IN THE COURT OF APPEALS OF IOWA

No. 17-1797
Filed February 6, 2019

CALVIN ORLANDO HOSKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Calvin Hoskins appeals the denial of his application for postconviction relief.

AFFIRMED.

Jeremy L. Merrill of Lubinus Law Firm, PLLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Benjamin Parrott, Assistant Attorney General, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

MULLINS, Judge.

Calvin Hoskins appeals the denial of his application for postconviction relief (PCR). He contends: (1) the district court erred in denying relief on his claim the State committed a *Brady*[1] violation in conjunction with his prosecution and (2) his PCR counsel was ineffective in not arguing his trial attorney rendered ineffective assistance in not moving to suppress evidence obtained as a result of a warrantless search of his person.

I. Background Facts and Proceedings

A jury convicted Hoskins of third-offense possession of marijuana. Hoskins subsequently admitted to facts necessary for sentencing enhancement as a habitual offender. This court affirmed his conviction on direct appeal. *See generally State v. Hoskins*, No. 12-1857, 2013 WL 4769586 (Iowa Ct. App. Sept. 5, 2013). In November 2013, Hoskins filed a PCR application alleging "evidence was destroyed" or "tampered with" by the State. In his testimony at the subsequent PCR trial, Hoskins generally complained that his trial attorney was ill-prepared for trial and additionally should have objected to the State's failure to preserve a "hard plastic card" used to scrape marijuana out of his mouth as evidence and for DNA testing. Hoskins and his counsel stated his complaints as follows:

> [T]here was no motion to suppress based on . . . a chain of custody from the [plastic] card and then there was no effort to get DNA testing done. . . . And my . . . lawyer wasn't prepared.

At the close of evidence, the court essentially asked for a clarification of the issues it was to consider:

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[1] *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

> So, as I understand this, Mr. Hoskins here is arguing that his . . . lawyer should have filed a motion to suppress the evidence of the marijuana because the card used to scrape it from his mouth allegedly was not placed into evidence.
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> . . . .
>
> Okay. And . . . secondly, that he is arguing that he should get a new trial because his lawyer did not attempt to collect . . . or get evidence of DNA off of the marijuana or the card.
>
> . . . .
>
> Okay. Then thirdly, . . . it appears that Mr. Hoskins is arguing in a general fashion the specific instances that his lawyer was not prepared for trial.

PCR counsel and Hoskins generally acknowledged the court correctly framed the issues presented, but clarified the first issue concerned the "chain of custody" as to the marijuana.

The court denied Hoskins's PCR application, finding no merit in any of his claims. As noted, Hoskins appeals.

II. Standard of Review

PCR proceedings are reviewed for correction of errors at law unless they raise constitutional issues. *More v. State*, 880 N.W.2d 487, 489 (Iowa 2016). Claims of *Brady* violations are constitutionally based and our review of such claims is therefore de novo. *DeSimone v. State*, 803 N.W.2d 97, 102 (Iowa 2011). Although claims of ineffective assistance of PCR counsel are statutorily based, we likewise review such claims de novo. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Analysis

Hoskins raises two arguments on appeal. First, he argues the district court erred in denying relief on his claim the State committed a *Brady* violation. Second,

he contends his PCR counsel rendered ineffective assistance. We will address each argument in turn.

A. *Brady* Violation

The State contests error preservation on Hoskins's *Brady*-violation claim, noting the issue was neither raised nor decided in the PCR proceedings and Hoskins's reformulation of the issues he presented below should not be heard for the first time on appeal. Upon our review, we agree. Hoskins did not raise an explicit claim of a *Brady* violation in the district court proceedings. Even if we were to assume his arguments could be interpreted as a *Brady* claim, the district court certainly did not rule upon it as a *Brady* claim, nor did Hoskins file a motion requesting a ruling on a *Brady* claim, or any other issue for that matter. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. . . . When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."). The fact that this is a constitutional issue does not negate the error-preservation requirement. *State v. Mulvaney*, 600 N.W.2d 291, 293 (Iowa 1999). Unlike, Hoskins's second claim, addressed below, Hoskins does not contend PCR counsel was ineffective in failing to properly raise this issue. *See State v. Fountain*, 786 N.W.2d 260, 262–63 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."); *see also State v. Harris*, 919 N.W.2d 753, 754 (Iowa 2018) ("When counsel fails to preserve error at trial, a defendant can have the matter reviewed as an ineffective-assistance-of-counsel

claim."). We decline to consider Hoskins's claim of a *Brady* violation for the first time on appeal. In any event, Hoskins failed to "prove by a preponderance of the evidence '(1) the prosecution suppressed evidence; (2) the evidence was favorable to [him]; and (3) the evidence was material to the issue of guilt.'" *Moon v. State*, 911 N.W.2d 137, 145 (Iowa 2018) (quoting *DeSimone*, 803 N.W.2d at 103).

B. Ineffective Assistance of PCR Counsel

Hoskins argues his PCR counsel was ineffective in not arguing his trial attorney rendered ineffective assistance in not moving to suppress evidence obtained as a result of a warrantless search of his person. Hoskins seems to take the position that the record is inadequate for us to fully consider this issue and asks that we remand the case to the district court and direct that he be allowed to supplement his PCR application to include it. The State counters that the record is adequate for us to conclude the search was valid. However, as the State points out, "Hoskins . . . does not explain how the search was illegal." We agree with the State that Hoskins has not sufficiently formulated his argument to facilitate our review. Under such a circumstance, we have been directed to not consider the claim, but also to not outright reject it. *Harris*, 919 N.W.2d at 754 ("If the development of the ineffective-assistance claim in the appellate brief was insufficient to allow its consideration, the court of appeals should not consider the claim, but it should not outright reject it.").

Likewise, the State's argument is incomplete. The State simply argues the officer's detection of the odor of marijuana provided probable cause sufficient to justify the warrantless search of Hoskins's person. We agree "that a trained

officer's detection of a sufficiently distinctive odor, by itself or when accompanied by other facts, may establish probable cause." *State v. Watts*, 801 N.W.2d 845, 854 (Iowa 2011). Such would normally be a sufficient basis for a judicial officer to grant an application for a search warrant. *See id.* at 853–56. However, when the search is conducted in the field without a warrant, probable cause must be accompanied by exigent circumstances in order for the search to be lawful. *See State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001); *compare Watts*, 801 N.W.2d at 851–52 (finding warrantless entry of apartment was unlawful as lacking "specific, articulable grounds to support a finding of exigent circumstances"), *with id.* at 852–56 (finding subsequent search pursuant to warrant was valid as supported by mere probable cause). The State forwards no argument as to what exigent circumstances justified the warrantless search.

We are not advocates and will not formulate an argument as to the legality of the search for either Hoskins or the State. Consequently, we affirm the denial of Hoskins's PCR application. We decline Hoskins's request for a remand to allow him to supplement his application. Instead, we preserve his ineffective-assistance claim as to PCR counsel for a possible successive proceeding. Hoskins may challenge the effectiveness of PCR counsel if he files another PCR application promptly after the issuance of procedendo. *See State v. Allison*, 914 N.W.2d 866, 891 (Iowa 2018).

AFFIRMED.