed it would not have been successful because the participants' gang affiliation was inseparable from the circumstances surrounding the murder. He also shared trial counsel's opinion that some gang-related testimony would be beneficial to the defense objective of implicating Montford. Heath now appeals the postconviction court's dismissal of his application for postconviction relief.

II. Standard of Review

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Nguyen v. State*, 707 N.W.2d 317, 322-23 (Iowa 2005); *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998).

III. Merits

A. Trial Counsel

Heath argues his trial counsel was ineffective for failing to adequately object to Black's testimony. Heath claims competent counsel would have, in addition to objecting to the testimony, cited to cases *State v. Nance*, 533 N.W.2d 557 (Iowa 1995), and *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), for the proposition that gang-related evidence is inherently prejudicial.

In order to show his counsel rendered ineffective assistance, Heath must show (1) his counsel breached an essential duty and (2) that breach resulted in prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In this case, trial counsel raised six objections to Black's testimony. Four of these objections were sustained. Heath's argument that specific reference to the two cases he cites would have strengthened his counsel's objections is doubtful. Neither of the cases applies to Heath's case.¹ As the postconviction relief court stated,

There is no question that the gang membership of the participants was a key ingredient in the circumstances that lead to the shooting. Thus the general proposition against admission of such evidence set out in *Nance* and the concerns about the right of association raised in *Dawson v. Delaware* are not applicable.

Further, counsel's defense strategy of pointing the finger at Montford would require some gang-related testimony to be admitted. It is clear trial counsel

¹ In *Nance*, the evidence of gang-membership did nothing to explain the circumstances of the crime. *Nance*, 533 N.W.2d at 562. Thus, the evidence only appealed to the jury's instinct to punish gang members. *Id.* In *Dawson*, the gang evidence was also irrelevant to the crime. *Dawson*, 503 U.S. at 166, 112 S. Ct. at 1098, 117 L. Ed. 2d at 317-18.

made the appropriate objections. Heath's claim with regard to trial counsel must fail.

B. Appellate Counsel

Heath argues his appellate counsel was ineffective in failing to raise the issue of Black's testimony on direct appeal. The standard for ineffectiveness of appellate counsel is the same as for trial counsel. *Luke v. State*, 465 N.W.2d 898, 901 (Iowa Ct. App. 1990).

Heath's appellate counsel stated he did not remember why he did not raise the issue on direct appeal. However, he testified at the postconviction relief hearing he would not now have handled the issue any differently. He testified he considered Black's testimony more probative than prejudicial and helpful to Heath's defense. We will not find ineffectiveness where reasonable strategy failed. See *Wemark*, 602 N.W.2d 810, 814 (Iowa 1999); *Luke*, 465 N.W.2d at 904. In addition, the postconviction relief court recognized and thoroughly discussed the issue of appellate counsel's failure to pursue the issue of Black's testimony. The court stated in part:

[T]his Court finds that, given the issues appellate counsel did raise on appeal and appellate counsel's realization that trial counsel strategically wanted some gang testimony admitted to focus blame on Montford, it cannot conclude that appellate counsel's performance was not within the range of normal competency even though appellate counsel failed to recognize a potentially meritorious claim that the evidence was impermissible expert testimony on witness credibility.

Further, even if appellate counsel violated a fundamental duty, this Court does not conclude that the erroneous admission of that evidence so undermined its confidence in the jury's verdict that a new trial is required. This is because of the amount of evidence that still points to Heath as one of the persons who participated in the chase that resulted in Eatman's death and the remaining evidence that Appleton's sudden change in his testimony was not

credible. The jury had multiple statements from eyewitnesses, participants and from a police officer that interviewed Heath. The statements from all the participants, including Heath, involved contradictions, denials and admissions. The gang testimony just added one more consideration that was not so overwhelming in itself to have outweighed all the other factors the jury had to consider. The Court of Appeals, notably, did not cite the gang expert testimony in support of its conclusion that there was sufficient evidence to convict Heath of the crime. Further, under the instructions, the jury did not necessarily have to conclude that Heath was the gunman, just that he was a knowing participant that acted with malice aforethought in assisting a shooter who acted with premeditation and a specific intent to kill. Thus, given the entire record, appellate counsel's failure to pursue the allegedly erroneous admission of gang-related credibility testimony did not cause the level of prejudice to Heath to require that he be granted a new trial.

We agree with the district court. This case was, pure and simple, about gang activity and resultant violence following an offensive gang remark. While we have difficulty with some of the evidence admitted, most notably the gang activity in the prison system, we are unable to conclude appellate counsel rendered ineffective assistance of counsel.

The district court's ruling denying postconviction relief is affirmed.

AFFIRMED.