

**IN THE COURT OF APPEALS OF IOWA**

No. 2-396 / 10-1406  
Filed July 11, 2012

**OMAR RASHEEN WILKINS,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

Omar Wilkins appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Tod J. Deck, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew H. Bockenstedt, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

**EISENHAUER, C.J.**

Omar Wilkins, convicted of first-degree murder, appeals the district court's dismissal of his application for postconviction relief. He alleges his trial attorney was ineffective in failing to investigate jailhouse conversations.<sup>1</sup> We affirm.

**I. Background Facts and Proceedings.**

On July 3, 2002, Myree Coleman Jr.<sup>2</sup> drove his friend David Hayes to 1510 Jones Street, Sioux City, so Hayes could purchase crack cocaine from Omar Wilkins.<sup>3</sup>

Within hours, early in the morning of July 4, 2002, Hayes again asked for a ride so he could purchase more crack cocaine from Wilkins. Coleman again drove Hayes to Jones Street. During this outdoor transaction, Hayes flashed a wad of bills, a fight occurred, and Hayes was shot and killed. Coleman fled. At 2:24 a.m., the police were dispatched to a report of shots fired in the 1500 block of Jones Street. The officers found the murder weapon and Wilkins, Ezzard Woods,<sup>4</sup> and Wayne Richard Edwards in Shirley Smith's house, 1507 Jones Street. Woods had a white cast on one arm. Alton Burden, Shirley Smith's son, was located nearby. Subsequently, Wilkins, Woods, Edwards, and Burden were arrested as material witnesses to the murder. Wilkins told the police he was not out of the house at the time of the shooting.

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<sup>1</sup> Wilkins also argues trial counsel was ineffective in failing to request a corroboration jury instruction and in failing to request a jury instruction defining theft. Because we agree with the postconviction court's detailed and well-reasoned analysis of these two issues, we affirm without further discussion. See Iowa R. App. P. 6.1203(a), (d).

<sup>2</sup> Coleman's nickname is J.R.

<sup>3</sup> Wilkins's nickname is O.J. He is also known as Michael Carter.

<sup>4</sup> Woods's nickname is "E."

Wilkins was charged with the murder of Hayes and in January 2003, his trial to a jury commenced. The testimony of Coleman, Woods, Edwards, Burden, and Smith supported the State's theory that Wilkins was the person who shot and killed Hayes. Michael Daniels, the upstairs tenant of 1510 Jones Street, testified he looked out his window when he heard a commotion, he didn't see the gun, but he saw the flash and the "flash came from where that white cast was."

Wilkins's attorney argued Woods, who had a white cast, shot Hayes. Wilkins's attorney attacked the credibility of Woods and Edwards, pointing out their favorable plea agreements. Further, Wilkins's attorney argued Smith's and Burden's testimony was suspect because Smith was admittedly intoxicated and Burden testified he had been high for two days at the time of the shooting. The attorney argued Coleman's testimony was unreliable because he drove away and was not interviewed by the police until the next day, July 5.

In February 2003, the jury, by special interrogatory answer, found Wilkins guilty of first-degree felony murder—underlying felony of second-degree robbery.

Wilkins appealed his conviction. On March 8, 2004, the appellate defender's office received the handwritten affidavit of Kevin Demale Johnson, stating:

In August of 2002, I was being held in the Woodbury County Courthouse Jail in E. Block . . . Alton Burton . . . was also in E. Block being held as a material witness to a murder. After me and Alton first met each other, we became real close and shared a lot of personal information.

Johnson's affidavit "purports to have heard some of the witnesses against the defendant concoct a conspiracy to convict him." *State v. Wilkins*, 693 N.W.2d

348, 352 (Iowa 2005). Additionally, this affidavit states Alton told Johnson that Edwards was the killer.

On appeal, Wilkins sought preservation of his claim for postconviction relief based on the alleged newly-discovered evidence. In March 2005, the Iowa Supreme Court rejected Wilkins's direct appeal challenges and affirmed his conviction. *Id.* at 350-52. The court preserved Wilkins's challenge based on the affidavit for postconviction proceedings. *Id.* at 352.

In May 2005, Wilkins filed an application for postconviction relief. Three grounds for relief were summarily dismissed, and after hearing the postconviction court denied relief and dismissed Wilkins's application. In August 2010, Wilkins filed a motion to amend and enlarge. In November 2010, the postconviction court filed a detailed response to Wilkins's motion and enlarged its findings. The court again denied relief.

Wilkins now appeals, arguing trial counsel was ineffective in failing to properly investigate the information provided by Kevin Demale Johnson.

## **II. Scope of Review.**

"Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution." *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). We review ineffective-assistance-of-counsel claims de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005). "[W]e give weight to the lower court's findings concerning witness credibility." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

### **III. Failure to Investigate.**

Wilkins argues attorney Williams was ineffective

in failing to investigate exculpatory information that was received by him from [Wilkins] that a witness named Kevin Johnson had overheard conversations regarding the principal witnesses concocting a conspiracy while in jail to testify falsely against [Wilkins] in order to relieve themselves of liability for the crimes committed.

Wilkins notes his defense at trial was to discredit the witnesses identifying Wilkins as the shooter while crediting the observations of Daniels, the upstairs-apartment witness. Therefore, defense counsel breached a duty by failing to investigate and Wilkins was prejudiced by the absence of Johnson's testimony further discrediting the State's witnesses.

At the postconviction hearing, Wilkins admitted he lied to protect himself when he told police officers he was not outside at the time of the shooting. Wilkins also testified he met Johnson in jail and Johnson told him that his codefendants were talking about him. He could not recall the month he met Johnson in jail. Wilkins asserts he asked Johnson to write down what he heard and he then gave trial counsel the Johnson affidavit. Wilkins also testified he spoke to trial counsel about the affidavit two or three times before the criminal trial and he kept asking if his attorney had spoken to Johnson yet. Wilkins expected Johnson to be called at trial, but did not question his attorney's trial strategy.

Attorney Williams testified he had no specific recollection one way or the other of: (1) conversations with Wilkins regarding Kevin Johnson or (2) Wilkins asking him to call Kevin Johnson as a witness. Williams stated if he had been

provided the Johnson affidavit, it would not have been destroyed, it is something he would have kept, and “[s]o if [Wilkins] said he provided it, I’m at a loss as to why it wouldn’t be in the file.” Williams believed Johnson’s allegations “normally would have been something to investigate,” depending on timing and context.

Further:

[I]f it were brought to my attention that there was this alleged conspiracy, and I tend to believe it was brought to my attention, I would also have been fully cognizant of the relative times of other allegations against [Wilkins]; I would take that into account. But what I would have looked at as well is whether or not these three guys [Burden, Woods, Edwards] had a chance prior to the time of their statements to the police to cook up a story. But given that they would be talking about that in the jail sort of belies the conspiracy that would have been in existence prior to the time of their statements. So it was a bit of a fishy analysis as to trying to establish any particular reason why this [Johnson] allegation would carry enough weight that would be persuasive enough to the jury so it didn’t look like we were just throwing stuff against the wall.

To establish his ineffective-assistance-of-counsel claim, Wilkins must prove by a preponderance of the evidence his trial attorneys failed to perform an essential duty and this failure resulted in prejudice. See *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). “However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.” *Ledezma*, 626 N.W.2d at 142.

We begin by addressing the prejudice element. Wilkins must demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). 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. *Id.* at 695-96. The governing question is “whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Id.* at 695.

In resolving this issue, we first look at the timing of the statements made to the police. All but one of the pretrial witness statements implicating Wilkins as the killer were made before the August 2002 timeframe specified in the Johnson affidavit’s first paragraph.<sup>5</sup>

On July 4, the day of the murder, officers interviewed Alton Burden, Shirley Smith, Ezzard Woods, and Wayne Edwards. On July 5, officers interviewed Myree Coleman, the victim’s driver.

On July 4, Burden identified Wilkins as the person who shot Hayes and stated a person with something on his arm (Woods) was trying to break Wilkins away from Coleman and Hayes.

Also on July 4, Shirley Smith told the police she cooked for Wilkins, Woods, and Edwards, and they called her “Mamma Shirley or Miss Shirley.” Previously, Smith had asked Woods about his arm and Woods explained he had been shot. The AK-47 used to kill Hayes was Smith’s gun; she kept it under her bed; and Wilkins, Woods, and Edwards knew it was there. Smith was intoxicated when she returned to her house in the early morning hours of July 4. She found Wilkins, Woods, and Edwards sitting on her porch. She told them to get off her porch, and she went to bed. “[T]hey woke me up saying, ‘Miss Shirley, I killed somebody.’” Further:

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<sup>5</sup> Kevin Demale Johnson was in the Woodbury County Jail: (1) July 6, 2002, 9:08 p.m. to July 7, 2002, 8:45 a.m.; (2) July 8, 2002, 2:20 a.m. to July 8, 2002, 9:50 a.m.; and July 22, 2002, 3:52 p.m. to October 9, 2002, 2:38 p.m.

I didn't see nothing, I didn't hear nothing, I'm telling you because I was plumb drunk when I came home . . . [I] went straight in the bed . . . . All I know is they came in there and said he had shot somebody. That was it.

On July 4, Woods told the police he had only been back in Iowa for a few days. Woods explained his hand injury was from being shot in South Carolina. Woods claimed he didn't shoot anyone and invoked his right to counsel.

On July 4, Edwards explained he gives Shirley Smith money to cook "for us." At first, Edwards stated he was asleep at Smith's house and knew nothing about the shooting. Later, Edwards admitted he kicked Hayes hard because "he got to go." Edwards then told Coleman: "He's beat up, so you get him and you get out of here." While Edwards was talking, he heard two shots. Edwards saw the gun in Wilkins's hands. Afterwards, Wilkins gave Edwards the gun and told him to hide it.

On July 5, Coleman told the police he drove Hayes to Jones Street to purchase drugs. Coleman described Wilkins, "the bandaged boy" (Woods), and another guy kicking Hayes and stating: "Give up the money and we won't hurt you." Further:

A. The wrapped hand guy went and got the gun, yeah. He was messing around with it, it wouldn't work. [Wilkins] took it. And [Wilkins] was messing around with it. And then that's when [Wilkins] shot him.

Q. Was [Hayes] being struck and kicked at that time while they were messing with the gun? A. At first, yes.

Q. When the guy with the bandage was messing with the gun? A. . . . [Wilkins] was hitting him . . . . He was watching the guy with the gun, messing with the gun. And the boy with the bandage said something, and [Wilkins] said I can make it work, I can make it work. That's what made [Wilkins] turn [Hayes] loose. [Hayes] was . . . kind of up like this, and [Wilkins] was messing with the gun and [Wilkins] said give up the money, give up the money. And that's when he was shot.



On July 8, Shirley Smith provided a sworn statement stating she knew Wilkins, Woods, and Edwards were dealing drugs. After returning home on July 4, she “laid down, everybody [Wilkins, Edwards, Woods] was like a bum rush in the house.” Smith testified to Wilkins’s admission: “I just killed somebody,” or “I just shot somebody.”

On July 11, 2002, Coleman provided a sworn statement describing the evening’s events and again stated Woods ran to get the gun and couldn’t get it to work. Wilkins then said, “I’ll show you how to make this work,” and grabbed the gun. “At first [Wilkins] couldn’t get it to work, so he took it and . . . hit [Hayes] in the face with the stock part of the weapon, which made David Hayes flop to the ground on his butt.” Wilkins “immediately held the weapon up in the firing position and shot Mr. Hayes.” Coleman saw them all running while he ran to his vehicle. Coleman heard Wilkins telling Woods, “I shot the hell out of him.”

Burden’s July 19, 2002 sworn statement identified Wilkins as the shooter, consistent with Burden’s July 4 statement. Burden lived across the street from “the Atlanta boys”—Wilkins, Woods, and Edwards. Further, Burden had purchased some crack from “the Atlanta boys” at 1510 Jones Street on July 4. After the purchase, Burden sat outside “and was getting high.” Burden saw Coleman’s vehicle pull up, saw Coleman and Hayes struggling with Wilkins, and saw Woods and Edwards come over to help Wilkins. Burden stated Wilkins fired one shot and “told them to get back.” Coleman and Hayes started running and Wilkins “fired the other shot and [Hayes] fell in the street.” Burden did not see

where the gun came from; he was just hoping somebody would drop drugs on the ground so he could pick them up.

On July 29, Edwards provided a sworn statement stating Hayes and Wilkins were fighting and Edwards, Woods, and Burden tried to break it up by kicking Hayes. Further:

[A]t that point we were down in the middle of the street, in my peripheral vision I can see Mr. Woods handing a gun over to [Wilkins] . . . . [T]hat's when I was turning over to . . . Hayes's friend and I said . . . you need to get out of here and get your friend out of here. And then I heard the shot. I heard the first shot, and it startled me. It was really, really, really loud. I . . . immediately looked over to where I heard the shot come from, and I saw [Wilkins] standing there with the gun in his hand . . . . The second shot I actually saw the gun in [Wilkins] hand. After the first shot Mr. Hayes hadn't been hit, it looked like he was backing up, and I heard the second shot, I saw Mr. Hayes stand completely up and I saw him fall to the ground. I immediately became panicked and ran into [Shirley Smith's] house.

The only sworn statement occurring after the affidavit's August 2002 timeframe occurred on November 4, 2002, when Woods provided a sworn statement. Woods admitted he retrieved the gun from Shirley Smith's house. Woods stated Wilkins took the gun away from him and "pointed it towards David Hayes. David Hayes grabbed the gun. [Wilkins] snatched it back, cocked it, he shot in the air one time, boom, then shot David Hayes." After Wilkins shot Hayes, he gave the gun to Wayne Edwards.

During trial, attorney Williams attacked the credibility of Woods, Edwards, and Burden, the alleged jailhouse conspirators, during cross-examination and during closing argument. While we conclude Johnson's testimony has the potential to impeach the testimony of Woods, Edwards, and Burden, we do not conclude Wilkins has proven he was prejudiced by defense counsel's breach of a

duty to investigate. We are unable to conclude Johnson's potential testimony would likely change the result if a new trial were granted. The issue is whether Wilkins received a fair trial or was prejudiced. Importantly, Edwards and Burden *each* gave two consistent statements to the police that Wilkins fired the gun *prior to* any of the alleged August 2002 and later jailhouse conspiracy conversations. Additionally, Coleman was the victim's driver and is essentially a neutral witness not associated with Woods, Edwards, or Burden, and not identified as a part of the alleged jailhouse conspiracy.<sup>6</sup> Coleman identified Wilkins as the shooter on July 5, the day after the shooting, and again on July 11, seven days after the shooting. Four days after the shooting, on July 8, Shirley Smith told the police Wilkins admitted shooting Hayes immediately after the event.

We also note the upstairs-apartment witness's testimony is the gun's flash was near the person with the white cast, i.e., Woods. Therefore, Johnson's potential testimony would not support this defense theory because Johnson states Alton Burden told him Edwards, not Woods, shot the gun.

Given the timing and consistency of the numerous statements to the police identifying Wilkins as the shooter prior to August 2002, we conclude granting Wilkins a new trial to include the testimony of Kevin Johnson would not likely produce a different result. Wilkins has failed to prove the prejudice prong of his ineffective-assistance claim.

Accordingly, we affirm the district court's denial of postconviction relief.

**AFFIRMED.**

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<sup>6</sup> The affidavit states a person nicknamed "Jayrock" was involved in the alleged conspiracy conversations. Shirley Smith's testimony indicates Coleman is not Jayrock. Coleman's nickname is J.R., not Jayrock.