

IN THE COURT OF APPEALS OF IOWA

No. 2-007 / 10-2116
Filed February 15, 2012

FRANCISCO A. ALATORRE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Francisco Alatorre appeals from the denial of his application for
postconviction relief. **AFFIRMED.**

Tammi M. Blackstone of Gaudineer, Comito & George, L.L.P., West Des
Moines, for appellant.

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

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Francisco Alatorre was charged with and found guilty of possession of a controlled substance with intent to deliver and failure to possess a drug tax stamp. This court affirmed his convictions on direct appeal, summarizing the relevant facts as follows:

On November 30, 2006, the Des Moines Police Department received details from a confidential informant that a drug deal was imminent. In an unmarked police car, Officer Brian Mathis followed a car driven by Miguel Diaz as Diaz picked up a passenger and drove to Marshalltown.¹ Officer Mathis stopped Diaz's car on its way back to Des Moines and conducted a consent search, but no drugs were found.

The confidential informant called Officer Mathis again on November 30, 2006, and informed him that the drug deal would occur later that evening. During the drug deal, the informant was to drive an unmarked Chevy Tahoe owned by the police department. The informant and the car were searched before the informant left to meet the dealer. Officer Mathis instructed the informant to call when drugs were in the car.

The informant first picked up Diaz, but did not call Officer Mathis. The informant next stopped at a Hy-Vee parking lot and picked up Alatorre. At that time, the informant called Officer Mathis. Officer Mathis was parked near the Hy-Vee parking lot and watched as Officer Kelly Evans stopped the informant's car.

When Officer Evans stopped the car, he found Diaz sitting in the front seat and Alatorre sitting in the backseat behind Diaz. Officer Evans ordered the men out of the car and saw an opaque plastic bag wedged under the front seat from the backseat where Alatorre had been sitting. The bag was halfway under the front seat, but was sticking out onto the backseat floorboard and contained a one-kilo brick of cocaine powder.

State v. Alatorre, No. 07-0950 (Iowa Ct. App. Oct. 29, 2008).

Alatorre filed an application for postconviction relief. He claimed trial counsel was ineffective for, among other things, failing to (1) secure the

¹ Miguel Diaz was a drug dealer the Des Moines police were targeting.

testimony of two witnesses and (2) offer certain evidence at trial. The district court denied these claims.

Alatorre appeals, raising the two issues identified above. To prevail, he 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). Based upon our de novo review of the record, see *King v. State*, 797 N.W.2d 565, 570 (Iowa 2011), we conclude Alatorre has failed to establish any prejudice resulted from the claimed errors.

With respect to the first claim, Alatorre asserts trial counsel should have sought the testimony of Miguel Diaz and the confidential informant. However, Alatorre did not present any evidence at the hearing on his application as to how these witnesses would have testified. His assumption that Diaz's testimony would have been favorable to him is pure speculation. See *Stewart v. Nix*, 31 F.3d 741, 744 (8th Cir. 1994) ("To prove prejudice from a trial attorney's failure to investigate potential witnesses, a petitioner must show that the uncalled witnesses would have testified at trial and that their testimony would have probably changed the outcome of the trial."); accord *Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984). Furthermore, the State was under no obligation to reveal the identity of the confidential informant to Alatorre, which he acknowledges on appeal. See *State v. Byrd*, 448 N.W.2d 29, 31 (Iowa 1989) ("A defendant has no right . . . to confront an informant who does not, directly or indirectly, give any evidence at trial."). Finally, even if these witnesses would have testified favorably for Alatorre, trial counsel articulated a sound strategic reason for not calling

them.² See *State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003) (“Generally, the decision not to call a particular witness or the defendant to testify implicates a reasonable tactical decision.” (citation omitted)).

Alatorre’s second claim fails in much the same way. He argues trial counsel should have obtained cell phone records from the confidential informant and Officer Mathis showing no call was made to the police alerting them drugs had been brought into the car. But at Alatorre’s trial, Officer Mathis testified he received a phone call from the informant after the informant picked up Alatorre, signaling drugs had been brought into the car. Alatorre offered no evidence at the postconviction hearing to rebut this testimony other than his own self-serving statements that he did not see the informant make a phone call. In addition, the spot where the drugs were found when the vehicle was stopped was readily accessible only to Alatorre. In light of this evidence, Alatorre has not shown a reasonable probability the result of the trial would have been different had the cell phone records been obtained and introduced into evidence. See *King*, 797 N.W.2d at 572 (“The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable.”).

We accordingly affirm the district court decision denying Alatorre’s application for postconviction relief.

AFFIRMED.

² Alatorre’s trial counsel testified he believed it was beneficial that Diaz and the confidential informant were unavailable for the trial because without their testimony the State had no direct evidence of Alatorre’s possession of the drugs.