IN THE COURT OF APPEALS OF IOWA

No. 9-740 / 08-1794
Filed November 12, 2009

NAPOLEON HARTSFIELD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Napoleon Hartsfield appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Brian Farrell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Napoleon Hartsfield appeals following the district court's denial of his application for postconviction relief. He contends his postconviction relief counsel was ineffective for not challenging the district court's "erroneous reliance on testimony about trial strategy from an attorney who did not, in fact, serve as trial counsel," as well as raising pro se claims. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

In 2001 Napoleon Hartsfield was charged with possession with intent to deliver and conspiracy to commit a felony, each charge stemming from different incidents. Following separate jury trials, Hartsfield was convicted and sentenced on each charge.

At issue here is Hartsfield's conspiracy conviction. The following facts were set forth in our opinion on Hartsfield's direct appeal of that conviction:

> On July 31, 2001, at approximately, 3:30 p.m., undercover Officers Gilbert Proehl and Jeff Collins were driving through downtown Davenport when surveillance officers notified them that a male individual, later identified as Hartsfield, might be involved in prostitution or selling drugs. The officers drove to the street corner where Hartsfield was standing and pulled over. Officer Proehl called out to Hartsfield. Hartsfield, who was accompanied by a female, replied there were too many people in the car for "his girl." Officer Proehl then asked where "James," a known drug dealer was, and Hartsfield responded "no one would date two guys." Officer Proehl said he was not interested in a date, but he was looking to buy a "half." Hartsfield informed officers he would arrange for the delivery of the drugs and also told them not to deal with anyone else unless they wanted to get "ganked."
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> Hartsfield went to a payphone and made some phone calls. When he came back to the officers' vehicle, he informed Officer Proehl he had called James's brother and the crack cocaine would be in good condition and he could inspect it before he made the purchase. Then Hartsfield instructed the officers to drive to a certain area and pull over. About thirty minutes later, a jeep belonging to James Thornton arrived in the area. Hartsfield

> approached the vehicle and had a conversation with the occupants. Next Hartsfield walked back to the officers' vehicle and asked Officer Proehl to get out of the car. Officer Proehl exited the vehicle, and Hartsfield told him that the men in the jeep would not give him the rock unless they got paid. Hartsfield stated he only had thirty dollars and he needed an additional twenty dollars. Hartsfield gave Officer Proehl his shoes as collateral for the twenty dollars. Hartsfield got into the jeep, and the men left the area.
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> The jeep appeared to be driving toward Centennial Bridge and Rock Island, Illinois. Officer Proehl instructed officers in the area to stop the car before it left the jurisdiction so the occupants could be identified. Officers from the gang unit stopped the jeep for a seat belt violation. The officers identified James Thornton as the driver, Roosevelt Thornton as the passenger, and Hartsfield as the backseat passenger. The officers obtained consent to search the jeep and found no contraband. Officers allowed the occupants to go. At approximately 4:30 p.m., Officers Proehl and Collins observed Hartsfield walking in the same area where he had previously made the phone calls. Officer Proehl waved Hartsfield over to their vehicle and asked him about the money. Hartsfield stated he had received Proehl's rock but had to swallow it when police initiated a traffic stop. He further stated that Roosevelt Thornton swallowed four bags of cocaine. Hartsfield also indicated that the police had taken his identification and money and he promised to pay them back. Subsequently, Hartsfield was arrested pursuant to an arrest warrant.
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> On October 18, 2001, Hartsfield was charged by trial information with conspiracy to deliver crack cocaine in violation of Iowa Code sections 703.1, 706.1, and 706.3 [(2001)].

State v. Hartsfield, No. 02-0638 (Iowa Ct. App. July 10, 2003) (internal footnotes omitted).

Hartsfield was appointed counsel. Thereafter, Hartsfield's counsel filed a notice that Hartsfield intended to rely on the defense of entrapment. Prior to trial, Hartsfield's counsel was permitted to withdraw, and the court appointed Lucy Valainis as Hartsfield's new trial counsel.

A jury trial was held on January 14, 2002. Hartfield's trial counsel did not assert the entrapment defense. The jury ultimately returned a verdict of guilty as charged.

After trial, Hartsfield filed a pro se motion to dismiss Valainis. The court allowed Valainis to withdraw and appointed David Treimer as Hartsfield's counsel. Treimer also represented Hartsfield on Hartsfield's then pending possession with intent to deliver charge.

Sentencing on Hartsfield's conspiracy conviction was held on April 18, 2002. Treimer appeared and represented Hartsfield at that hearing. The district court sentenced Hartsfield to a five-year indeterminate term of incarceration.

Hartsfield directly appealed his conspiracy conviction, and we affirmed. *See State v. Hartsfield*, No. 02-0638 (Iowa Ct. App. July 10, 2003). We later affirmed Hartsfield's possession with intent to deliver conviction. *See State v. Hartsfield*, No. 02-0744 (Iowa Ct. App. Aug. 13, 2003).

On November 19, 2003, Hartsfield filed his application for postconviction relief (PCR) on the conspiracy charge. Among other things, Hartsfield asserted his trial counsel was ineffective for failing to: (1) "investigate the facts and to [subpoena] the Thortons," and (2) "argue entrapment defense at trial."[1] At some point, Hartsfield filed a PCR application concerning his possession conviction. An attorney was appointed to represent Hartsfield in both matters. In 2006 Hartsfield filed a motion to dismiss his PCR counsel. The court subsequently granted Hartsfield's motion, and a different attorney was appointed as Hartsfield's PCR counsel in both PCR cases.

Hartsfield's PCR applications were tried together on July 5, 2007; February 29, 2008; and October 10, 2008. On the first day of trial, Hartsfield's

[1] Hartsfield also argued his appellate counsel was ineffective for failing to assert these allegations on direct appeal.

PCR counsel called Hartsfield's prior attorney David Treimer to the stand. Treimer mainly testified as to his actions in Hartsfield's possession trials.[2] The State recalled Treimer on the second day of trial, and Treimer was questioned about his representation of Hartsfield in the conspiracy case. Although Treimer only represented Hartsfield at the sentencing, Treimer inexplicably testified he represented Hartsfield at trial in the conspiracy case. Treimer testified as to why he did not subpoena the Thortons and assert an entrapment defense on Hartsfield's behalf. Hartsfield's PCR counsel cross-examined Treimer, but did not question him about the fact he did not represent Hartsfield at his trial on the conspiracy charge. Hartsfield then had the opportunity to personally question Treimer. Hartsfield never questioned Treimer about the fact he did not represent him at trial in the conspiracy case. In fact, Hartsfield questioned Treimer as to why Treimer allegedly never checked or made any kind of investigation whether one of the Thortons was an informant. Hartsfield did not, at that time, call to the court's attention that Treimer was not his trial counsel in the conspiracy case.

On the third day of trial, Hartsfield testified that Valainis was his trial counsel in the conspiracy case, and alleged she was ineffective for not trying to get the Thortons to testify, among other reasons. At the end of the hearing, the following exchange occurred:

> [HARTSFIELD]: I would like [the court] also to take into consideration in the possession with intent—the conspiracy case, Ms. Valainis represented me on that case, not Mr. Triemer. Mr. Treimer came to the court and testified to the fact that he represented me on that case, and you will see on the transcripts,

[2] Hartsfield's possession case was tried three times. *See State v. Hartsfield*, No. 02-0744 (Iowa Ct. App. Aug. 13, 2003). The first two trials ended in mistrials, and Hartsfield was convicted at the conclusion of the third trial. *Id*.

> he never represented me on the possession—I mean, on the conspiracy case, so—
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> [THE COURT]: Okay, I've got that noted in my notes and you've adequately testified to that, and I do have the transcripts, . . . and I don't remember whose name was on that particular [case], but I'm sure when I get back and read it, I'll figure that out.

Valainis was never called to testified, and Treimer was not recalled.

On October 24, 2008, the district court entered its findings of facts, conclusions of law, and order denying Hartsfield's application for PCR on his conspiracy conviction. Relevant here, the court found:

> Attorney Treimer testified that he was only able to track down one of the Thorton brothers. One brother was federally indicted. Mr. Treimer went to the federal courthouse and talked to one of the Thortons in federal court. Mr. Treimer testified that it was his trial strategy decision not to subpoena the Thortons. . . . The court does not find that the decision not to subpoena the Thortons was prejudicial to the defendant. Had they testified, they may well have presented more evidence against the defendant and had their credibility attacked based on the felony conviction for a similar crime. The court finds that neither the appellate or trial counsel were ineffective [for failing to investigate the facts and to subpoena the Thortons].

As to Hartsfield's claim that his trial and appellate counsel were ineffective in failing to raise trial counsel's ineffectiveness by not arguing entrapment, the court held:

> Mr. Triemer has extensive experience as a criminal lawyer. In his professional opinion the facts of this case did not support a claim of entrapment. As a lawyer, he is ethically bound not to bring frivolous claims before the courts. Under the facts of this case, two undercover officers drove to an area of Davenport known for drug traffic. The defendant approached their vehicle and they asked the defendant to get them some drugs. The defendant indicated that he had to make a phone call and left. He came back and said he needed the money first. The officers complied. The defendant did not give them the drugs. He was charged with conspiracy to commit a felony. The defendant alleges that the informant to the officers was part of the conspiracy. He argues that it is not a

> conspiracy if one of the co-conspirators was the informant. The evidence presented does not support this theory.

The defendant did not directly appeal the district court's denial of his application for PCR. Instead, he filed this appeal asserting his PCR counsel was ineffective for not challenging the district court's "erroneous reliance on testimony about trial strategy from an attorney who did not, in fact, serve as trial counsel." Additionally, Hartsfield filed a pro se brief raising an additional claim concerning his PCR counsel.

II. Standard of Review.

Iowa appellate courts typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, where the applicant asserts claims of a constitutional nature, such as ineffective assistance of counsel, our review is de novo. *Id*.

III. Discussion.

To establish a claim of ineffective assistance of counsel, Hartsfield has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). "To prove the first prong, the defendant must overcome the presumption that counsel was competent." *Id*. To prove the second prong, Hartsfield must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). If the defendant is unable to prove either prong, the ineffective assistance claim fails. *Ledezma*, 626 N.W.2d at 142.

Assuming without deciding that Hartsfield's PCR counsel failed to perform an essential duty, we find Hartsfield failed to establish the requisite prejudice. We reach this conclusion because we believe Hartsfield has failed to show a reasonable probability that the outcome of the proceeding would have differed if his PCR counsel had successfully challenged the district court's reliance on Treimer's testimony. We have very serious concerns regarding the overall failure to clarify Treimer's testimony, but without considering Treimer's testimony upon our de novo review, we find the facts of the case and Hartsfield's own testimony at the PCR trial support the postconviction court's denial of his claims that his trial counsel was ineffective.

Here, there was no evidence that the Thortons were informants. Moreover, Hartsfield admitted the Thortons were being investigated and that both of them had been convicted in federal court and sentenced to twenty years for criminal activity around the same time as his crime. Hartsfield also acknowledged that their testimony could have been detrimental to him. We agree with the district court that "[h]ad [the Thortons] testified, they may well have presented more evidence against the defendant and had their credibility attacked based on the felony conviction for a similar crime." Thus, Hartsfield failed to show the result would have been different had his trial counsel subpoenaed the Thortons.

Additionally, Hartsfield presented no evidence supporting the viability of the entrapment defense at the hearing on his postconviction application, and the facts of this case simply do not support the defense. "Entrapment occurs when a peace officer induces an otherwise law-abiding citizen to commit an offense. To

rise to the level of prohibited activity, the officer's conduct must involve 'excessive incitement, urging, persuasion, or temptation.'" *Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 479 (Iowa 1998) (citations omitted). Conduct that merely affords a person an opportunity to commit an offense is not entrapment. *Id*. Because the entrapment defense is unsupported, we find Hartsfield's argument regarding the ineffectiveness of trial counsel for failure to assert the defense to be without merit. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) ("[C]ounsel has no duty to raise an issue that has no merit."); *see also Anfinson v. State*, 758 N.W.2d 496, 502 (Iowa 2008) (determining attorney did not breach a duty in failing to investigate or present an insanity defense based on postpartum depression because defendant did not present any evidence at the postconviction hearing supporting that defense). Accordingly, we conclude Hartsfield failed to show a reasonable probability that the outcome of the proceeding would have differed if his PCR counsel had successfully challenged the district court's reliance on Treimer's testimony.

In our de novo review we have carefully considered all of appellant's claims and arguments. Those not specifically addressed in this decision are either covered by our resolution of the arguments addressed here, or we concluded they are without merit. We affirm the decision of the district court.

***IV. Conclusion*.**

Because we conclude Hartsfield failed to show a reasonable probability that the outcome of the proceeding would have differed if his PCR counsel had successfully challenged the postconviction court's reliance on Treimer's

testimony, and that his pro se claims are without merit, we affirm the decision of the district court.

AFFIRMED.