

IN THE COURT OF APPEALS OF IOWA

No. 3-343 / 12-0501
Filed May 30, 2013

MICHAEL ROACH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

A postconviction relief applicant appeals the district court's order denying him relief. **AFFIRMED.**

Thomas P. Graves of Graves Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

Michael Roach appeals the district court order denying his application for postconviction relief (PCR).¹ This application was Roach's third application, now claiming counsel on his second PCR was ineffective for not pursuing live testimony of affiants who offered allegedly newly discovered evidence. He also argues the district court on his current application should have granted his motion to keep the record open so a subpoenaed witness who failed to show up could testify.

We made the following fact findings on Roach's appeal of the denial of his second PCR application:

On October 22, 2003, Roach shot and killed Jonathan Ellis in an upstairs bedroom of Ellis's residence. Shanta Smith and Dorothy Johnson both testified for the State at trial. Johnson resided with Ellis and was in the house at the time of the shooting; Smith was just outside the house.

. . . .
. . . Smith testified that Roach told her that Ellis "had pulled a gun on him . . . and he reacted and he didn't mean to shoot him." Roach also told Smith he "didn't mean to shoot [Ellis] over eighty bucks." Roach's counsel cross-examined Smith about her plea bargain and her motive to lie.

Johnson confirmed that after she could not find the envelope of money, Ellis and a person she did not know entered the house and headed upstairs. She confirmed that shortly after they went upstairs, she heard the shot that killed Ellis. She ran out of the house and called the police.

Roach took the stand in his own defense and described his interactions with Ellis as a marijuana purchase and not a robbery. Roach told officers that he provided Ellis \$100, but Ellis did not provide \$100 worth of marijuana. Johnson resided with Ellis and

¹ Roach filed a number of pro se motions, particularly a pro se motion for extension of time to file a pro se supplemental brief. We denied that motion as untimely. He filed a "Motion to Review a Single Justice Order" attempting to explain his tardy attempt to file a supplemental brief complaining his current appellate counsel was ineffective for failing to send him the proof brief. We deny his request to reverse our previous order, though we preserve his claim of ineffective assistance of counsel.

testified she had never seen him sell marijuana. No weapons or drugs were found in Ellis's room. No marijuana was detected in Ellis's body.

Roach initially told officers that Ellis had pulled a gun on him during the drug deal, and Roach described himself and Ellis [as] "gun to gun, face to face." Roach later admitted to officers that he never saw Ellis with a gun, but he was afraid Ellis would pull a gun. Roach testified at trial that he killed Ellis in self-defense under a sincere belief that Ellis was going to shoot him. A psychotherapist testified that Roach suffered from post-traumatic stress disorder and that, in Roach's mind, Roach's actions on the night of October 22 were reasonable.

On July 6, 2004, a jury returned a verdict finding Roach guilty of first-degree robbery and the lesser-included offense of second-degree murder. The jury rejected the felony murder and first-degree murder alternatives. On direct appeal, this court affirmed Roach's convictions in December 2005.

Roach v. State, No. 09-1555, 2011 WL 944429, at *1-3 (Iowa Ct. App. Mar. 21, 2011).

We found the record inadequate to address Roach's claims that postconviction counsel was ineffective for failing to investigate newly discovered evidence and in failing to compel the attendance of the two affiants. The affidavits supported a theory that the victim planned to rob Roach and Smith lied about it.

On our de novo review of his ineffective-assistance-of-counsel claim, we find the district court properly denied Roach's application. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). As the district court found,

[PCR counsel] elected to enter the affidavits as a matter of strategy, believing that this was the best manner in which to proceed. Uncertain whether these witnesses would actually appear, she made a calculated decision to approach the prosecutor for a stipulation as to the admissibility of the affidavits. This was clearly within the range of normal competence.

“[W]e will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail.” *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). We agree with the district court that PCR counsel represented Roach competently in her decision to use the stipulated affidavits. Roach has therefore failed to show how his PCR counsel breached an essential duty. See *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). Moreover, Roach has failed to show how the live testimony would have supported his application as the evidence of guilt was clearly sufficient. See *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994).

Additionally, the district court did not abuse its discretion in denying the motion to keep the record open to compel one of the witnesses to appear because the record was already clear as to the probable content of that witness’s testimony. See *State v. Clark*, 814 N.W.2d 551, 564 (Iowa 2012). As Roach’s counsel told the court, “I believe [the absent subpoenaed witness] would testify consistently with his affidavit. He did not indicate to me that there was anything else that he recalled, but he did affirm the information that’s before the court.”

We affirm without further opinion. See Iowa Ct. R. 21.26(1)(a), (d), (e).

AFFIRMED.