IN THE COURT OF APPEALS OF IOWA

No. 1-520 / 10-0770
Filed August 10, 2011

DION SCOTT MILLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

The applicant appeals the district court's denial of his application for postconviction relief, premised on his trial attorney's failure to secure a key witness for trial. **AFFIRMED.**

Douglas E. Cook of Cook Law Office, Jewell, for appellant.

Dion Miller, Fort Dodge, pro se.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Ricki Osborn, County Attorney, and Jennifer Bonzer, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Dion Miller appeals the district court's denial of his application for postconviction relief, premised on his trial attorney's failure to secure a key witness for trial.

I. Background Proceedings

The State charged Dion Miller with first-degree burglary in connection with an assault of his former girlfriend at the home of his half-brother, Marcus Hill. *See* Iowa Code § 713.1 (2007). The hotly contested issue was whether Miller entered Hill's home without a "right, license or privilege" to do so. *Id.*; *State v. Miller*, No. 08-0534 (Iowa Ct. App. Mar. 26, 2009). On this question, Miller sought to introduce an out-of-court statement Hill made that Hill "let [Miller] in" to the house. The district court declined to admit the statement and, following a bench trial, found Miller guilty as charged.

On direct appeal, this court affirmed the district court's refusal to admit Hill's out-of-court statement and affirmed his judgment and sentence. *Miller*, No. 08-0534. Among other things, this court noted that "Miller apparently made no attempt to subpoena Hill for trial, nor did Miller move for a continuance." *Id.*

Picking up on this statement, Miller filed an application for postconviction relief alleging his trial attorney was ineffective in failing to subpoena Hill for trial and in failing to seek a continuance of the trial until Hill was found.[1] Following an evidentiary hearing, the district court denied Miller's application. Miller appealed.

[1] Miller raised several other issues, which were denied in a partial summary judgment ruling as having been previously resolved on direct appeal.

II. Analysis

To prevail on his ineffective-assistance-of-counsel claim, Miller must show trial counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The claim may be resolved on either ground. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We elect to resolve it on the prejudice prong.

To establish prejudice, Miller must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Reviewing the record de novo, we are convinced he cannot meet this burden.

First, Miller made admissions that his entry into the home was forced. Specifically, in a recorded telephone call set up by a law enforcement agent following the assault, he stated "[Hill] didn't want to let me in the house," "I beat on the door," and "[Hill] tried a football [tackle]" once he gained entry. The trial court found these admissions "tempered" Hill's statement about letting Miller in and possibly rendered it moot.

Second, Hill's out-of-court statement was not entirely exculpatory. Although Hill did say he let Miller in, he also said that Miller was "pounding on the door," and Miller pushed past him once the door was opened. At the postconviction relief hearing, Hill appeared for Miller and testified Miller simply "brushed against" him. The State countered with evidence that Miller "bumped into [Hill] while standing in the doorway."

Third, Hill's statement that he let Miller into his house was cumulative of the ex-girlfriend's trial testimony that Hill told her he let Miller in. *See Schrier v.*

State, 347 N.W.2d 657, 664 (Iowa 1984) (noting the failure to produce cumulative testimony is not a sufficient showing of prejudice in an ineffective-assistance claim).

Finally, even if Miller's initial entry into Hill's home was not forced, Hill appeared to concede at the postconviction relief hearing that Miller's right to be in the home ended at some point thereafter. *See* Iowa Code § 713.1 (stating a defendant's presence in an occupied structure is unlawful if the defendant remains in the structure after the defendant's "right, license or privilege to be there has expired"); *State v. Walker*, 600 N.W.2d 606, 609 (Iowa 1999) ("If the defendant remains on the premises after having reason to know he has no right to do so, he has 'remained over' and, if, during the time he unlawfully remains on the premises, he forms the requisite intent to commit a felony, assault or theft, the defendant has committed a burglary."). Specifically, he said he told Miller to "get the fuck out" of the house. This concession was consistent with the ex-girlfriend's trial testimony that, during the assault, Hill told Miller to "get the fuck out, and get off" her.

We conclude there is no reasonable probability the result of Miller's trial would have been different had his trial attorney secured the testimony of Hill or asked for a continuance so that he could be located.

We affirm the district court's denial of Miller's application for postconviction relief.

AFFIRMED.