

IN THE COURT OF APPEALS OF IOWA

No. 0-057 / 09-0326
Filed April 21, 2010

LAWRENCE LARRY MCCOY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

Lawrence McCoy appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

Lawrence McCoy appeals from the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

Lawrence McCoy was convicted of first-degree murder and willful injury following an August 2002 jury trial. We borrow the statement of facts from McCoy's direct appeal, *State v. McCoy*, No. 02-1516 (Iowa Ct. App. Dec. 10, 2003):

The body of Jonathon Johnson, brother of Brandy Johnson, was found in Davenport wrapped in a blanket in the back seat of his car. Johnson had been stabbed and shot several times and had sustained a severe blunt trauma injury to his head.

Lawrence McCoy became a suspect in the murder. He shared an apartment with Brandy until her incarceration six months prior to Jonathon's death. Although the two initially entered into a written lease agreement, their arrangement had reverted to a month-to-month tenancy by the time of the investigation.

When Brandy heard about the death of her brother, she called her father and told him to give the police permission to search the apartment. Officers met Brandy's father, proceeded to the premises, and obtained written consent from the landlord to enter the apartment. Once inside, the police discovered what they believed to be bloodstains on the front door, wall, and ceiling. One of the detectives also found a bottle with a fingerprint and what he believed to be blood.

On direct appeal, McCoy argued the district court abused its discretion in admitting the detective's testimony that a fingerprint found on a bottle in the apartment was, in his view, "made in blood." We noted that cross-examination of a criminologist established that the pigment on the part of the bottle containing McCoy's fingerprint may not have been blood and, if the discoloration was blood, there was no way to tell whether the fingerprint was placed on the bottle before

or after the blood. We affirmed McCoy's conviction, concluding the detective's limited mention of a "fingerprint in blood" was not unfairly prejudicial.

McCoy filed an application for postconviction relief asserting claims of ineffective assistance of trial, appellate, and postconviction counsel. McCoy also sought a new trial alleging newly discovered evidence undermined the reliability of the jury's guilty verdict and that the change in the felony-murder rule announced in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), should be applied to his case retroactively. The postconviction court denied the application for postconviction relief and McCoy now appeals.

II. Scope and Standard of Review.

Postconviction relief proceedings are law actions generally reviewed for errors at law. Iowa R. App. P. 6.907; *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Ineffective-assistance-of-counsel claims, however, are constitutional in nature and our review is de novo. See *Millam*, 745 N.W.2d at 721.

III. Ineffective Assistance of Counsel.

McCoy contends trial counsel was ineffective in failing to object to prosecutorial misconduct and, further, that appellate counsel was ineffective in not raising the issue on direct appeal. He also contends postconviction counsel was ineffective in not subpoenaing a witness to testify at the postconviction hearing to support his claim of newly-discovered evidence. We will address each of these claims.

In order to prevail on a claim of ineffective assistance of counsel, the applicant must prove by a preponderance of the evidence, both that counsel failed to perform an essential duty and that the applicant was prejudiced. *State*

v. Williams, 695 N.W.2d 23, 28-29 (Iowa 2005). Both elements, however, do not always need to be addressed because failure to prove either element is fatal to the claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). If the claimed deficient conduct does not result in prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Prejudice is established by proof “that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003); *see also Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

A. Postconviction Counsel. McCoy contends postconviction counsel was ineffective in failing to subpoena state’s witness, Jerome Wilson, to testify at the postconviction hearing to support his claim of newly-discovered evidence. The alleged newly-discovered evidence was submitted by way of an investigator’s affidavit concerning Wilson’s statements to the investigator. McCoy argues that this hearsay could not support his claim of newly-discovered evidence. However, the postconviction court considered the substance of Wilson’s statements to the investigator, described in the investigator’s affidavit, as compared with his testimony at trial and the several inconsistent statements Wilson gave before trial.¹ The district court rejected the claimed newly-

¹ We have no transcript from the postconviction hearing and, consequently, cannot determine if a hearsay objection was raised.

discovered evidence as insufficiently inconsistent to make a difference in the outcome of McCoy's trial.

We agree with the district court that McCoy has failed to establish the requisite prejudice in counsel's failure to subpoena Jerome Wilson. "For purposes of applying the *Strickland* prejudice standard, the gravity of counsel's error, whether at trial or on appeal, must be measured in terms of its probable consequences at trial." *Gering v. State*, 382 N.W.2d 151, 156 (Iowa 1986). Jerome Wilson testified at McCoy's criminal trial and at the trials of McCoy's two co-defendants, Darryl McCoy and Chance Barnes. He gave several inconsistent statements to the police before the trials. His testimony was challenged extensively on cross-examination, including his numerous inconsistent statements to criminal investigators. What Wilson told the investigator in 2006 was merely cumulative or impeaching of his numerous other inconsistent statements, and, consequently, his testimony would not have met the requirements of newly-discovered evidence warranting a new trial. Wilson did not recant on the fundamental question of whether McCoy was guilty, acknowledging that "they sent the right person to prison." See *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998) (noting the applicant must show (1) the evidence was discovered after judgment, (2) it could not have been discovered earlier in the exercise of due diligence, (3) it is not merely cumulative or impeaching, and (4) it would probably change the result if a new trial is granted).

B. Prosecutorial Misconduct. McCoy complains that trial counsel was ineffective in failing to object to prosecutorial misconduct, and that appellate counsel was ineffective for failing to raise on direct appeal that trial counsel's

conduct was ineffective. He argues that in closing argument, the prosecutor improperly portrayed the evidence by asserting: (1) the defendant left his fingerprint in blood, when a state's crime laboratory witness testified that he had not tested that area on the bottle for blood; and (2) that Jerome Wilson heard gunshots, when Wilson testified to hearing breaking glass and loud noises. McCoy also claims the prosecutor improperly vouched for Wilson's credibility.

A prosecutor "is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." Moreover, a prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence. A prosecutor may not, however, express his or her personal beliefs.

Graves, 668 N.W.2d at 874 (citation omitted).

We agree with the postconviction court that the prosecutor's arguments did not fall outside the scope of acceptable conduct in light of defense counsel's cross-examinations of the witnesses highlighting inconsistencies and disputed evidence. Therefore, trial counsel did not err in failing to object; and appellate counsel did not err in failing to raise the asserted error.

IV. Retroactivity of *Heemstra*.

In *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), our supreme court reversed a murder conviction, holding that because the act causing willful injury was the same act that caused the victim's death, the assault necessarily merged in to the murder and thus could not serve as a predicate felony for felony murder purposes. The court stated:

The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.

Heemstra, 721 N.W.2d at 558. In *State v. Goosman*, 764 N.W.2d 539, 545 (Iowa 2009), our supreme court concluded that the *Heemstra* case “clearly involved a change in law” and “[a]s a result, the limitation of retroactivity announced . . . did not violate federal due process”

McCoy argues that the postconviction court erred in concluding that the *Heemstra* decision did not apply to him. On appeal, McCoy contends the failure to apply the ruling retroactively to him violates his constitutional right to equal protection and the requirement of separation of powers. The State responds that McCoy did not preserve these claims for appeal. We agree.

The postconviction court wrote:

The Court recognizes McCoy’s three arguments for applying *Heemstra* retroactively based upon (1) Iowa Code sections 822.2(1) and 822 (3) [constitutional violation]; (2) Due process; and (3) Cruel and unusual punishment grounds, but if this significant law is to be changed again, the Trial Court defers to the Supreme Court. Thus, McCoy’s application for relief based upon this ground should be denied.

The postconviction court made no ruling on the claims McCoy makes here with respect to equal protection and separation of powers. Thus, the issues are not properly before us. *Goosman*, 764 N.W.2d at 545.

V. Conclusion.

The district court did not err in denying the application for postconviction relief. We therefore affirm.

AFFIRMED.