IN THE COURT OF APPEALS OF IOWA

No. 9-140 / 07-1927
Filed May 29, 2009

MICHAEL TERRY WILLIAMS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, James Drew, Judge.

Michael Terry Williams appeals the denial of his application for postconviction relief. **AFFIRMED.**

Rockne Cole of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett and Douglas Hammarand, Assistant Attorneys General, for appellee State.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Michael Terry Williams appeals the denial of his application for postconviction relief. Williams raises a number of issues. His most substantial claim is that his trial counsel simultaneously represented an alibi witness, resulting in an impermissible conflict of interest. After careful consideration of Williams's arguments, we affirm the decision of the district court.

I. FACTS AND PROCEDURAL BACKGROUND.

On July 27, 1998, Bruce Vrchota was murdered at his home. Williams was subsequently tried and convicted of first-degree murder and first-degree robbery in connection with Vrchota's death. The trial evidence was summarized in our prior opinion on direct appeal:

> Williams and two other men discussed breaking into Vrchota's house in order to get marijuana and cash Vrchota was known to keep in his home. All three men dressed in black clothing. After midnight, Vrchota's son, Shelly, saw the three men enter his father's house. He later identified Williams to be the one who was carrying a gun. Shelly testified Williams pointed the gun to his face and told him not to look at him. Shelly also testified Williams demanded money and asked where Vrchota kept his cash. Williams forced Vrchota into another room. Shelly heard sounds of a desk drawer being opened and then heard two gunshots. The gun used to shoot Vrchota was later identified as a .9-millimeter handgun. The evidence indicated this gun had been in Williams's possession shortly before the shooting and was found hidden in Williams's brother-in-law's house. Williams's fingerprints were on the clip.

State v. Williams, No. 99-0551 (Iowa Ct. App. Aug. 16, 2000).

Two members of the Cerro Gordo County public defender's office, Leslie Hult[1] and her supervisor Susan Flander, represented Williams at trial. Hult was engaged to be married to an attorney in the Cerro Gordo county attorney's office

[1] We will refer to Leslie Dalen here by her former name, Leslie Hult.

(Carlyle Dalen), although she did not initially disclose that information to Williams. Williams learned of that fact from another inmate and confronted Hult shortly before trial. In addition, another assistant public defender, Katherine Evans, who did not represent Williams at trial, was married to Gregg Rosenbladt, another individual in the county attorney's office. Rosenbladt was going to be one of the trial attorneys for the State, but at the last minute he stepped aside, and the attorney general's office prosecuted the case on its own.

When we heard Williams's direct appeal in 2000, we affirmed his convictions, except we remanded for an evidentiary hearing on the potential conflict of interest issues arising out of the Hult/Dalen and Evans/Rosenbladt relationships. Subsequently, the district court denied relief, and in 2002 we affirmed. *State v. Williams*, 652 N.W.2d 844, 850 (Iowa Ct. App. 2002).

In 2003 Williams filed an application for postconviction relief, which was amended several times and ultimately ran thirty-nine pages long. The district court denied the application on October 8, 2007, following another evidentiary hearing. Williams now appeals that denial. In his application and on this appeal, Williams argues that his trial counsel or prior appellate counsel (who also handled the December 2000 hearing on remand) were constitutionally ineffective for various reasons. Williams's principal contentions are the following: (1) Susan Flander, one of his two trial attorneys, also represented Deanna Ackerman, a potential alibi witness, at the time of Williams's trial, and Ackerman was never called to testify; (2) Williams's prior appellate counsel did not fully explore certain conflicts arising out of the Hult/Dalen and Evans/Rosenbladt relationships on remand; and (3) Williams's prior appellate counsel failed to challenge legal errors

made in this court's 2000 opinion. Of these, we believe the first is the most significant.

Vrchota's son called 911 to report the shooting at 1:42 a.m on July 27, 1998. Deanna Ackerman later made a statement to the police that at about 1:00 to 1:30 a.m. the same night she phoned Williams's house. According to Ackerman's statement, a woman answered and put Williams on the phone. Ackerman asked Williams for some marijuana, and Williams told Ackerman she would need to come to his house to get it. Ackerman stated she never went to Williams's house that night.

According to a statement from another witness, Ackerman told her she paged Williams the night of the murder at 2:05 a.m., and Williams returned her call.

Ackerman also appeared at the Mason City police station at about 3:30 a.m. the same night to report two males that she wanted removed from her apartment. The police immediately regarded these two individuals as potential suspects in Vrchota's murder, broke into the apartment, and took them both to the station, but never charged them. Ackerman was never called as a witness at trial.

During the entire time period between the murder (July 27, 1998) and Williams's trial (March 1999), Susan Flander—one of Williams's two trial counsel—was representing Ackerman on either a theft charge, a possession of marijuana charge, or both.

In the postconviction relief hearing, Flander admitted she had represented both Williams and Ackerman simultaneously. However, asserting the attorney-

client privilege, Flander refused to disclose any conversations she had had with Ackerman about Williams, or even whether there had been such conversations. Nonetheless, Flander testified that the defense decided not to call Ackerman as an alibi witness because Ackerman's statement that she reached Williams at his house conflicted with Williams's own statement to police that he was at a bar. Ackerman's statement was also inconsistent with the trial testimony of Williams's then-girlfriend (later wife) that she saw Williams at the bar at 11:30 p.m. and that he returned home about two-and-a-half hours later (i.e., at 2:00 a.m.).

II. LEGAL ANALYSIS.

We review ineffective-assistance of-counsel claims de novo. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant is required to show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Collins*, 588 N.W.2d at 401. To establish the first prong, a defendant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish the second prong, the defendant must demonstrate the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 142. With these principles in mind, we turn to Williams's claims.

A. Ackerman Representation.

Williams argues that he received ineffective assistance at trial in 1999 because his trial counsel, Susan Flander, was simultaneously representing an alibi witness, Deanna Ackerman. Williams contends there was an "actual conflict" as defined in *State v. Watson*, 620 N.W.2d 233, 239 (Iowa 2000), and that he was not required to show this conflict "adversely affected" his counsel's performance. The State, by contrast, contends that under *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S. Ct. 1237, 1244, 152 L. Ed. 2d 291, 305 (2002), an "actual conflict" is now deemed one that "adversely affects" counsel's performance. In *State v. Smitherman*, 733 N.W.2d 341, 347-48 (Iowa 2007), our supreme court required a showing of "adverse effect" under the circumstances of that case, but left open the question whether Iowa—in applying its own constitution—would follow the more restrictive *Mickens* definition of "actual conflict" in future cases involving different facts.

We believe, after careful consideration, that Flander's representation of Ackerman did not present an actual conflict even under the *Watson* definition. Thus, we uphold the district court's ruling denying postconviction relief on this ground. Ackerman's "alibi" statement appears, on its face, to contradict the version of facts given by Williams and his wife, namely that he was at a bar at the time of the murder. Therefore, it is difficult to see how calling Ackerman at trial could have helped Williams's defense. Furthermore, her statement was at best an incomplete alibi for Williams. Given Ackerman's vagueness about timeframes, a jury could have accepted the truth of her statement entirely and still found that Williams arrived at Vrchota's home before 1:42 a.m. Yet, at the

same time, Ackerman's statement was utterly inconsistent with Williams's own assertion that he was at a bar. Since Ackerman was not, on the very face of things, a witness who was going to be helpful to Williams's defense, we hold there was no "actual conflict" arising out of Flander's dual representation of both parties.

We find further support for this position in the supreme court's recent decision in *State v. Smith*, 761 N.W.2d 63 (Iowa 2009). Although that case involved a different issue, namely whether a defendant's chosen counsel should have been disqualified based on a conflict of interest, the court did emphasize the importance of distinguishing "actual" conflicts from "speculative" conflicts, and relied on the minutes of testimony to determine no actual conflict existed, at least to that point. *Smith*, 761 N.W.2d. at 74. Similarly, we believe it is appropriate to conclude there is no actual conflict here based on the signed statement given by Deanna Ackerman.

Williams argues vigorously[2] that it is unfair for the district court or this court to decide conclusively there is no "actual conflict" when Flander declines to reveal what Ackerman told her (if anything) about Williams. We respectfully disagree. We are faced with competing concerns. Williams was convicted ten years ago, after a trial in which the State presented strong evidence of his guilt. For the State now to have to retry Williams because his trial counsel concurrently represented a non-witness, whom the available evidence indicates would not have helped Williams, seems to us more than the Sixth Amendment or Article I section 10 requires.

[2] We commend Williams's counsel for his thorough and forceful presentation.

We agree that a conflict question such as this must be scrutinized very carefully. This could well be a different case if the existing record did not make it clear why Ackerman was not going to help Williams's defense. Nonetheless, on the present record, we believe the district court made the correct decision.

B. Romantic Relationships.

Williams also urges that he received ineffective assistance on appeal and on remand because various aspects of the Evans/Rosenbladt and Hult/Dalen relationships did not surface in those proceedings. He contends that certain clients of Evans and/or Hult—Chris Morrill, Delona Webster, Vernon Moon, and Romie Williams—either had relevant information about the murder or actually testified for the prosecution at trial.

However, the record does not reveal the presence of any actual conflicts here. There is no reason to believe Morrill's or Webster's testimony could have benefited Williams had either of them testified at trial. Morrill claimed to have heard jailhouse conversations about the murder. The conversations amounted to inadmissible hearsay and, in any event, they incriminated Williams. Webster's statements to police were also inadmissible hearsay, and again, they incriminated Williams.

Moon and Romie Williams did testify for the prosecution. However, Evans's representation of both of them had terminated before they became prosecution witnesses. Neither Moon nor Romie Williams were ever represented by Hult or Flander personally. Thus, it is difficult to see how Hult or Flander would have been constrained in their duty to vigorously investigate and cross-examine Moon or Romie Williams on the defendant's behalf. There is no actual

conflict here. The district court did not err in denying postconviction relief to Williams on this ground.

C. Failure to Challenge this Court's Ruling.

Williams also takes issue with his appellate counsel's failure to seek further review of our 2000 decision. He argues that the court of appeals decision was wrong, and only a constitutionally ineffective lawyer would have let the ruling stand. Williams's argument is an interesting example of how the postconviction relief process can metastasize, as new allegations of ineffective assistance are layered on top of old ones. On our review, we do not believe we were wrong.

Williams's position is that this was always a case like *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), and *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999), where there should have been automatic reversal of his convictions instead of a remand, due to the district court's failure to conduct a proper inquiry into the Evans/Rosenbladt and Hult/Dalen situation. However, we respectfully disagree. As noted in our 2000 opinion, this was not a *Holloway*- or *Atley*-type case where the defendant objected to the alleged conflict. *State v. Williams*, No. 99-0551 (Iowa Ct. App. Aug. 16, 2000). Rather, Williams consented to it, albeit without the full exploration of that conflict that we held was constitutionally required. *Id.* Therefore, instead of reversing the convictions, we remanded. *Id.*

Shortly after our 2000 decision involving this defendant, our supreme court decided *State v. Watson,* 620 N.W.2d 233 (Iowa 2000). The supreme court noted that courts around the country had disagreed over whether an automatic reversal is required if (a) the trial court knew or should have known of a conflict,

and (b) the trial court failed to conduct a proper inquiry, even though (c) no objection was made at trial. *Watson*, 620 N.W.2d at 237-38. The supreme court held that in Iowa, a reversal would be required under these circumstances, but only if there was an "actual conflict." *Id*. at 238. If the appellate record showed only a "possible" conflict, the case should be remanded for determination whether there was an "actual" conflict. *Id*. That of course is exactly what we ordered in 2000, without the benefit of *Watson*. *See State v. Williams*, No. 99-0551 (Iowa Ct. App. Aug. 16, 2000).

Moreover, when this case returned to us again in 2002, following the remand to the district court to examine the conflict of interest issues presented by the Evans/Rosenbladt and Hult/Dalen relationships, we specifically held that the law of the case did not preclude our reconsidering the propriety of an automatic reversal. *Williams*, 652 N.W.2d at 848. Once again, with the benefit of the supreme court's decision in *Watson*, we determined an automatic reversal was not warranted. *Id*. at 849.

Conflict of interest claims pose a challenge to courts, partly because the legal profession itself has not completely sorted out and distinguished the concepts of "potential conflict of interest," "actual conflict of interest," "adverse effect on representation," and "prejudice." Nevertheless, we believe the foregoing demonstrates that Williams's appellate counsel were not constitutionally ineffective. Remand rather than outright reversal was always the appropriate course of action in this case. The district court properly denied relief on this ground in October 2008.

D. Other Grounds for Relief.

Williams also raises additional grounds for relief. He contends first that his trial counsel were constitutionally ineffective for failing to investigate two other individuals as possible murder suspects. We respectfully reject this contention. Given the strong evidence of Williams's guilt and the absence of any hard evidence linking these two other individuals to the murder, Williams has failed to sustain his burden of showing either prejudice or that his counsel failed to perform an essential duty. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (requiring an applicant to show that (1) counsel failed to perform an essential duty and (2) prejudice resulted in order to prevail on an ineffective-assistance-of-counsel claim).

Williams also insists his trial counsel were constitutionally ineffective for failing to object to a number of the standard Iowa jury instructions on murder that were given in this case. Upon our review, we find he has not met the *Strickland* standards.

Williams contends, moreover, that his trial counsel were ineffective in failing to call Deanna Ackerman and another individual as witnesses (apart from any conflicts of interest). As we have already discussed, we do not believe Ackerman would have been helpful to Williams's defense. The other witness gave two statements, which were inconsistent with each other, and neither of which appears to have been necessarily helpful to Williams. This contention does not meet the *Strickland* standards.

Williams also asserts his trial counsel were ineffective in not independently investigating the time of Vrchota's death. Given the timing of the 911 call by

Vrchota's son, which was not open to dispute, we believe Williams's trial counsel were not constitutionally deficient in failing to perform an independent investigation of the time of death.

Additionally, Williams maintains his trial counsel were constitutionally ineffective because, after advancing on cross-examination of the State's witnesses the theory that the prosecution was fabricating its case, they modified their position at closing argument. According to Williams, this change of course was illustrated by his counsel's argument that the case showed "[t]he power of suggestion, influence, uncertainty, confusion, mistakes," and "[a]ll of those things have led to misidentification, Shelly Vrchota's misidentification of Williams as being the person in his house that July morning. All of those things add up to reasonable doubt." Respectfully, we do not see any inconsistency here, let alone *Strickland* ineffectiveness. Trial counsel did not attempt to argue that the son's eyewitness identification of Williams at the scene of the murder was a deliberate "fabrication." Had they done so, they would likely have incurred significant juror resentment. Rather, they consistently took the position that the identification was the product of mistake and outside suggestion. This was a reasonable, if ultimately unsuccessful, defense strategy.

Williams also faults his trial counsel for failing to object to prosecutorial misconduct, including two references during closing argument to "lies" by the defendant. Upon our review, we agree with the district court that this conduct was not especially inflammatory, and certainly that the *Strickland* standards have not been met.

Finally, Williams contends his trial counsel should have sought a cautionary jury instruction when the deceased's son testified that he recognized Williams from having seen his picture on a TV wanted poster, and should have raised an unfair prejudice objection to testimony about his sale of cocaine on the night of the murder. We agree with the district court that these matters realistically could not have affected the outcome of this case. The jury was aware of the overall context of this case in which the victim himself was apparently a marijuana dealer.

For the foregoing reasons, we affirm the district court's denial of postconviction relief.

AFFIRMED.