IN THE COURT OF APPEALS OF IOWA

No. 2-119 / 10-1625
Filed April 25, 2012

JAMES WILLIAM LANGDEAUX,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dickinson County, David A. Lester, Judge.

James Langdeaux appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

James W. Langdeaux, Clarinda, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Jason Carlstom, County Attorney, and Charles Thoman, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

The applicant, James Langdeaux, appeals from the district court's denial of an application for postconviction relief filed nearly twenty years ago. We affirm.

I. Background Facts and Proceedings.

James Langdeaux stabbed and killed a man in a bar in 1987. He was charged with first-degree murder under alternative theories of premeditation and felony murder, based on the predicate felony of willful injury. *See* Iowa Code § 707.2(1), (2) (2011).[1] At his jury trial, Langdeaux testified in his own defense and claimed he stabbed the man in self-defense. Other witnesses disputed that claim. Langdeaux also raised an intoxication defense. The jury found Langdeaux guilty as charged. He was sentenced to life in prison without parole.

Langdeaux appealed, claiming trial counsel was ineffective for failing to (1) raise a timely objection to the felony-murder jury instruction and (2) challenge one of the jurors for cause. This court rejected his claims and affirmed his conviction and sentence. *See State v. Langdeaux*, No. 88-852 (Iowa Ct. App. Aug. 23, 1989).

Langdeaux then filed an application for postconviction relief, asserting trial counsel was ineffective for failing to demand the State reveal the underlying felony it was relying on in charging him with first-degree murder. We affirmed the district court's denial of this application, finding it was evident trial counsel was

[1] Because no substantive difference exists between the relevant current code sections and those in force at the time the action arose, all references are to the 2011 Iowa Code unless otherwise indicated. *See IBP, Inc. v. Burress*, 779 N.W.2d 210, 212 n.1 (Iowa 2010).

aware before trial the State was relying on willful injury as the underlying felony. *See Langdeaux v. State*, No. 90-1160 (Iowa Ct. App. Nov. 26, 1991).

Langdeaux filed his second, and current, application for postconviction relief in May 1992. The State filed a motion to dismiss, which was summarily granted by the district court without notice or hearing. Langdeaux appealed. The Iowa Supreme Court reversed and remanded with instructions to set the State's motion for hearing. *See Langdeaux v. State*, No. 92-0982 (Iowa Apr. 5, 1993).

On remand, Langdeaux attempted to amend and recast his application to add several new grounds for relief. The district court denied Langdeaux's motions to amend, believing it could not address new matters raised after the remand. After a hearing, the court granted the State's motion to dismiss. Langdeaux appealed. We reversed and remanded, finding the court erred in limiting its review to Langdeaux's original claims. *See Langdeaux v. State*, No. 93-1557 (Iowa Ct. App. Jun. 27, 1995).

In the years since our remand, Langdeaux has filed numerous motions for discovery and sanctions, as well as motions to amend. Our supreme court also decided *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), which overruled precedent existing at the time of Langdeaux's conviction and held "if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." Langdeaux redoubled his efforts to overturn his conviction after *Heemstra* and filed several more amendments, seeking retroactive application of the decision.

Following a summary disposition ruling disposing of some of the claims and a hearing on the ones remaining, the district court entered an order denying Langdeaux's application for postconviction relief. This appeal followed.

II. Scope and Standards of Review.

We normally review postconviction proceedings for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel, we conduct a de novo review. *Id.*

III. Discussion.

A. Ineffective Assistance of Counsel Claims.

Langdeaux claims trial counsel performed deficiently in the following areas: (1) failing to investigate a witness's statement, (2) providing inadequate advice about a plea offer from the State, (3) failing to challenge a juror for cause, and (4) failing to object to prosecutorial misconduct. To prevail on these claims, Langdeaux must prove by a preponderance of the evidence that counsel failed to perform an essential duty and prejudice resulted. *Id.* at 158. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* at 159.

1. Failure to investigate witness's statement. We begin by addressing Langdeaux's assertion that his trial counsel failed "to pursue evidence relevant to the character of [the victim] which was referred to in a statement given by . . . Sheriff Robert Rolfes to DCI Agent Lubkeman." The statement Langdeaux is referring to reads as follows:

> Sheriff Rolfes stated that he had never had trouble with Duane [the victim] and knew him quite well. He stated that Duane could be aggressive if he wanted to and he wouldn't back down

> from a fight. Rolfes also stated that Duane didn't go out looking for fights, however. Rolfes also stated that Duane was good at "bullshitting" with people. He stated Duane was a good worker. He further stated that there were a few family problems in Duane's family, but those weren't anything serious. . . . Rolfes stated that Duane was a typical Iowa kid with a typical background.

Langdeaux argues trial counsel should have interviewed or deposed the sheriff in order to further explore his opinion about the victim's aggressive nature. If this had been done, Langdeaux posits the sheriff's testimony "would have challenged the very core of the State's case and would have supported Langdeaux's self-defense claim."

The problem with this argument is that one of Langdeaux's trial attorneys testified at the postconviction hearing that he did interview the sheriff and, after speaking with him, decided not to call him as a witness because the sheriff would have testified Langdeaux was a troublemaker. We will not second-guess counsel's strategic decision, which was made after a reasonable investigation, to not call the sheriff as a witness. *See State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003) ("An ineffective assistance of counsel claim generally does not lie for the exercise of judgment."); *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) ("Generally, the decision not to call a particular witness . . . implicates a reasonable tactical decision.").

2. Inadequate advice about plea offer. Langdeaux next claims trial counsel failed to inform him of the felony-murder rule in advising him about the State's offer of a plea bargain to second-degree murder. He asserts that if he had been told about the rule, he "most definitely" and "absolutely" would have

accepted the State's offer. We agree with the district court that Langdeaux did not prove the prejudice prong of this claim.

The prejudice inquiry in an ineffective-assistance claim arising out of the plea process "'focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" *Kirchner v. State*, 756 N.W.2d 202, 205 (Iowa 2008) (citation omitted). Thus, in order to prove prejudice, "an applicant who previously rejected a plea offer in favor of going to trial 'must show that, but for counsel's advice, he would have accepted the plea.'" *Id.* (citation omitted). "The applicant 'must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised.'" *Id.* (citation omitted). Self-serving statements by themselves are not sufficient to make this showing. *Id.* at 206; *see also Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1204 (N.D. Iowa 2000).

Defense counsel testified at the postconviction hearing that Langdeaux "was convinced he didn't do anything wrong." He remembered Langdeaux was angry "that he would have to plead guilty and have a mandatory sentence. . . . He was firm that he didn't want to do it." Counsel also believed Langdeaux would have been unable to establish a factual basis for a plea to second-degree murder, testifying, "He wouldn't admit . . . that he killed Mr. Krogman without some provocation by the decedent. And the plea, in my opinion . . . would have been a shambles. . . . [H]e was just adamant that he didn't do anything wrong." *See Wanatee*, 101 F. Supp. 2d at 1201 (stating in determining prejudice, the court must consider whether the applicant could have performed the agreement if

it had been accepted). Other evidence in the record supports counsel's recollection of Langdeaux's stance in rejecting the plea offer.

Before, during, and after the trial, Langdeaux maintained his actions in stabbing the victim were justified. Immediately after his arrest, Langdeaux told police he stabbed the victim in self-defense. He repeated this story to a friend who had been with him that night, embellishing the details of the victim's supposed precipitating attack on him.[2] Langdeaux admitted at trial the story he told his friend was a lie. He also lied to police about where he got the knife from and about the victim's friend ripping his shirt in order to support his claim of self-defense. *Cf. id.* at 1206 (considering fact defendant did not lie to avoid liability in determining whether he established he would have pleaded guilty had he been properly advised). And in a letter to the court after trial, Langdeaux stated, "I did stab Mr. Krogman out of fear for myself, because he was coming after me, and I perceived Mr. Johnson on the other side of me, blocking my path. I felt it was necessary to defend myself." Finally, at the hearing on his postconviction application, Langdeaux agreed with the State that he did not believe he acted with malice aforethought. *See State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003) (stating malice aforethought is an essential element of second-degree murder).

Had the jury accepted Langdeaux's justification defense, he would have been acquitted not only of first-degree murder, but also the lesser-included

[2] Langdeaux called his friend from jail and told him "three guys jumped him and that when . . . one of the guys grabbed him, he . . . stabbed the guy." An officer who overheard this conversation testified Langdeaux kept repeating to his friend, "Attempted murder, ha. It was self-defense."

offense of second-degree murder, as well as willful injury—the predicate felony for the State's felony-murder theory. *See State v. Shanahan*, 712 N.W.2d 121, 134-35 (Iowa 2006) (applying justification defense in second-degree murder case); *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995) (applying justification defense in willful injury case); *see also* Iowa Code § 708.4. This seriously undercuts Langdeaux's after-the-fact assertion that he would have accepted the State's offer and pleaded guilty to second-degree murder if he had been informed of the felony-murder rule. We accordingly affirm the district court's rejection of this claim.

3. Failure to challenge juror for cause. One of the jurors in Langdeaux's case indicated during voir dire her daughter had been present at the bar when the stabbing occurred, though she did not see the actual incident. In his direct appeal, Langdeaux argued trial counsel was ineffective in failing to challenge this juror for cause. We rejected that claim in Langdeaux's direct appeal, stating, "We do not find the voir dire transcript to reveal that [the juror] had formed or expressed such an opinion as to the guilt or innocence of Langdeaux." *See State v. Langdeaux*, No. 88-852 (Iowa Ct. App. Aug. 23, 1989). Langdeaux now claims the juror cried during voir dire and this showed she had a fixed opinion about the case.

We agree with the State that this same claim was decided adversely to Langdeaux on direct appeal, though without the contention the juror had cried. It cannot be raised again. *See* Iowa Code § 822.8 ("Any ground finally adjudicated . . . may not be the basis for a subsequent application . . . ."); *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971) ("'A postconviction proceeding is not intended

as a vehicle for relitigation, on the same factual basis, of issues previously adjudicated . . . .'" (citation omitted)). In any event, we believe the district court was correct in denying the claim because, as the court found, there was "(1) no record evidence [the juror] was so emotionally upset she cried, and (2) no evidence her fear regarding her daughter's future safety impacted her impartiality."

4. Prosecutorial misconduct.[3] During Langdeaux's trial, the prosecutor asked a police officer whether Langdeaux had lied about bringing the knife with him to the bar. The prosecutor also asked Langdeaux whether the officer and other witnesses to the stabbing were lying. And in closing arguments, the prosecutor argued Langdeaux had called these witnesses liars and implied Langdeaux himself was a liar, stating at one point, "The Defendant calls them a liar. We know that they spoke the truth." No objection was made to any of these questions or statements. *See State v. Graves*, 668 N.W.2d 860, 874, 876 (Iowa 2003) (holding it is misconduct under any circumstances for a prosecutor to ask a witness to comment on the veracity of another witness or for a prosecutor to "call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments"). We believe this claim can be resolved on the prejudice prong of the ineffective-assistance analysis.

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[3] Although we choose to address Langdeaux's argument on prosecutorial misconduct, he, in his pro se brief, has failed to provide this court with appropriate references to the record disclosing the error and the issue may be deemed waived. Iowa R. App. P. 6.903(2)(g)(3). "Courts should not be required to search the record to verify the facts and actions taken and are warranted in ignoring uncited contentions, especially in cases where the record is voluminous." *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001) (quoting *Tratchel v. Essex Group, Inc*., 452 N.W.2d 171, 174 (Iowa 1990).

In order to establish prejudice, Langdeaux must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (citation omitted). In determining whether this standard has been met, "we look to the totality of the evidence, the factual findings that would have been affected by counsel's errors, and whether the effect was pervasive, minimal, or isolated." *Nguyen v. State*, 707 N.W.2d 317, 324 (Iowa 2005). While the instances of prosecutorial misconduct were not isolated, their impact on the central issue of the case (whether Langdeaux attacked the victim in self-defense) was minimal. *See Carey*, 709 N.W.2d at 559 (reaching same conclusion under similar facts). More importantly, the State's case against Langdeaux was strong. *See id.* ("The most important factor under the test of prejudice is the strength of the State's case.").

Langdeaux conceded the underlying elements of first-degree murder. The only material dispute was whether his actions were justified or excusable because of his intoxication. On the issue of justification, Langdeaux claimed the victim pushed him, while the victim's friend approached him from behind, making him fearful of an attack. But none of the witnesses to the stabbing saw the victim push Langdeaux. In fact, several of the witnesses testified Langdeaux hit the victim first. And the victim's friend testified he was outside the bar when the stabbing occurred. Langdeaux also admitted neither the victim nor his friend had a weapon.[4]

[4] The jury was instructed that

With respect to Langdeaux's intoxication defense, the State's expert witness testified that although Langdeaux had been drinking when the incident occurred, "the alcohol was not having a significant impact at all on his behavior" based on Langdeaux's history of alcohol use and his clear recall of the stabbing. Langdeaux's expert witness essentially conceded as much, testifying that while he did not think Langdeaux had sufficient time to premeditate the stabbing given his level of intoxication, he "could have had the intent to kill," and he "did have the capacity to willfully injure" or act with malice.

In light of this overwhelming evidence against Langdeaux, we conclude it is not reasonably probable that but for counsel's error in failing to object to the prosecutorial misconduct, the result of the proceeding would have been different. We accordingly affirm the district court's dismissal of this claim.

B. Retroactivity of Heemstra.

Seventeen years after the direct appeal of Langdeaux's murder conviction was finalized, our supreme court decided *Heemstra*, 721 N.W.2d at 558, which invalidated the felony-murder theory applied in Langdeaux's case. The court limited its decision "to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *Heemstra*, 721 N.W.2d at 558.

> to constitute justification, one may only use reasonable force. Reasonable force is that force and no more, which a reasonable person would find necessary, under the facts and circumstances existing at that time, to use to prevent death or injury to himself. *The use of deadly force against another is reasonable only to resist a like force or threat*.

(Emphasis added.)

After *Heemstra* was decided, Langdeaux amended his postconviction application to add a claim that the failure to apply *Heemstra* to his case constitutes cruel and unusual punishment under the federal and state constitutions. The district court allowed Langdeaux's amendment, though the time designated in the pretrial order for amendments had elapsed. After the hearing on his application began, Langdeaux filed yet another motion to amend, seeking to add equal protection and separation of powers claims regarding the nonretroactivity of the *Heemstra* decision.

Following the hearing, the district court entered a ruling denying Langdeaux's cruel-and-unusual-punishment argument. The court did not rule on the equal protection and separation of powers claims. Langdeaux accordingly filed a motion to enlarge or amend. The court denied Langdeaux's motion, finding those claims "were not properly raised by [Langdeaux] through a procedurally appropriate amendment to his postconviction relief application" and, in any case, were without merit. Langdeaux now argues the court erred in denying his equal protection and separation of powers claims.[5] We disagree for the reasons that follow.

1. Denial of motion to amend. Iowa Rule of Civil Procedure 1.402(4) provides that after a responsive pleading is served, "a party may amend a pleading only by leave of court or by written consent of the adverse party." *See* Iowa Code § 822.7 (stating the rules of civil procedure are applicable to postconviction relief proceedings). While trial courts should liberally grant

[5] He does not challenge the court's denial of his cruel-and-unusual-punishment claim, though the issue was addressed by the State in its brief. We will accordingly confine our analysis to the equal protection and separation of powers claims.

amendments, *see* Iowa R. Civ. P. 1.402(4), the court has considerable discretion in ruling on a motion for leave to amend the petition. *See Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002). Our courts have affirmed denials of motions to amend made close to, or on the day of, the trial on the petition. *See Holliday v. Rain & Hail, L.L.C.*, 690 N.W.2d 59, 65 (Iowa 2004); *Norwest Bank Marion, Nat'l Ass'n v. L T Enters., Inc.*, 387 N.W.2d 359, 365 (Iowa Ct. App. 1986).

We find no abuse of discretion in the court's denial of Langdeaux's untimely amendment. The motion was made close to twenty years after his original application was filed, after numerous other amendments were allowed, after the deadline for making amendments had expired, and after the hearing on his application had already commenced. *See, e.g.*, *Bennett v. City of Redfield*, 446 N.W.2d 467, 475 (Iowa 1989) ("The court did not abuse its discretion in denying the motion to amend because it was untimely."). Regardless, we agree with the district court that Langdeaux's claims fail on their merits.

2. Equal protection. Langdeaux argues the failure to apply *Heemstra* retroactively to his case "is an unreasonable classification which violates the equal protection provisions of the" federal and state constitutions.[6] We disagree for several reasons.

[6] Langdeaux does not argue the analysis to be applied to his claim under the Iowa Constitution should be different than that applied under the United States Constitution. We accordingly apply the same analysis to both claims, though we recognize our right to fashion our own test for examining claims brought under the state constitution. *See In re Detention of Hennings*, 744 N.W.2d 333, 338-39 (Iowa 2008). Along the same lines, we reject Langdeaux's pro se claim that the district court erred in relying solely on state law in denying his equal protection claim. Although the court cited cases from the Iowa Supreme Court in analyzing the issue, those cases were based on federal constitutional principles.

First, while the Equal Protection Clauses of the United States and Iowa Constitutions require equal treatment of similarly situated people, dissimilar treatment of people who are situated differently does not violate equal protection. *See In re Detention of Hennings*, 744 N.W.2d 333, 339 (Iowa 2008). Though not clearly expressed, Langdeaux is apparently arguing he is being treated differently than defendants whose cases were not yet final at the time *Heemstra* was decided. However, there is "an important distinction between cases on direct appeal and those on collateral review." *In re Olopade*, 403 F.3d 159, 163 n.4 (3d Cir. 2005). "Simply put, because prisoners seeking collateral review are not similarly situated to prisoners whose cases are on direct appeal, it is constitutionally permissible to apply different rules to the two different categories of prisoners." *Id.*

Second, and contrary to Langdeaux's assertions otherwise, "courts are entitled to refuse to apply new state court decisions retroactively." *Stewart v. Lane*, 60 F.3d 296, 304 (7th Cir. 1995). The United States Supreme Court has long held "the federal constitution has no voice upon the subject" of retroactivity. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). Thus, the "decision of a state court to make a ruling retroactive or prospective raises no constitutional issue." *Hill v. Roberts*, 793 F. Supp. 1044, 1045 (D. Kan. 1992); *see also Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (recognizing state courts are under no constitutional obligation to apply their own criminal decisions retroactively).

The Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), is of no help to Langdeaux, as that case only requires that state courts

apply new federal constitutional rules "retroactively to all cases, state or federal, pending on direct review or not yet final." In fact, *Griffith* endorses the "rationale for distinguishing between cases that have become final and those that have not, and for applying new rules retroactively to cases in the latter category." 479 U.S. at 322. Langdeaux does not fall within the ambit of *Griffith*, as his case was on collateral review at the time of *Heemstra* decision. *See, e.g.*, *Stewart*, 60 F.3d at 304.

Third, our supreme court has recognized a rational basis exists "for classifying appellants in accordance with whether their claim previously has been fully considered and adjudicated." *Everett v. Brewer*, 215 N.W.2d 244, 247 (Iowa 1974).

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

Teague v. Lane, 489 U.S. 288, 309 (1989).

For all these reasons, we find no merit to Langdeaux's equal protection claim.

3. Separation of powers. The separation-of-powers doctrine is violated "if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000). Langdeaux argues the refusal to apply *Heemstra* retroactively to his case "is an unlawful exercise of Legislative power by the Judicial branch." We disagree.

In determining its decision in *Heemstra* should only apply to the present case and those not yet final where the issue was raised, the Iowa Supreme Court was exercising its judicial power "to decide and pronounce a judgment and carry it into effect." *See Klouda v. Sixth Judicial Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 261 (Iowa 2002); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (describing determination of whether a judicial decision operates retroactively as "a matter purely of judicial mechanics"). Langdeaux has not directed our attention to any case supporting his position. We accordingly reject this claim as well.

C. Request to Proceed Pro Se.

After the first day of the postconviction hearing, Langdeaux wrote the presiding judge a letter expressing dissatisfaction with his court-appointed attorney and requesting "the opportunity to perform examinations of witnesses personally." The district court entered an order granting Langdeaux's request and directed the sheriff to transport Langdeaux to the second day of the hearing.

On the morning of the hearing, the court addressed Langdeaux's letter as follows:

> It is my understanding from your letter that you may have been considering proceeding pro se. Are you still desiring to do that?
>
> THE PETITIONER: No. Larry and I talked about it the other night, and it was my decision to let him go ahead and do the presentation himself.
>
> THE COURT: Okay. . . . And Mr. Langdeaux, do you still want an opportunity to do some questioning or are you going to turn it all over to Mr. Stoller?
>
> THE PETITIONER: Mr. Stoller and I have talked about this, and from what I understand, we're going to discuss it just briefly after his direct examination to determine whether I'm going to do some questions myself, Your Honor.

> THE COURT: Okay. Mr. Stoller, anything you want to add beyond what I've already stated?
>
> MR. STOLLER: No, Your Honor. That substantially clarifies the situation. . . . I had prepared my motion to withdraw and the consent for Mr. Langdeaux. I visited with him at the jail and he at first wanted me in an advisory capacity, and I informed the court accordingly. As of last night when we reviewed his case . . . he decided . . . that he would like me to proceed with the primary questioning. . . . Then before we finish . . . I'll consult with Mr. Langdeaux . . . and see if there is any additional questions that he would like me to ask him, and we'll proceed accordingly.

Based on this record, we find no merit to Langdeaux's contention in his pro se brief that the district court "abused its discretion by failing to hold a sua sponte hearing on Langdeaux's complaint of a breakdown in attorney/client communication during postconviction proceedings."

IV. Conclusion.

Having considered all arguments set forth in this appeal, whether or not specifically mentioned in this opinion, we affirm the district court's denial of Langdeaux's application for postconviction relief.

AFFIRMED.