

**IN THE COURT OF APPEALS OF IOWA**

No. 0-665 / 09-1313  
Filed October 20, 2010

**GARY CHRISTOPHER FORD,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Webster County, Thomas J. Bice,  
Judge.

Appellant appeals the post conviction court's ruling denying his application  
for post conviction relief. **AFFIRMED.**

Douglas Cook, Jewell, for appellant.

Gary Ford, Fort Dodge, appellant pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney  
General, Ricki Osborn, County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes  
no part.

**VOGEL, P.J.**

Gary Ford appeals the post-conviction court's denial of his application for post-conviction relief. Ford first asserts his trial counsel was ineffective for failing to investigate potential alibi witnesses and present an alibi defense. He next asserts his post-conviction counsel was ineffective for failing to investigate or call alibi witnesses to support his post-conviction claims. We affirm.

**I. Background Facts and Proceedings**

Ford was charged with first-degree robbery after a liquor store was robbed on April 18, 2007, at 8:50 p.m. It is Ford's contention that he was elsewhere when the robbery occurred, and had counsel investigated his alibi witnesses, he would have been acquitted. Ford was initially represented by attorney Jim Koll, but Koll withdrew after a conflict of interest developed. Attorney Wendy Samuelson was appointed to represent Ford on August 20, 2007, just eight days before the scheduled trial. At a hearing on August 23, Samuelson stated that she believed it would be in Ford's best interest to request a continuance of the trial, to allow her more time to prepare a defense. Ford refused to agree to a continuance, stating that it was his decision to proceed with trial as scheduled. Following the August 28 jury trial, Ford was convicted of first-degree robbery in violation of Iowa Code section 711.2 (2007). He appealed, but his appeal was dismissed by our supreme court as frivolous on May 1, 2008. Ford then filed an application for post-conviction relief, which after a hearing on his claims, was denied. Ford appeals from the post-conviction ruling.

## II. Standard of Review

We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). A claim may be resolved on either prong. *Id.*

## III. Trial Counsel

At the post-conviction hearing, Ford asserted his trial counsel was ineffective for failing to investigate potential alibi witnesses and present an alibi defense. Samuelson testified that in preparing for trial, she received detailed information from Koll regarding the work he had already done in preparing Ford's defense. Samuelson stated, "[Koll's] investigator had looked into the alibi defense and it didn't—time-wise, the witnesses weren't able to make it tight enough for it to be real effective." Samuelson also recalled conversations she had with Ford about potential alibi witnesses and the inconsistencies in those witnesses' statements. As to one witness, Adibey Habhab, who claimed to be with Ford "all day and night" on the date of the robbery, Samuelson testified that Ford agreed prior to trial that Habhab was now estranged from him and "too much of a loose cannon" to put before the jury.<sup>1</sup> Samuelson further testified that

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<sup>1</sup> Habhab stated she and Ford stayed at the hotel the entire night. Her statement conflicts with Ford's assertion that he and Habhab were at another lady's house all day and night. Both statements further conflict with Bonita Urich's purported statement that Ford was at her house only after 9:00 p.m. Video security tapes show Habhab and Ford coming and going to and from the hotel throughout the evening.

Ford's insistence on proceeding to trial as scheduled, rather than agreeing to a continuance, prevented her from presenting the alibi defense. She testified that she urged Ford to agree to a continuance, as she did not feel she would have sufficient time to further investigate and depose witnesses beyond the work Ford's previous attorney, Koll, had accomplished:

[M]y understanding is is that—and especially since depositions were taken of the defense witnesses, that, um, the State would then have the opportunity to depose any defense witnesses. Adibey had already been deposed, but Bonita Urich wouldn't have been. Those things would not have coincided very well with Mr. Ford's wish to go to trial within a week.

Ford testified that he met with Samuelson "every day since she got the case 'cause it was a short timespan . . . . So she wanted to meet every day. We met at least two, three hours a day," except for the weekend. He denied, however, that they discussed a continuance until Samuelson requested a hearing on the matter, which occurred on August 23. At that time, Samuelson summarized on the record her work to date in preparing Ford's defense, and that she felt she needed more time to prepare for trial. The court then inquired as to whether it was Ford's "desire to proceed with trial on this coming Tuesday, August 28th?" Ford responded, "Yes, it is." Ford's refusal to agree to a continuance of the trial hampered Samuelson's ability to give Ford, "as high of quality of defense" as she claimed she would have been able to offer, if he would have agreed to a continuance. In particular, Samuelson wanted to further investigate Koll's opinion that the alibi witnesses would *not* be helpful to Ford's defense.

Samuelson testified at the post-conviction hearing that despite the limited time she had to prepare for trial, she read all the approximate fifteen or sixteen depositions, watched all of the video multiple times, met with the prosecutor, prepared for jury voir dire, prepared opening statement, closing argument, and cross-examination questions, anticipated objections which could be lodged at trial, researched likely jury instructions, and evaluated an “eleventh hour plea offer” with Ford. Samuelson’s decision to not call what she and Koll perceived to be flawed alibi witnesses or pursue an alibi defense was a strategic decision, and reasonable in light of all the facts she reviewed with Ford and analyzed prior to trial. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (stating strategic decisions made following a less than thorough investigation must be based on reasonable professional judgments, supporting the particular level of investigation conducted).

In denying Ford’s claims, the district court found,

Ford was competently represented by Jim Koll. . . . Mr. Koll testified that he considered the proposed alibi defense . . . but that he was not convinced that, because of inconsistencies and timeline problems, this defensive tactic was valid. [Koll] shared these concerns with Wendy Samuelson.”

. . . .  
Given this record, the court FINDS that the decision to proceed to trial, notwithstanding the advice of his counsel, was that of Applicant/Defendant. That being the case, Mr. Ford cannot now be heard to complain of his counsel not having spent the time to further develop the perceived alibi defense. Further, defense counsel’s decision not to pursue the alibi defense, given the potential problems associated with this possible tactic, do not rise to the level of ineffective assistance of counsel.

We agree with the post-conviction court’s fact findings and agree with its conclusion that trial counsel breached no essential duty.

#### **IV. Post-Conviction Counsel**

Ford next asserts his post-conviction counsel was ineffective for failing to investigate or call alibi witnesses to support his ineffective assistance of trial counsel claims. If the appellate record shows as a matter of law the defendant cannot prevail on such a claim, we will consider the defendant's claim without further post conviction proceedings. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003).

Ford's decision to proceed with trial as scheduled, against the advice of counsel, hindered his trial counsel's ability to successfully utilize the witnesses he asserts would have provided him an alibi for the night of the robbery. He cannot now assert his post-conviction counsel was ineffective for failing to call the same witnesses he did not allow his trial counsel adequate time to investigate. See *Knudsen v. Merle Hay Plaza, Inc.*, 160 N.W.2d 279, 285 (Iowa 1968) ("Litigant cannot complain of error which he invited or to which he assented.").

We agree with the post-conviction court that trial counsel breached no essential duty. We also conclude post-conviction counsel breached no duty to Ford, by failing to pursue an issue Ford waived below. See *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998) (stating counsel has no duty to pursue a meritless issue).

**AFFIRMED.**