

**IN THE COURT OF APPEALS OF IOWA**

No. 0-931 / 09-1555  
Filed March 21, 2011

**MICHAEL ROACH,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,  
Judge.

Michael Roach appeals from the denial of his application for  
postconviction relief. **AFFIRMED.**

Shawn Smith, Ames, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant  
County Attorney, for appellee State.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes  
no part.

**POTTERFIELD, J.**

Michael Roach appeals from the district court's ruling denying his application for postconviction relief. He argues the district court erred in finding newly discovered evidence was inadequate to justify a new trial. Roach also argues that his postconviction counsel provided constitutionally ineffective representation in not investigating and presenting evidence, including Roach's testimony, to shore up the inadequacies in the newly discovered evidence. We have considered each of Roach's claims, including those he presents in his pro se brief, and affirm the ruling of the district court, preserving two claims for further postconviction proceedings.

**I. Background Facts and Proceedings**

On October 22, 2003, Roach shot and killed Jonathan Ellis in an upstairs bedroom of Ellis's residence. Shanta Smith and Dorothy Johnson both testified for the State at trial. Johnson resided with Ellis and was in the house at the time of the shooting; Smith was just outside the house.

Smith gave her testimony in exchange for a plea bargain and described to the jury spending the evening of October 21 with Roach. Sometime around 11:00 p.m., Ellis left Johnson at their residence and drove to Smith's house to give Smith and Roach a ride to his house. Smith testified that while in Ellis's car, Roach pointed a gun at Ellis and demanded money. Roach then made Smith drive the car to an address Smith did not know, which turned out to be Ellis's residence. After Smith parked, Roach told Ellis to make a call and have whoever was in the house bring out money in an envelope and place it on the porch.

Johnson testified she received three calls from Ellis directing her to find an envelope of money and put it on the porch. Ellis told her that a woman would be coming to get the money from the porch. Johnson searched the house but could not find the envelope.

Smith testified that after Ellis made several phone calls, Roach told Smith to go knock on the door and get the money. When Smith went to the door, she saw at least two people inside the house, but no one answered the door, and there was no money on the porch.

Smith returned to the car, where Roach had a gun to Ellis's head. Smith testified Roach then told Ellis they would go into the house together to get the money. Smith testified that about forty seconds after Roach and Ellis went into the house, she heard a gunshot. Smith stated she saw a female run out of the house followed shortly by Roach.

Roach ran back to the car and told Smith to drive. Smith testified that Roach told her that Ellis "had pulled a gun on him . . . and he reacted and he didn't mean to shoot him." Roach also told Smith he "didn't mean to shoot [Ellis] over eighty bucks." Roach's counsel cross-examined Smith about her plea bargain and her motive to lie.

Johnson confirmed that after she could not find the envelope of money, Ellis and a person she did not know entered the house and headed upstairs. She confirmed that shortly after they went upstairs, she heard the shot that killed Ellis. She ran out of the house and called the police.

Roach took the stand in his own defense and described his interactions with Ellis as a marijuana purchase and not a robbery. Roach told officers that he

provided Ellis \$100, but Ellis did not provide \$100 worth of marijuana. Johnson resided with Ellis and testified she had never seen him sell marijuana. No weapons or drugs were found in Ellis's room. No marijuana was detected in Ellis's body.

Roach initially told officers that Ellis had pulled a gun on him during the drug deal, and Roach described himself and Ellis and "gun to gun, face to face." Roach later admitted to officers that he never saw Ellis with a gun, but he was afraid Ellis would pull a gun. Roach testified at trial that he killed Ellis in self-defense under a sincere belief that Ellis was going to shoot him. A psychotherapist testified that Roach suffered from post-traumatic stress disorder and that, in Roach's mind, Roach's actions on the night of October 22 were reasonable.

On July 6, 2004, a jury returned a verdict finding Roach guilty of first-degree robbery and the lesser-included offense of second-degree murder. The jury rejected the felony murder and first-degree murder alternatives. On direct appeal, this court affirmed Roach's convictions in December 2005.

In his 2008 application for postconviction relief, Roach alleged that he had newly discovered evidence, in the form of two affidavits, that Smith lied at trial and that she had been involved with Ellis in a plot to rob Roach on the night of Ellis's death. The parties stipulated that the two affiants would testify in accordance with their affidavits.

The first affiant, a cousin of Ellis, described a plan in which the affiant would help Ellis and Smith rob Roach. The affidavit states Ellis was to call the affiant at a later time to "set it up." The affiant never received the call. The

second affiant describes a conversation with Smith during which she said she would have to lie in court against Roach to obtain a plea agreement from the prosecution.

The district court denied Roach's application, finding the affidavits did not meet the standard required for a new trial as newly discovered evidence. Roach appeals, arguing: (1) the district court erred by not granting a new trial based on newly discovered material evidence; and (2) his postconviction counsel was ineffective.

## **II. Newly Discovered Evidence**

On appeal Roach first argues, through counsel and pro se, that the district court erred by not granting him a new trial based on newly discovered evidence. "The standard of review on appeal from the denial of postconviction relief is for errors at law." *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

In order for a defendant to prevail on a motion for new trial based on a claim of newly discovered evidence, he must show: (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

*Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991).

The first two elements relate to the discovery of the witnesses and their testimony. The district court ruled that no evidence was presented as to when the evidence in the affidavits was discovered or how it became available to Roach and that Roach therefore failed to meet the first two requirements for newly discovered evidence.

Requirements three and four relate to the substance of the new evidence. Impeachment evidence has not fared well in the newly discovered evidence cases and has been found to be not material and not sufficiently prejudicial to warrant a new trial where the witness was already impeached at trial. See *Frank v. State*, 376 N.W.2d 637, 642 (Iowa Ct. App. 1985). The district court ruled that the content of the affidavits provided impeachment evidence, some of which contradicted Roach's testimony at trial, and otherwise were not material, and would not warrant a new trial.

We have carefully reviewed the briefs and the record in this case. We find the district court's rulings in the case to be thorough, well-reasoned, and fully supported by the record. We adopt its reasoning as our own and for all the reasons stated therein, we affirm the rulings of the district court. See Iowa Ct. R. 21.29(1)(d).

### **III. Ineffective Assistance**

Roach also argues pro se that his postconviction counsel was ineffective for: (1) failing to investigate and adequately conduct discovery of the circumstances surrounding the newly discovered evidence; (2) advising Roach that his testimony would not assist in the argument of issues related to the newly discovered evidence; and (3) failing to compel the attendance of the two witnesses who signed the affidavits constituting the newly discovered evidence. We review ineffective-assistance-of-counsel claims de novo. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009).

To prevail on his claim of ineffective assistance of counsel, [Roach] must ultimately show that his attorney's performance fell outside a normal range of competency and that the deficient performance so

prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

*Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings where an adequate record of the claim can be developed. *Id.*

We find Roach cannot succeed on his claim that postconviction counsel was ineffective in failing to have Roach testify at the postconviction hearing.

In addressing Roach's claim, the postconviction district court stated,

No evidence has been presented as to when this evidence became available to the defendant or how it became available to the defendant. Roach failed to prove that the evidence could not have been discovered earlier in the exercise of due diligence.

The court further found, "This evidence also fails as to the third and fourth elements." Roach suggests that his testimony could have established "how and when the newly discovered testimony came about." However, Roach does not show how his testimony would have changed the result of the proceeding, given the district court's conclusion that the evidence failed as to the third and fourth elements. Roach cannot prove he was prejudiced by his postconviction counsel's failure to have him testify at his postconviction hearing. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001) ("The applicant must also prove he was actually prejudiced by the alleged error.").

We find the record is inadequate to address Roach's claims that postconviction counsel was ineffective in failing to investigate newly discovered

evidence and in failing to compel the attendance of the two affiants. We preserve these claims for another postconviction proceeding.

**AFFIRMED.**