

IN THE COURT OF APPEALS OF IOWA

No. 2-169 / 11-0743
Filed April 25, 2012

MICHAEL L. SCHAWITSCH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge.

Michael Schawitsch appeals the dismissal of his third application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee-State.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Michael Schawitsch appeals the dismissal of his third application for postconviction relief. Schawitsch argues: (1) newly discovered evidence entitles him to a new trial and (2) trial counsel was ineffective in failing to adequately investigate. We affirm.

I. Background Facts and Proceedings.

After a 1999 jury trial, Schawitsch was convicted of two counts of first-degree robbery, two counts of unauthorized possession of an offensive weapon, and one count of first-degree burglary. Our decision upholding Schawitsch's criminal convictions details the case background:

On February 6, 1999, at about 6:30 p.m., a man armed with a gun came into the Joy Mart convenience store in Keokuk, Iowa. He demanded money from the clerk, Renee Merydith. She gave him cash, and he left. Merydith then called the police.

The next day, on February 7, 1999, a man came through an unlocked back door into the McDonald's Restaurant in Keokuk at about 10:30 p.m., after the main restaurant had closed, but drive-through service was still available. The man went up to the front counter, displayed a gun, and demanded money from an employee, Michael Burchett. Two other employees, Mandy Hendricks and Rory O'Connell, were able to observe the man. The employees gave the man cash, and he left.

While the McDonald's robbery was taking place, an employee alerted a drive-through customer the business was being robbed. The customer drove to the police station and informed them of the robbery. Police officers quickly arrived at the scene and observed a white Chevrolet Corsica leaving the restaurant. The car did not have any license plates. The driver led officers on a high-speed chase into Illinois along Nauvoo River Road. Officers were not able to stop the vehicle.

On February 8, 1999, a sawed-off shotgun was found along the escape route. Merydith and Hendricks identified the shotgun as similar to the one used in the robberies. In April 1999, blue jeans, two bank bags marked McDonald's, another bank bag, and \$1098 in cash were found hidden under a boat near Nauvoo River Road. No identifiable fingerprints were found on any of the items.

Police officers received information Michael Schawitsch owned a car similar to that used in the McDonald's robbery. Officers prepared a photographic lineup of six individuals, including Schawitsch. Merydith, Hendricks, and O'Connell all identified Schawitsch's photograph as that of the robber. Burchett was unable to make a selection from the photographic lineup.

Defendant's former girlfriend, Christine Jordan, testified she had owned a white Corsica. In February 1999, after Jordan and defendant separated, defendant had the vehicle in his possession. Jordan took the license plates off the car and signed the title over to him. The vehicle was left at an auto body shop in April 1999. Later, an unidentified female called and told the shop owner to junk the vehicle. The owner of a salvage yard in Illinois testified he took possession of a white Corsica in August 1999. When he received the car the title was in the name of "Michael Schawitsch." One of defendant's pay stubs was found in the vehicle.

Schawitsch testified that on February 6, 1999, he spent the evening at the house of his brother, Kevin Schawitsch. He stated the next day, February 7, 1999, Kevin and Kevin's girlfriend, Lora Aden, drove him to his mother's house. His mother corroborated his testimony he was at her house on the evening of February 7, 1999. Aden's testimony also supported that of defendant.

Three eyewitnesses, Merydith, Hendricks, and O'Connell, picked [Schawitsch] out of the photographic lineup [on April 16, 1999]. Merydith and Hendricks had both seen the robber at close range, paid close attention during the crime, and were certain defendant was the robber. O'Connell, who had seen the robber from the back of the McDonald's Restaurant, was also able to identify defendant.

Three eyewitnesses . . . identified [the defendant] at the trial. There was evidence defendant owned a vehicle of the same color, make, and model as the getaway car in one of the robberies. [Schawitsch's] explanation for how the car ended up in a junkyard in Illinois, that he sold the car to an unknown man, who then junked it, is less than credible.

State v. Schawitsch, No. 00-0475 (Iowa Ct. App. June 13, 2001).

Schawitsch's subsequent applications for postconviction relief and federal habeas corpus were denied. *Schawitsch v. Burt*, 491 F.3d 798, 803 (8th Cir. 2007) (ruling photographic lineup "was not unnecessarily suggestive, nor did it bear a substantial risk of irreparable misidentification at trial"); *Schawitsch v.*

State, No. 07-0873 (Iowa Ct. App. Mar. 14, 2008) (rejecting claims of ineffective assistance of counsel on statute of limitations grounds); *Schawitsch v. State*, No. 02-1549 (Iowa Ct. App. June 25, 2003) (ruling Schawitsch's postconviction proceeding reasserts arguments raised on direct appeal).

In March 2010, Schawitsch again sought postconviction relief alleging newly discovered evidence (affidavits of Anamosa inmates Clifton Wayne Bell and Richard Leroy Parker) prove "his actual innocence." Schawitsch also alleged trial counsel was ineffective "for failing to investigate the exculpatory evidence of another suspect."

Detective Hinton's March 1999 investigative report includes information about Christina Hawks and her car. Hawks's car is similar to the car used in the McDonald's robbery. Detective Hinton's report states Christina's boyfriend is nineteen-year-old Tyler Wheatley. During trial, defense counsel cross-examined detective Hinton on his failure to interview Hawks's boyfriend.

Parker's January 2010 affidavit discusses his conversation with Clifton Bell, who is from Keokuk:

Out of curiosity, I asked . . . what type of establishments did the person [Tyler] rob in Keokuk. [Clifton Bell's] response was a McDonald's, and he didn't remember the other place, but that he recalls that the individual told him that he out ran the police in a chase. Immediately, I knew that there was a great possibility that he was referring to the robberies that Michael Schawitsch was charged and convicted of.

At his September 2010 deposition, Parker testified he doesn't have any personal knowledge of what "the individual," allegedly said. Further:

Q. But you don't know when [Clifton] was telling you about this that he was relating statements that Tyler had made or if [Clifton] was relating statements that [Clifton's brother] had made to

him? A. I don't know who specifically stated what or how that went.

Clifton Bell's January 2010 affidavit describes a summer of 2004 conversation at a Keokuk casino involving "a man named Tyler." At his September 2010 deposition, Clifton explained he and his brother Terry were drinking with Tyler at the casino. Clifton testified Terry was the only person who heard Tyler's alleged statements at the casino. Clifton stated later in the evening, Terry told him that Tyler had "been in a high speed chase and [Terry] thought [Tyler] had something to do with McDonald's." Clifton didn't know how old Tyler was, but estimated his age to be thirty or forty.

By the time Clifton discussed Terry's statements with inmate Parker, Terry was deceased. Further: "Q. Do you remember Mr. Tyler's first name? A. I don't know. Q. Or do you know if that was his first name? A. I don't know nothing about him. Q. You simply know him as Tyler? A. Yeah."

In his September 2010 deposition, Schawitsch testified his attorney never discussed Tyler Wheatley with him, he never saw the statement Christina Hawks gave to the police, and the description of the car Christina Hawks owned "was just shoved under the rug."

In his November 2010 deposition, trial attorney Dennis stated the State gave him the whole investigative file and it was his practice to provide all the discovery documents to his clients. Therefore, he would have provided all the documents to Schawitsch. Further:

Q. . . . Did you have any concerns about identifying Tyler Wheatley by name in front of the jury knowing that he lived in Keokuk? A. . . . Yes, I did. Because of his last name and possibly

because we would have undercut our argument for doubt about whose car was whose and [the police] couldn't identify the right car.

Q. Certainly you were trying to infer through your questioning that Tyler Wheatley was a possible suspect in this matter, correct? A. Correct.

Q. You knew by that time that Tyler Wheatley was only nineteen years old, correct? A. Correct.

Q. And Mr. Schawitsch was thirty-five years old? Yes.

Q. And you knew at the time of trial that Mr. Wheatley's description did not match the description given by the eyewitnesses in this case, did you not? A. Yeah.

Q. Would that have been a concern for you if you identified this Tyler Wheatley by name and somebody on the jury might have known who he was? A. Correct, that's right.

The postconviction court denied relief, and Schawitsch now appeals.

II. Scope of Review.

Postconviction relief proceedings are not criminal proceedings, but rather are civil proceedings "triable at law to the court." *Jones v. State*, 479 N.W.2d 265, 269 (Iowa 1991). Generally, we review postconviction relief proceedings for errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). "We give weight to the lower court's findings concerning witness credibility." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We review ineffective-assistance-of-counsel claims de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

III. Newly Discovered Evidence.

Under Iowa Code section 822.2(1)(d) (2009), an applicant may seek postconviction relief if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Schawitsch claims the 2010 Parker and Bell affidavits and their deposition testimony constitute the "newly discovered evidence" entitling him to a new trial.

We follow the same analysis to resolve section 822.2(1)(d) claims as we do to resolve claims of a new trial based on newly discovered evidence. *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). “It is obvious the legislature intended the sufficiency of the showing necessary to obtain a new trial based on newly discovered evidence to be the same whether the ground is raised in a motion for new trial or in a postconviction application.” *State v. Sims*, 239 N.W.2d 550, 555 (Iowa 1976). “Motions for new trials based upon newly discovered evidence are not favored in the law and should be closely scrutinized and granted sparingly.” *State v. Compiano*, 261 Iowa 509, 516, 154 N.W.2d 845, 849 (1967).

Schawitsch must prove four elements before a new trial will be granted:

(1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial.

Grissom, 572 N.W.2d at 184.

“Thus, by definition, newly discovered evidence refers to evidence which existed at the time of the trial proceeding.” *Id.* (denying postconviction relief where applicant’s “newly discovered evidence” did not exist at the time of sentencing). “Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence.” *Id.* Rather, the “material facts not previously presented” statutory ground requires an applicant to present facts that existed at the time but may have been unknown to the parties. *Id.* Schawitsch’s trial occurred in 1999, and the Parker/Bell affidavits discuss a summer of 2004

conversation with a “Tyler.” Accordingly, this conversation occurred subsequent to trial and does not qualify as “newly discovered evidence.”

However, Iowa has an exception to the requirement the “newly discovered evidence” exist at the time of trial. “It is found in extraordinary cases when an ‘utter failure of justice will unequivocally result’ if the new evidence is not considered or where it is no longer just or equitable to enforce the prior judgment.” *Id.* at 185 (quoting *Benson v. Richardson*, 537 N.W.2d 748, 762-63 (Iowa 1995)). Our review of the record reveals the “extraordinary exception” does not apply. Tyler’s alleged statements were made to Terry Bell not to Clifton Bell. Clifton does not know if Tyler is the first or last name of the person talking to his brother. Clifton did not testify to any date or timeframe for the McDonald’s robbery Tyler is alleged to have discussed. Even if we ignore the potential hearsay challenges to this vague evidence, Tyler’s alleged statements are not specific enough to allow this case to qualify as an “extraordinary exception.”

Additionally, Schawitsch failed to prove the fourth element—the “newly discovered evidence” would probably change the result if a new trial is granted. We conclude there is too much other evidence of Schawitsch’s guilt in the record. In addition to the analysis detailed above in our resolution of Schawitsch’s direct appeal, we adopt the postconviction court’s discussion of the strength of the State’s case:

[Schawitsch] was identified at trial by three eyewitnesses. Tyler Wheatley’s description did not match the description given by the eyewitnesses in the case. During the original trial in this matter, Renee Merydith testified that on February 6, 1999, she was working at Joy Mart from 6:00 p.m. to 10:00 p.m. when a man walked into the store, flashed a gun at her, and told her that he wanted all the money. After the robbery, Renee Merydith identified [Schawitsch]

in a photo-lineup as the man who robbed Joy Mart. She also identified [Schawitsch] when she testified at trial. At trial, Mandy Hendricks testified that she is the swing shift manager at the Keokuk McDonald's and was working on February 7, 1999 about 10:30 p.m. when a man walked into the restaurant and demanded all of the money at gunpoint. Mandy identified [Schawitsch] as the robber in a photo-lineup. She also identified [Schawitsch] as the robber during trial. Rory O'Connell testified at trial that he was working at about 10:30 p.m. at McDonald's on February 7, 1999 when he saw a man come into the restaurant and demand money. When asked to identify the robber in a photo-lineup and again later at trial, Rory identified [Schawitsch].

Therefore, without the probability of a different result, a new trial is not warranted.

IV. Ineffective Assistance of Counsel.

Schawitsch argues trial counsel was ineffective in failing to conduct additional interviews to "investigate Wheatley's connection based on the information found in the police reports."¹

Detective Hinton, the chief investigating officer, discussed his investigation in a March 1999 report:

On 12-06-99 . . . [Joy Mart employee Renee Merydith] described the guy as . . . white male, *mid to late thirties*

On 02-07-99 . . . I talked to the shift manager, Mandy Hendricks [A]t about 10:30 p.m. a guy came through the rear side door . . . of [McDonald's]. She was sweeping over in that area . . . and saw the guy come in She describes [him] as . . . [a] white male, *mid thirties or early forties*

. . . .

On 02-08-99 . . . I got a call from Shannon Edwards [who] was out by her car, the night of the robbery at McDonald's, and she

¹ Schawitsch also argues counsel was ineffective in failing to assert the evidence relating to Tyler Wheatley was suppressed under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). However, Schawitsch's application for postconviction relief did not argue counsel was ineffective for failing to argue the State withheld exculpatory evidence in violation of *Brady* and the postconviction court did not address this issue. Therefore, Schawitsch has failed to preserve error. See *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (holding issues must be "presented to and passed upon by the district court" before they can be decided on appeal).

saw the white car the police were looking for. She is very sure it is a Corsica, four door, early nineties

. . . .
 On 02-15-99 . . . Officer Symmonds saw a car . . . that matched the car I was looking for It was an Illinois plate . . . registered to Christina Hawks, Basco, IL, on a white 1991 Chevy Corsica, four door Based on where the car was parked I thought the owner might be living in the apartments It was later learned that A'Lee [Tyler] Wheatley and Christina Hawks lived in that building

On 03-09-99 . . . I had dispatch run a criminal history on Wheatley I also checked with Hancock County and got a photo of him. Wheatley is *nineteen* years old

. . . .
 On 03-15-99 . . . I got a call from Trooper Rairden [T]here is a girl named Chris [who] has been saying that her ex-boyfriend is the one who did the robberies in Keokuk, and that he used her car to do them. Chris' ex-boyfriend is Michael Schawitsch. He's tall, *in his thirties*

. . . .
 On 3-19-99 . . . I talked to Christina Michelle Hawks Christina told me that she has lived with A'Lee Tyler Wheatley (Tyler), for the last two months. She has no idea who did the robberies at Joy Mart or McDonald's. She doesn't let anyone drive her car, not even Tyler. She didn't know the police had been looking for a car just like hers. She is positive that no one could have taken her car without her knowing it. She bought her Chevy Corsica in September of 1997, and . . . she got her Illinois license plates around December 1998

. . . .
 On 04-01-99 . . . I talked to Christine Joy Jordan She told me that she dated Michael Schawitsch for the last five years. They broke up in December of 1998 She thinks her ex-boyfriend, Mike Schawitsch, did the robberies She had a white 1988 or 1989 Chevy Corsica four door. The license plates and car were in her name [S]he took the plates off that car. She had a friend go to Lehr and Clark . . . and transfer the title to Mike's name. She kept the plates and doesn't know what Mike did for plates She describes Mike as . . . *thirty-five years old*

On 04-02-99 . . . Lehr and Clark insurance . . . transferred the title of Christine Jordan's 1989 Chevy Corsica to Michael Schawitsch on 02-05-99

(Emphasis added.)

The minutes of testimony, filed in June 1999, provide descriptions of the robber from Sara Kloeopfer and Mark Twitchell. They observed him from the McDonald's drive-through window while the robbery was in progress. Kloeopfer described the robber as "at least thirty years old," while Twitchell described the robber as "between thirty and fifty years old."

The minutes also provide descriptions of the robber from Michael Burchett and Rory O'Connell, employees of McDonald's. Burchett described a "white male, mid thirty's to early forties" and O'Connell described "a white male, late 30's to early 40's in age, 'salt and pepper' black hair."

Officer Hinton testified at the September 1999 hearing on Schawitsch's motion to suppress evidence of the pretrial identification through the photographic array. Schawitsch attended the suppression hearing. Hinton stated Schawitsch is thirty-five years old and described his current hair color as "[d]ark hair, starting to turn gray." Witnesses Merydith and Hendricks testified at the suppression hearing and both made an in-court identification of Schawitsch as the robber.

Also at the suppression hearing, Merydith testified she told the police she was "100 percent" sure of her selection of Schawitsch as the Joy Mart robber from the photo line-up and "[w]hen I looked at the photos I knew who it was." Hendricks explained the robber was standing within a foot of her when she told him the McDonald's dining area was closed. Hendricks described what happened when she looked at the photo line-up:

I looked at all of them. I looked at every face and just broke it down to where I eliminated everyone but one. And, I mean, when I first scanned over it, I recognized him. But I didn't want—I work

with the public, so I didn't want someone that I see every day or see every once in a while to get accused of something that they didn't do. I wanted to make absolutely sure.

Q. And you picked a photograph out? A. Yes, I did.

“To establish an ineffective-assistance-of-counsel claim, [Schawitsch] must demonstrate ‘(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.’” *Lado*, 804 N.W.2d at 251 (quoting *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006)). Schawitsch must prove both elements by a preponderance of the evidence. *Id.*

We begin with the prejudice prong. To establish prejudice, Schawitsch must prove “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Lyman*, 776 N.W.2d 865, 878 (Iowa 2010). Here, even if we *assume* Schawitsch has proven the first element, there remains overwhelming evidence of guilt. Given the eyewitness testimony of not one, but three witnesses identifying Schawitsch as the robber at photographic lineups and at trial, and given the fact additional eye-witnesses described the robber as middle-aged in police interviews, there is not a reasonable probability that the result would have been different had trial counsel conducted an additional investigation of nineteen-year-old Tyler Wheatley.

For all of the above reasons, we affirm the dismissal of Schawitsch’s application for postconviction relief.

AFFIRMED.