

IN THE COURT OF APPEALS OF IOWA

No. 2-698 / 10-0734
Filed September 19, 2012

CHANCE BARNES,
Petitioner/Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Paul L. Macek,
Judge.

Chance Barnes appeals the denial of his postconviction relief application, claiming that he is entitled to a new trial based on ineffective assistance of counsel, newly discovered evidence, and the cumulative effect of various trial errors. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Chance Barnes, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ. Tabor, J. takes no part.

VAITHESWARAN, P.J.

Chance Barnes appeals the denial of his postconviction relief application.

I. Background Facts and Proceedings

A jury found Barnes guilty of first-degree murder and willful injury. On direct appeal, this court affirmed his convictions and sentence. *State v. Barnes*, No. 02-1363, 2003 WL 22340208 (Iowa Ct. App. Oct. 15, 2003). In that opinion, we described the events preceding the murder as follows:

[Johnathan] Johnson and Jerome Wilson drove to McCoy's apartment, expecting to buy drugs from McCoy. When they arrived, McCoy, Barnes, and McCoy's brother, Darryl, were in the apartment. McCoy told Wilson to leave, and Johnson agreed Wilson should wait outside. Wilson heard glass breaking and other loud noises come from the apartment. Barnes came out, "looking all sweaty and stuff, crazy." Barnes told Wilson, "I would not go back up in there if I was you." Wilson ran away.

Id., at *1.¹

After the opinion was filed, Barnes petitioned for postconviction relief on multiple grounds. Several years and numerous filings later, a postconviction attorney amended Barnes's prolix application and narrowed the grounds for relief. The district court subsequently issued a pretrial order stating "no further amendments to the application" would be allowed "without a hearing showing the necessity due to circumstances unknown as of the time of the pretrial conference." The court limited the issues for hearing to those raised in counsel's amended application and the State's answer.

¹ The McCoy brothers were also found guilty. They are the subject of several appellate opinions. See *State v. McCoy*, 742 N.W.2d 593 (Iowa 2007); *State v. McCoy*, 692 N.W.2d 6 (Iowa 2005); *McCoy v. State*, No. 09-0326, 2010 WL 1578780 (Iowa Ct. App. Apr. 21, 2010); *State v. McCoy*, No. 02-1516, 2003 WL 22899507 (Iowa Ct. App. Dec. 10, 2003).

Following an evidentiary hearing, the district court addressed and denied the several claims raised in Barnes's amended application for postconviction relief. This appeal followed.

Barnes raises three issues, arguing: (A) counsel was ineffective in failing to assert prosecutorial misconduct based on the State's knowing use of Jerome Wilson's "grossly inconsistent evidence," (B) he should have been granted a new trial based on newly discovered evidence, and (C) he did not receive a fair trial under the totality of the circumstances.

II. Analysis

A. Prosecutorial Misconduct

In his amended application for postconviction relief, Barnes alleged that his direct appeal attorney was ineffective in "failing to challenge inconsistencies in the testimony of witness Jerome Wilson between [his] trial and the trials of the codefendants." He separately alleged his trial attorney was ineffective in failing to object to several claimed instances of prosecutorial misconduct. None of the claimed prosecutorial failings concerned the prosecutor's knowing use of Jerome Wilson's "grossly inconsistent" evidence.

The district court addressed the asserted inconsistencies in Wilson's testimony. The court also addressed the identified claims of prosecutorial misconduct. The district court did not address Barnes's present claim that the prosecutor committed misconduct by intentionally presenting Jerome Wilson's grossly inconsistent testimony. For that reason, the State argues that this present claim was not preserved for our review. Barnes responds that he raised the issue in a "memorandum in support of application."

The memorandum, filed several months after the district court limited the issues that could be raised, includes a single sentence addressing the present claim: “The use of inconsistent evidence by the prosecutor in multiple trials renders the conviction void for want of due process.” Barnes does not, and did not, argue that this new claim involved “circumstances unknown as of the time of the pretrial conference,” as required by the court’s order.

Because Barnes did not timely raise the issue of prosecutorial misconduct in the presentation of Jerome Wilson’s inconsistent testimony and because the district court did not address this issue, we agree with the State that error was not preserved. See *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (concluding that error was only preserved on issues decided by the district court).

B. Newly Discovered Evidence

A postconviction relief applicant may seek 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.” Iowa Code § 822.2(4) (2003). Barnes asserts that, following trial, Jerome Wilson recanted his testimony and the recantation constitutes newly discovered evidence which should have entitled him to a new trial.

The district court addressed this issue as follows:

The applicant refers the court to the statement of a private investigator. The only evidence from a private investigator introduced in this case is petitioner’s exhibit 12. In that exhibit this court cannot find a recantation of Jerome Wilson’s trial testimony in respect to identifying the applicant as the person who came from the apartment. . . . The affidavit of the private investigator may or may not reflect inconsistencies between Jerome Wilson’s trial testimony and the statement he made to the investigator. In the trial of this case it was trial counsel’s strategy to emphasize the

many inconsistencies in Jerome Wilson's testimony. The investigator's affidavit may simply be evidence of yet more inconsistencies. The point, however, is that trial counsel did vigorously explore Jerome Wilson's inconsistencies. This arguably new inconsistency is not actually newly discovered evidence. The evidence is the inconsistency of Jerome Wilson and, again, trial counsel was as effective as possible in this regard. Trial counsel did not fail to perform an essential duty and, moreover, no prejudice resulted to this applicant as a result of any inconsistent statements made by Jerome Wilson to the investigator. As a result of this finding, appellate counsel had no reason to appeal.

We concur in these findings and conclusions. At Barnes's trial, Wilson testified that Barnes was one of the people in the apartment at the time of Johnson's murder and he came out of the apartment "[l]ooking all sweaty and stuff, crazy." The investigator's affidavit and attached two-page report of an interview she conducted with Jerome Wilson did nothing to undermine this testimony. Indeed, the statement to the investigator, made at the behest of the attorney for Barnes's co-defendant, made no mention of Barnes. And, far from recanting his testimony, Wilson confirmed he was in the vicinity of the apartment; the apartment was Lawrence McCoy's; Johnson went inside the apartment; and Johnson did not come out. When Wilson was asked by the investigator what might have happened to him had he entered the apartment, Wilson responded that he also would be dead "because he was around when they killed [Johnson]."

It is true that Wilson's many statements about the matter, including his statement to the investigator, were riddled with inconsistencies. For example, in his statement to the investigator, he first stated he sat in his car the entire time, and later said he was outside the apartment door. But these inconsistencies were thoroughly explored by Barnes's trial attorney and none of the inconsistencies undercut Wilson's testimony that Barnes was in the apartment at

the time of the murder. In sum, the affidavit failed to raise issues that “were not previously presented and heard.” For that reason, the affidavit did not constitute newly discovered evidence and did not entitle Barnes to a new trial.

C. Fair Trial

Barnes finally argues the cumulative effect of the trial errors mentioned above entitles him to a new trial. As we have not found error, we cannot find any cumulative effect of error.

We affirm the district court’s denial of Barnes’s application for postconviction relief.

AFFIRMED.