IN THE COURT OF APPEALS OF IOWA

No. 2-287 / 11-0215
Filed May 23, 2012

JORGE MARTINEZ-PEREZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Jorge Martinez-Perez appeals from the postconviction court's denial of his application for postconviction relief. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Jorge Martinez-Perez was convicted of possession of a controlled substance with intent to deliver and failure to possess a drug tax stamp. He filed an application for postconviction relief asserting, among other things, that his trial counsel was ineffective in failing to request that Perez's trial be severed from the trial of his three co-defendants and in implying during his voir dire questions that Perez's status in the country was unlawful. The postconviction court denied his application for postconviction relief. Perez appeals.

I. Background Facts and Proceedings

On direct appeal, this court stated the facts as follows:

> This case began when Davenport police officers learned that a Hispanic male driving a champagne-colored Chevrolet Silverado with California license plates was selling cocaine out of 524 North Lincoln Court, an older home that had been converted to four separate apartments. On February 2, 2008, officers conducted a traffic stop on the Silverado as it left the apartment building. The driver, Miguel Trujillo, matched the description of the drug dealer and the Silverado was registered in his name. A drug dog conducted an exterior sniff of the Silverado, but did not alert, and Trujillo was allowed to leave. Officers continued to survey the apartment building, but did not see the Silverado again after the stop.
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> Thereafter, officers developed a confidential informant to engage in a controlled buy and provide more information about the drug operation at the apartment building. On February 7, 2008, the confidential informant drove to the apartment building to buy cocaine. Officers watched nearby from their vehicles as a male walked down the driveway from the apartment building, approached the confidential informant's vehicle, and sold the informant one-fourth ounce of cocaine for $180 of the police department's serialized bills. In order to identify the seller, an undercover officer

drove by and the two looked directly at each other. The officer later identified the seller as Jorge Perez.

After the drug deal, Perez walked back in the direction of the apartment building, but entered the building using the back entrance. In order to determine the apartment Perez had come from, several officers knocked on the doors of each apartment using the ruse that they were investigating recent car burglaries in the area. No one answered at apartments 1, 2, and 4. Trujillo answered the officers' knocks at apartment 3 and initially answered the officers' questions, but then went inside the apartment to get Perez to translate for him. The officers observed Trujillo was very nervous, his body was very shaky, and his voice was trembling, and that Perez seemed to be in a hurry and wanted the officers to leave as quickly as possible.

Based on Trujillo's and Perez's behavior, the officers believed there were drugs in the building. After reporting their findings, the officers returned to the apartment building ten to fifteen minutes later to secure the residence and obtain permission to search the apartment. Trujillo and Perez allowed the officers into the apartment, and the officers immediately noticed a razor with apparent cocaine residue on the kitchen table. Trujillo and Perez, along with Trujillo's daughter and her boyfriend, Claudia Trujillo and Andres Garcia, were kept inside the apartment until a search warrant was obtained.

With the help of a drug dog, officers eventually discovered more than 500 grams of cocaine in various places inside and outside the apartment. Officers also found two digital scales and a razor blade with cocaine residue on them, and plastic bags, wrap, and a heat sealer consistent with that used to package the drugs found at the apartment. Among the occupants' personal property, the officers found multiple cell phones, and the memory of one contained several calls from the number the confidential informant had used to set up the earlier controlled buy. Officers seized $612 in cash from Trujillo, $160 in cash from Garcia, $378 in cash from Claudia Trujillo, but no money from Perez. The officers did not uncover the $180 in serialized bills used in the controlled buy earlier that evening.

On February 15, 2008, Perez was charged with possession of a controlled substance with intent to deliver and failure to affix a

> drug tax stamp. Trujillo, Garcia, and Claudia Trujillo were similarly charged.

State v. Perez, No. 08-0991, 2009 WL 2424635, at *1–2 (Iowa Ct. App. Aug. 6, 2009). Following a jury trial, Perez was convicted as charged. Perez's conviction was affirmed on direct appeal.

Perez filed an application for postconviction relief asserting his trial counsel was ineffective in failing to request that Perez's trial be severed from the trial of his three co-defendants and in implying during his voir dire questions that Perez's status in the country was unlawful. The postconviction court denied his application. Perez appeals, asserting: (1) the postconviction court failed to apply the proper standard in analyzing his claim related to severance; (2) his postconviction counsel was ineffective in his presentation of Perez's argument that his trial counsel had breached an essential duty in not requesting to sever his trial from that of his co-defendants; (3) the postconviction court erred in analyzing his argument related to his trial counsel's statements about his status in the country; and (4) his postconviction counsel was ineffective in his presentation of Perez's argument relating to trial counsel's statements about his status in the country.

II. Standard of Review

We review Perez's ineffective-assistance-of-counsel claims de novo. *See Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007). In order to prove his counsel was ineffective, Perez must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In order to establish the first prong of the test, Perez must

show that his counsel did not act as a "reasonably competent practitioner" would have. *Id.* We presume the attorney performed competently and avoid second-guessing and hindsight. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). To satisfy the second prong, Perez 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. Utter*, 803 N.W.2d 647, 654 (Iowa 2011). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*

We review Perez's other claims for errors at law. *See Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Severance

In his application for postconviction relief, Perez asserted his trial counsel was ineffective for failing to request that he be tried separately from his three co-defendants. The postconviction court found Perez failed to prove his counsel was ineffective or that he was prejudiced by counsel's performance, noting "[Trial counsel] concluded Perez had no legal grounds under Iowa Rule of Criminal Procedure 2.6(4)(b) for severance because none of the other defendants made statements prejudicial to him." The postconviction court concluded that because Perez's trial counsel "was correct on the law on severance applied to the facts as he knew them," Perez was not denied effective assistance of counsel. Perez argues on appeal that the postconviction court failed to properly apply the standard for severance required by Iowa Rule of Criminal Procedure 2.6(4)(b).

"The general rule is defendants who are charged together are tried together. Under [Iowa Rule of Criminal Procedure 2.6(4)(b)], the trial court can

order separate trials if a defendant would be prejudiced by a joint trial." *State v. Truesdell*, 511 N.W.2d 429, 432 (Iowa Ct. App. 1993). Iowa Rule of Criminal Procedure 2.6(4)(b) states:

> When an indictment or information jointly charges two or more defendants, those defendants may be tried jointly if in the discretion of the court a joint trial will not result in prejudice to one of the parties. Otherwise, defendants shall be tried separately. When jointly tried, defendants shall be adjudged separately on each count.

Severance may be warranted by any of the following factors:

> (1) if admission of evidence in a joint trial would have been inadmissible and prejudicial if a defendant was tried alone, (2) if a joint trial prevents one defendant from presenting exculpatory testimony of a codefendant, (3) if consolidation will produce a trial of such complexity and length that the jury will be unable to effectively compartmentalize the evidence against each defendant, and (4) if defenses presented by different defendants conflict to the point of being irreconcilable and mutually exclusive.

State v. Williams, 525 N.W.2d 847, 849 (Iowa 1994).

On appeal Perez asserts the postconviction court erred in failing to consider whether the complexity and length of the multiple-defendant trial prejudiced Perez. *See Truesdell*, 511 N.W.2d at 431 ("An accused may be prejudiced by a joint trial if the trial is of such complexity and length that the jury in unable to effectively compartmentalize the evidence against each defendant."). Perez did not argue before the postconviction trial court that his trial should have been severed because of the complexity of the issues; rather, Perez argued his trial should have been severed to avoid any prejudice that results from "a jury looking over, seeing four Latino, non-English-speaking defendants, charged with dealing cocaine." Because Perez did not specifically argue the complexity ground before the postconviction court, this argument is properly raised as a

claim that his postconviction trial counsel was ineffective for failing to raise the complexity issue before the postconviction court. *See State v. Goodson*, 503 N.W.2d 395, 399 (Iowa 1993) ("The defendant may not announce an objection at trial and on appeal rely on a different objection to challenge an adverse ruling."). Since Perez also raised this argument in an ineffective-assistance-of-counsel context, we address the claim in that context below.

Perez asserts his postconviction trial counsel was ineffective in failing to point out the confusion and complexity of the trial, which necessitated severance. Perez argues the trial was made complex because there were four co-defendants, each requiring their own interpreter; three defense attorneys; many witnesses; many objections; technical issues; and confusing law regarding constructive possession.

On our review we find Perez cannot show he was prejudiced by postconviction counsel's failure to assert his trial counsel was ineffective in not requesting a severance based on the complexity of the trial. The entire trial lasted five days, with the first day being used exclusively for jury selection. The majority of the evidence was related to general facts and circumstances surrounding the crimes and was introduced against all defendants equally. Perez does not argue that any of the evidence admitted applied exclusively to his co-defendants. The defenses presented only one brief witness, no defendant testified, and the State put on no rebuttal evidence. Further, the record overwhelmingly supports the jury's verdict. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 696

(1984). We cannot find that had postconviction trial counsel made such an ineffective-assistance argument, the postconviction court would have found trial counsel was ineffective. Perez has failed to show prejudice.

Perez also asserts on appeal that his postconviction trial counsel was ineffective in failing to "properly bring to light" that his trial counsel was ineffective in failing to request severance of Perez's trial from that of his co-defendants. Perez complains his postconviction counsel failed to ask his trial counsel whether he had considered severing the defendants' trials. A review of the postconviction trial transcript reveals Perez's postconviction counsel asked trial counsel whether he had talked with Perez about severing his trial from that of his co-defendants and also inquired about counsel's understanding of what would have been necessary to sever the trial. Perez's trial counsel explained he did not recall having considered seeking a severance given his understanding that he would have had to show "some kind of conflict between the defendants." Because Perez's postconviction counsel thoroughly investigated this issue during the postconviction hearing, we find he did not breach an essential duty in this regard.

IV. Immigration Status

Perez also asserts that despite the district court granting a motion in limine requesting that information about his immigration status be kept from the jury, his trial counsel implied during voir dire that Perez's status in the country was unlawful. In his application for postconviction relief, Perez asserted trial counsel was ineffective in this regard. In addressing this argument, the postconviction court found, "Perez asserts trial counsel allowed references to or implied that Perez was illegally in the United States. . . . The State did not attempt to

introduce any evidence that Perez was in the country illegally." On appeal, Perez asserts the postconviction court erred in analyzing whether the State, and not Perez's trial counsel, had introduced evidence regarding Perez's immigration status. Perez also asserts his postconviction trial counsel was ineffective in failing to properly raise this argument before the postconviction court.

After a review of the record, we find Perez cannot show his postconviction trial counsel was ineffective in the presentation of this claim to the postconviction court. A review of the postconviction relief application, the postconviction hearing transcript, and the postconviction court's order as quoted above reveal that it was clear the issues presented included whether trial counsel was ineffective for mentioning during voir dire immigration status as a potential area for prejudice. Therefore, we find Perez cannot succeed on his claim that his postconviction counsel presented the matter in a way that caused the court to be "unable to decipher exactly what argument was being raised."

We also find the postconviction court did not err in denying Perez's claim that trial counsel was ineffective in making references to persons with undocumented status in the country during voir dire. The record shows that on three occasions during voir dire, Perez's trial counsel questioned whether any jurors disagreed that everybody would be entitled to the same rights whether English-speaking, Spanish-speaking, citizen or not a citizen. The State asserts trial counsel had a valid strategic reason for inquiring about whether the jurors would hold some prejudice against such a defendant. We cannot find Perez proved he was prejudiced by trial counsel's questions regarding citizenship. As stated above, the evidence against Perez was overwhelming. We cannot find

the result of Perez's trial would have been different had trial counsel not briefly mentioned citizenship status in general terms. *See State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (finding no prejudice could result from counsel's alleged deficient performance as the evidence of defendant's guilt was overwhelming).

AFFIRMED.