IN THE COURT OF APPEALS OF IOWA

No. 1-143 / 09-1384
Filed May 11, 2011

ANTHONY BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his conviction for second-degree murder. **AFFIRMED.**

Angela Fritz Reyes, Davenport, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

Anthony Brown was charged with first-degree murder and willful injury for causing the death of Marjorie Beck, his paramour. Brown was questioned by police officers after Beck disappeared. He told them he hit Beck twice with a brick and he "just snapped." Brown filed a motion to suppress his statements to police officers. He claimed he had taken several Prozac tablets while he was being taken to the police station and his statements were not voluntary. The district court denied the motion to suppress, finding Brown knowingly, intelligently, and voluntarily waived his right against self-incrimination.

Brown and the State thereafter entered into an agreement that the trial information would be amended to charge one count of second-degree murder and the case would be heard as a bench trial on a stipulated record.[1] The stipulated record did not include a transcript or recording of the interrogation of Brown. The district court found Brown guilty of second-degree murder in violation of Iowa Code section 707.3 (2003). Brown was sentenced to a term of imprisonment not to exceed fifty years. Brown's conviction was affirmed on appeal. *See State v. Brown*, No. 04-1340 (Iowa Ct. App. Sept. 14. 2005).

On January 4, 2007, Brown filed an application for postconviction relief, claiming he received ineffective assistance because defense counsel failed to:

[1] The stipulated record included: (1) a three-page summary of evidence; (2) ten pages of minutes of testimony; (3) a diagram of the area where Beck's body was found; (4) eight pages of reports from the Iowa Division of Criminal Investigation; (5) a preliminary report by the medical examiner; (6) the autopsy report; (7) a psychological evaluation of Brown by Dr. Timothy Murphy; (8) a psychiatric evaluation of Brown by Dr. Tracy Gunter of the Iowa Medical and Classification Center; (9) five photographs from a surveillance camera; and (10) four photographs of the victim's body and the area where it was found.

(1) point out inconsistencies in the officers' testimony at the suppression hearing; (2) claim he was under the influence of drugs when he was interrogated; (3) claim the bench trial was illegal; (4) claim the procedure involving "stipulated testimony" was invalid; (5) claim the court should not consider the DNA evidence; (6) point out there was a typographical error in the amended trial information; (7) claim the trial information was not filed until after the trial; and (8) claim the trial court failed to consider lesser-included offenses.

The district court considered and discussed each of these issues, and concluded Brown had failed to show he received ineffective assistance of counsel. The court concluded, "Other than the vague and generalized claims he makes against both trial and appellate counsel, his application for postconviction relief is without substance." The court denied Brown's application for postconviction relief. Brown appeals the district court's decision.

II. Standard of Review.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume that representation by counsel is competent, and an applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

III. Defense Counsel.

A. Brown first contends he received ineffective assistance because defense counsel failed to challenge inconsistent statements during the suppression hearing from officers regarding his interrogation.[2] He asserts that if defense counsel had raised this argument, the court would have granted his motion to suppress. He claims that due to the court's ruling on his motion to suppress he decided to waive his right to a jury trial.

It is clear that at the time of the suppression hearing the district court was aware of the discrepancies in the testimony of the two officers who interrogated Brown. In the suppression ruling the court states, "Detectives Neyrick and Thomas's testimony is not consistent in all respects, but they agree Brown knew what he was doing."

Furthermore, Brown has not shown that if defense counsel raised these concerns in a different manner the district court's ruling on the motion to suppress would have been different. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

[2] Brown claimed Detective Andre Neyrinck testified he sat in the back seat of a police vehicle with Brown and had to shake him to wake him up, while Detective William Thomas testified he and Detective Neyrinck sat together in the front of the vehicle, with Brown in the back, and Brown displayed no signs of intoxication or drowsiness.

In the direct appeal, Brown also claimed that if defense counsel had raised different claims at the motion to suppress, the motion would have been successful and he would not have agreed to a bench trial. We rejected his claims of prejudice, stating "We also find no reasonable probability the outcome of this case would have been different for the defendant had he insisted on going to trial, even if his statements to detectives had been suppressed." *State v. Brown*, No. 04-1340 (Iowa Ct. App. Sept. 14. 2005). We conclude Brown has failed to show he was prejudiced by defense counsel's actions.

B. Brown contends defense counsel should have filed a motion for new trial to raise issues that (1) the trial court abused its discretion by rejecting stipulated evidence of the doctors' examination reports, (2) the judgment was void because the amended trial information was not filed before the court's decision, and (3) the court failed to consider all lesser included offenses.

While Brown claims defense counsel should have filed a motion for new trial on certain grounds, he makes no argument to support those grounds, or to argue why a motion for new trial would have been successful. Brown's failure to present any argument or legal authority supporting his claims regarding a motion for new trial means those issues are waived on appeal. *See* Iowa R. App. P. 6.904(2)(*g*)(3) ("Failure to city authority in support of an issue may be deemed waiver of that issue."). We conclude Brown has failed to show he received ineffective assistance due to defense counsel's failure to file a motion for new trial.

IV. Postconviction Counsel.

A. Brown was originally charged with first-degree murder, and he filed a defense of diminished responsibility. He asserts postconviction counsel was ineffective for failing to raise a claim that defense counsel was ineffective for failing to rescind the defense of diminished responsibility when the charge was later amended to second-degree murder. He states this defense became irrelevant because second-degree murder does not have an element of specific intent. *See Anfinson v. State*, 758 N.W.2d 496, 503-504 (Iowa 2008). Brown claims he was prejudiced because defense counsel submitted an untenable defense.

On issues of ineffective assistance of counsel, we may address the issue of prejudice first. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). We conclude Brown has failed to show he was prejudiced by counsel's failure to rescind the defense of diminished responsibility. He does not assert that a different defense should have been submitted, or specifically state how he believes he was prejudiced by the submission of the defense of diminished responsibility. We do not believe the result of the criminal proceedings against Brown would have been different if the defense of diminished responsibility had been rescinded. Brown has failed to show he received ineffective assistance on this ground.

B. Brown claims postconviction counsel should have raised a claim that defense counsel was ineffective for failing to challenge defects in the amended trial information. He claims the trial information was not sufficient because it did not set forth the factual particulars necessary to sustain a conviction. He

contends he was prejudiced because he was convicted of a crime for which he had not been adequately charged.

Among other matters, Iowa Rule of Criminal Procedure 2.4(7)(*d*) provides that an indictment should include:

> Where the means by which the offense is committed are necessary to charge an offense, a brief statement of the acts or omissions by which the offense is alleged to have been committed. No indictment is invalid or insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in a matter of form which does not prejudice a substantial right of the defendant.

The purpose of a trial information or indictment is to afford the person charged with an opportunity to prepare a defense. *State v. Davis*, 581 N.W.2d 614, 616 (Iowa 1998). We consider both the trial information and the minutes of testimony in determining whether an accused has been adequately apprised of the crime charged. *State v. Grice*, 515 N.W.2d 20, 23 (Iowa 1994). Here, the amended trial information together with the minutes were sufficient to apprise Brown of the charge against him. Because a motion to dismiss based on inadequacy of the trial information would have lacked merit, Brown has not shown he received ineffective assistance due to postconviction counsel's failure to raise this issue. *See State v. Dalton*, 674 N.W.2d 111, 120 (Iowa 2004).

We affirm the decision of the district court denying Brown's application for postconviction relief.

AFFIRMED.