

IN THE COURT OF APPEALS OF IOWA

No. 8-006 / 05-1771
Filed June 25, 2008

KENNETH RAY SHARP,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart
Scoles, Judge.

Kenneth Ray Sharp appeals the district court's denial and dismissal of his
application for postconviction relief from his conviction for kidnapping in the first
degree. **AFFIRMED.**

Carla S. Garrels-Pearson, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, and Paul L. Martin, County Attorney, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, J.J.

MILLER, J.

Kenneth Ray Sharp appeals the district court's denial and dismissal of his application for postconviction relief from his conviction for kidnapping in the first degree. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Sharp was convicted, following a jury trial that began on October 30, 1995, and ended on November 7, 1995, of kidnapping in the first degree. The conviction arose out of the alleged kidnapping, assault, and rape of J.S. by Sharp and his co-defendant, Mark Hoffman. Sharp appealed his conviction, contending the trial court erred in failing to suppress evidence seized during the execution of a search warrant and there was insufficient corroboration of an accomplice's testimony. This court affirmed Sharp's conviction on direct appeal. *State v. Sharp*, No. 95-2228 (Iowa Ct. App. Feb. 26, 1997).

On March 14, 2005, Sharp filed an amended and substituted application for postconviction relief.¹ In his application Sharp alleged his trial counsel, Richard Tompkins, Jr., had rendered ineffective assistance in seven specified ways. A hearing was held on the application. Sharp participated by telephone. After hearing testimony for both the applicant and the respondent, including testimony from Sharp and Tompkins, the court entered a written ruling denying and dismissing the application. The district court separately addressed each of

¹ As noted by the district court, this case has a long and convoluted procedural history beginning with Sharp's initial application for postconviction relief filed on May 27, 1998. Sufficed it to note for purposes of this appeal that James McCarthy was finally appointed as Sharp's fourth court-appointed attorney in this postconviction action, and Mr. McCarthy filed the amended and substituted application for postconviction relief from the denial of which Sharp now appeals.

Sharp's claims of ineffective assistance of trial counsel and concluded in a thorough ruling that Sharp failed to meet his burden of proving his trial counsel had rendered ineffective assistance.

Sharp appeals the district court's denial of his application, contending his postconviction counsel was ineffective for (1) not claiming his trial counsel was ineffective for not securing the notes his co-defendant, Hoffman, wrote to his attorney, (2) not claiming his trial counsel was ineffective for failing to acquire and use information regarding Hoffman's alleged prior bad acts, and (3) not making a reasonable inquiry and investigation in order to establish his trial counsel was ineffective for not allowing Sharp to accept an alleged mid-trial plea bargain offer. Finally, Sharp makes nine separate claims of violation of his rights to due process of law under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and asserts that if any of the nine had been investigated, and established at the postconviction hearing, his conviction would have been overturned.

II. SCOPE AND STANDARDS OF REVIEW.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts a claim of constitutional nature, such as ineffective assistance of trial counsel, we evaluate the totality of the circumstances in a de novo review. *Id.* Defendants have a right to effective counsel in a postconviction proceeding as well, because although it is not a constitutional right the statutory right to postconviction counsel implies a right to effective counsel. *Dunbar v. State*, 515

N.W.2d 12, 14 (Iowa 1994). Competency standards are the same for postconviction counsel as for trial counsel. *Id.* at 15.

III. MERITS.

A person claiming he or she received ineffective assistance of counsel must prove by the preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted from the error. *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To prove the first prong, failure of an essential duty, the person must overcome a presumption that counsel was competent and show that under the entire record and totality of circumstances counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove the second prong, resulting prejudice, the person must show that counsel's failure worked to the person's actual and substantial disadvantage so there exists a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Doggett*, 687 N.W.2d at 100; *Ledezma*, 626 N.W.2d at 143-44. On appeal we can affirm a rejection of an ineffective-assistance-of-counsel claim if proof of either element is lacking. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

A. Ineffective Assistance of Postconviction Counsel.

1. Hoffman's notes.

It appears from the record in Sharp's criminal case that there was an informal, reciprocal discovery agreement between the prosecution and Sharp's attorney, Tompkins, and Hoffman's attorney, Levad. At some point before Sharp's trial began the State and Hoffman reached a plea agreement and

Hoffman entered a guilty plea. Hoffman was allowed to plead guilty to the lesser offense of aiding and abetting sexual abuse in the third degree and agreed to testify at Sharp's trial.

Hoffman's sentencing was scheduled for November 13, 1995. While his case was pending, Hoffman had made handwritten notes about the offense. The notes were originally directed to his attorney, Levad. At Hoffman's behest Levad turned the notes over to the presentence investigator, Della Weaver. Levad believed he turned the notes over to her after Sharp's trial, about a day before Hoffman's sentencing. The notes were turned over to Weaver so that she would have a written record of Hoffman's version of the offense.

When Levad received a copy of the presentence investigation report for Hoffman's sentencing he was surprised to find an attached police report that he had not previously received. He apparently received the presentence investigation report on or shortly before November 9, 1995, because late on that date he faxed a copy of the attached police report to Tompkins. Tompkins and Levad subsequently had a conversation in which Levad informed Tompkins that Levad had forwarded Hoffman's handwritten notes to the county attorney's office.

At some time after Sharp's trial Levad and the county attorney had a conversation about whether Levad had provided Hoffman's notes to the county attorney's office. The two of them then searched the county attorney's materials concerning the case against Sharp and Hoffman and found no such notes. The county attorney was of the opinion that the only possibility was that Levad had instead given the notes to William Basler, the Iowa Department of Criminal

Investigation case agent for the case involving Sharp and Hoffman. Basler, however, testified at a hearing on a motion for new trial filed by Tompkins for Sharp that the only notes of Hoffman's that he had possessed or seen were six pages seized from Hoffman's jail cell pursuant to a search warrant, and that no other such notes had ever been provided to him or requested by him. The record shows that in Levad's opinion Hoffman's notes consisted of at least 100 pages.

Following Sharp's conviction Tompkins filed the motion for new trial mentioned above. In it he alleged the prosecutor had committed prejudicial misconduct by failing to completely honor the reciprocal discovery agreement, in part because the prosecution did not turn over to Tompkins all of Hoffman's notes. A hearing was held on this motion at which Levad testified there were "well over a hundred" pages of notes by the time he turned them over to Della Weaver and they contained information he believed would have been "interesting" to Tompkins as Sharp's defense attorney. However, Levad also testified the notes contained nothing that was inconsistent in any way with any of Hoffman's deposition or trial testimony.

Sharp claims on appeal that his postconviction counsel was ineffective for not raising an ineffective assistance claim against Tompkins for not securing the notes Hoffman wrote to his attorney while he was in jail.

First, Sharp cannot show that Tompkins performed below the range of normal competency concerning Hoffman's notes. Hoffman's notes were directed to his attorney, and, as opined by the district court twice in the underlying criminal case against Sharp, were subject to attorney-client privilege. Sharp, and thus

Tompkins, had no right to access the notes unless and until that privilege was waived. Further, in ruling on Sharp's motion for new trial the district court found that the notes did not reach the hands of the county attorney or Agent Basler, and did not find their way to any law enforcement agency until they got to Della Weaver. This finding is fully supported by the record and we adopt it.

Second, we conclude that Sharp cannot have been prejudiced by not having the notes until after his trial. As shown by Levad's testimony during the hearing on Sharp's motion for new trial, Hoffman's notes contained nothing inconsistent with or at variance from either the testimony Hoffman gave when his deposition was taken by Tompkins or the testimony Hoffman gave at trial. Sharp has not met his burden to prove that there exists a reasonable probability that the result of his criminal trial would have been different if he had had Hoffman's notes.

Because we have determined Sharp has failed to show this ineffective assistance of trial counsel claim would have prevailed had it been raised, we further conclude his postconviction counsel could not have been ineffective for failing to raise the same issue in his postconviction application. Postconviction counsel had no duty to raise this meritless issue, and thus cannot have been ineffective for failing to do so. See *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998) (stating trial counsel is not incompetent in failing to pursue a meritless issue).

2. Hoffman's prior bad acts.

At the postconviction hearing Sharp testified that while he was being transported to Oakdale after his sentencing in 1995 another convicted felon, Rick Latham, told him he “got screwed” because Hoffman, who had testified against Sharp as part of a plea agreement, had committed the rape and murder of Richard Vargas in the county jail in 1986, a crime for which Larry Fielding had “taken the rap.” Hoffman apparently was never charged with or convicted of any crime related to Richard Vargas. Sharp argued that his trial counsel, Tompkins, knew about Hoffman’s guilt in the Vargas case because Tompkins was the “prosecuting attorney at the time” of Vargas’s murder in 1986.

Tompkins testified at the postconviction hearing that he served as Cerro Gordo County Attorney from 1979 to 1983 and then entered private practice. He further testified that he had no involvement with the 1986 prosecutions of Latham and Fielding for the death of Vargas, and had no personal knowledge about their indictments other than what he read in the newspaper. The State also presented evidence that Hoffman was in the county jail on unrelated charges at the time of Vargas’s murder. Thus Hoffman, as well as several others who were inmates at the time of Vargas’s death, was listed as a witness in Fielding’s and Latham’s murder trials.

On appeal Sharp claims his postconviction counsel was ineffective for not raising an ineffective assistance of trial counsel claim against Tompkins, apparently on the theory that if Tompkins had made a reasonable investigation he would have discovered this alleged prior bad act by Hoffman and such evidence would have resulted in a different outcome at trial.

There was strong evidence against Sharp at his criminal trial. First, J.S. testified in detail about being sexually assaulted by Sharp at Sharp's house, including the fact he threatened her with a knife during the assault. Second, although Sharp did not testify at trial, an audiotape of an interview with Sharp shortly after his arrest was played for the jury. In the interview Sharp admitted he was with Hoffman and J.S. in the countryside where she was sexually assaulted by Hoffman. In addition, during an earlier interview with officers in his home while a search warrant was being executed, Sharp also admitted he was in the countryside with Hoffman, admitted he witnessed Hoffman sexually assault J.S., and stated he, Sharp, had "started to" penetrate the victim but "just couldn't." Finally, during the search of Sharp's residence a knife was found under the pillow on his bed. A pair of Sharp's jeans and a black t-shirt were also seized. Later DNA tests conducted on these garments revealed epithelial cells which matched the victim but did not match either Sharp or Hoffman.

Furthermore, we note it is not at all clear from the record before us that the purported evidence concerning Hoffman's alleged involvement in the prior crime would have been admissible at Sharp's underlying criminal trial. From the record before us we do not believe such evidence would have been admissible as evidence either of Hoffman's character or for impeachment purposes under rules of evidence 5.404, 5.607, 5.608, or 5.609.

Assuming without deciding that the evidence of Hoffman's alleged prior bad act would have somehow been admissible at Sharp's underlying trial, we conclude that given the strong evidence of Sharp's guilt Sharp cannot show how

the evidence of Hoffman's alleged prior bad act would likely have changed the outcome of his trial. Therefore, Sharp cannot show that he was prejudiced by Tompkins alleged breach. Because we conclude Sharp cannot prove that this ground of ineffective assistance of trial counsel would have prevailed had it been raised, we further conclude his postconviction counsel could not have been ineffective for failing to raise the issue in his postconviction application. Postconviction counsel had no duty to raise this meritless issue, and thus cannot have been ineffective for failing to do so. *Ceaser*, 585 N.W.2d at 195.

3. Offer of plea bargain.

One of the issues raised by Sharp in his postconviction application was a claim that Tompkins was ineffective because he "did not permit [Sharp] to accept the plea bargain offer, despite [Sharp's] desire to take the plea bargain offer." At the postconviction hearing, Sharp testified that during a break in his criminal trial the prosecutor walked past him in the courtroom and said to Sharp, "[t]wenty-five years, Mr. Sharp." Sharp claims he "started to accept" the "offer" but Tompkins stated, "Mr. Sharp has nothing to offer," and would not let him accept the offer. Sharp alleged this offer was made on the record and in front of the jury. Tompkins testified at the postconviction hearing that this event "never happened." He stated he in fact had sought a plea bargain from the prosecutor numerous times but none was ever offered before, during, or after the trial.

The postconviction court found the testimony of Sharp and Tompkins was irreconcilable on this point, but that Tompkins was the more credible witness. The court thus concluded "that a preponderance of the credible evidence

established that no offer in that regard was ever extended to Sharp in the underlying action.” The court noted it was not directed to anywhere in the transcript that disclosed the purported exchange regarding the plea offer.

The trial court, as factfinder, is to determine witness credibility and the weight of the evidence as a whole. See *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Trial court findings on credibility of witnesses are entitled to considerable deference by this court. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). Accordingly, we defer to and agree with the postconviction court’s finding that Tompkins was the more credible witness here. Thus we, like the district court, conclude the preponderance of the credible evidence in the record before us established that no plea offer was ever extended to Sharp by the prosecution in the underlying criminal action and therefore Tompkins could not have been ineffective for failing to allow Sharp to accept such an offer.

On appeal Sharp appears to be claiming postconviction counsel was ineffective for not making a reasonable inquiry with regard to this issue by interviewing alleged witnesses and obtaining information not contained in the record in order to properly establish this claim of ineffective assistance of trial counsel.

In complaining of the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job, for example should have called additional witnesses. *Dunbar*, 515 N.W.2d at 15 (citing *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983)). The defendant must state specific ways in which counsel's performance was inadequate and how competent

representation probably would have changed the outcome. *Id.* Claims of ineffective assistance of postconviction counsel are preserved for further postconviction relief only if the applicant makes a minimal showing of the potential viability of the claim. See *State v. Alloway*, 707 N.W.2d 582, 587 (Iowa 2006) (citing *State v. Wagner*, 410 N.W.2d 207, 215 (Iowa 1987)). This requires the applicant to show the need to develop a further record, and to explain why the actions of counsel were ineffective and how those actions resulted in prejudice. *Id.* A bald assertion is insufficient. *Id.*

Here, postconviction counsel did raise this issue in the postconviction application and then solicited testimony from both Sharp and Tompkins on the issue. On appeal Sharp alleges postconviction counsel should have interviewed alleged witnesses, but he does not name or otherwise identify the purported witnesses that he claims should have been interviewed, does not state what evidence would have been obtained from those witnesses, and does not suggest how that evidence more likely than not would have changed the outcome of the proceeding. Further, not only is Sharp's claim that the alleged plea offer was made on the record before the jury not supported by the record, it is in fact directly contradicted by it. Upon our own review of the record before us, including the transcript of the underlying criminal trial, we are unable to find any evidence of the alleged plea agreement in that record. We therefore conclude Sharp's claim of ineffective assistance of postconviction counsel on this ground also fails because he does not sufficiently allege what more a reasonably competent attorney would have done or show how he was prejudiced. We

conclude he has not made the minimal showing of potential viability of this claim necessary for it to be addressed or preserved for a further postconviction proceeding.

B. Alleged *Brady* Violations.

Finally, Sharp sets forth nine separate contentions and asserts: “If any one of these contentions had been investigated, and established at the post conviction hearing . . . that would have been the basis Mr. Sharp needed to establish a *Brady* violation, which would have resulted in overturning his conviction.” The Supreme Court in *Brady* held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. Evidence that may be used to impeach a witness's credibility is included in this rule. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985); *see also State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996).

The nine *Brady* “violations” alleged by Sharp are (1) his trial counsel refused to accept the State’s motion for mistrial, (2) the prosecution offered perjured testimony from Hoffman and from Sharp’s ex-wife, (3) his trial counsel refused to waive his right to speedy trial even though Sharp wanted more time, (4) he was not taken before the judge to make his initial appearance or to be arraigned, (5) his counsel would not let him testify on his own behalf even though he wanted to, (6) his trial counsel failed to ask for defense tests to address

prosecution expert testimony, (7) the State withheld information about Hoffman that would have helped him impeach Hoffman's testimony, (8) his trial counsel failed to object to the introduction of his taped confession that had been altered, and (9) his trial counsel failed to object to certain DNA evidence introduced by the State.

We conclude that only one of these nine contentions, number (7), which apparently relates to Sharp's claim regarding Hoffman's alleged prior bad acts, actually implicates the issues involved in *Brady* and its progeny. We have already determined that neither Sharp's trial counsel nor his postconviction counsel was ineffective for not raising this issue, because Sharp did not meet his burden to show how the outcome of either his trial or his postconviction action would likely have been different had they done so. We thus need not address the issue further here.

IV. CONCLUSION.

For the reasons set forth above, we conclude Sharp has not met his burden to show his postconviction counsel rendered ineffective assistance, and has not established that any *Brady* violation occurred in his underlying criminal trial. We affirm the judgment of the postconviction court.

AFFIRMED.