IN THE COURT OF APPEALS OF IOWA

No. 2-251 / 10-1877
Filed April 25, 2012

GENE DUWAYNE COOK, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Gene Cook Jr. appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Marc A. Elcock of Elcock Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Gene Cook Jr., following a trial to the court, was convicted of five counts of lascivious acts with a child. His convictions were affirmed on appeal. *See State v. Cook*, No. 03-1992, 2005 WL 291546 (Iowa Ct. App. Feb. 9, 2005). He now appeals from the denial of his application for postconviction relief in which he alleged his trial counsel was ineffective in failing to call several witnesses, failing to hire a private investigator, and failing to adequately challenge the identification procedures used by police.

We review a claim of ineffective assistance de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). To prove a claim of ineffective assistance of counsel, Cook must show by a preponderance of evidence that (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *See id.* at 784. An ineffectiveness claim fails if the applicant is unable to prove either element of this test. *Id.*

Cook has failed to establish his ineffective-assistance-of-counsel claims. First, trial counsel's decision not to call witnesses who could only testify as to Cook's character was a reasonable tactical decision. If such character evidence was introduced, the State was no longer held to its pretrial agreement not to offer evidence of Cook's prior convictions. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (noting "strategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable'" (citation omitted)). Moreover, he does not assert that the results of his trial would have been different had these character witnesses testified.

Cook's contentions that trial counsel was ineffective in failing to hire a private investigator and in failing to challenge the identification procedures similarly fail. Trial counsel did cross-examine the investigating detective about a newspaper article describing a man exposing himself in a nearby neighborhood a few weeks after the crimes Cook was accused of committing. Cook provides no evidence that would negate the witnesses' descriptions and identifications of him as the perpetrator of the crimes for which he was charged. And Cook has not established the identification procedures used were impermissibly suggestive, which would support a motion to suppress. *See State v. Folkerts*, 703 N.W.2d 761, 764 (Iowa 2005) (noting Iowa courts follow a two-step analysis to determine: (1) whether the out-of-court identification procedure was "impermissibly suggestive," and (2) if so, "whether, under the totality of the circumstances, an identification made by the witness at the time of trial is irreparably tainted").

The district court did not err in denying the application for postconviction relief. We therefore affirm.

AFFIRMED.