

IN THE COURT OF APPEALS OF IOWA

No. 6-122 / 04-0880
Filed April 26, 2006

ANDREW PAUL JACKSON, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Andrew Jackson, Jr., appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Frank Burnette, Des Moines, for appellant.

Thomas J. Miller, Attorney General of Iowa, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel Voogt, Assistant County Attorney, for appellee-State.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

Andrew Jackson, Jr., appeals from the denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

In June of 2000, three masked men broke into an apartment, wielding semi-automatic weapons and demanding money. Police were notified, and were able to apprehend two of the men immediately. During the ordeal, one of the victims, Heather Clair, was able to view the face of the third man when he removed his mask for approximately fifteen minutes, but she claimed inability at that time to identify him. Clair immediately provided, however, a general description of the man, as a slender, six-foot tall African American.

Through interviews with the two apprehended men involved in the burglary, officers learned that the third suspect was called by the street-name “Whomp.” With this information, officers obtained the photograph of Andrew Jackson and presented it to Clair in a photo array. Clair promptly identified Jackson as the third intruder.

Jackson was charged with first-degree robbery, first-degree burglary, and second-degree kidnapping. Following a jury trial, Jackson was convicted of each charge. Jackson appealed, challenging the district court’s admission of hearsay evidence that linked him to the street-name “Whomp.” Jackson also alleged his trial counsel was ineffective in failing to (1) file a motion to suppress Clair’s identification, (2) call an expert witness concerning the identification, and (3) object to the hearsay evidence concerning the street-name. A panel of this court

affirmed Jackson's convictions, but preserved his claims of ineffective assistance to allow the record to be developed through postconviction proceedings.

Initially, Jackson filed a pro se application for postconviction relief. The pro se application alleged ineffective assistance of trial counsel in (1) failing to move to suppress the identification, (2) improperly advising Jackson to testify, (3) failing to find and offer an alibi witness, (4) failing to depose the State's witnesses in advance of trial, (5) failing to object to prosecutorial misconduct, (6) failing to object to prior bad acts evidence, and (7) failing to object to admission of evidence of accomplices' convictions. The pro se application also alleged error by the district court in (1) admitting hearsay evidence in violation of Jackson's constitutional right of confrontation, and (2) denying Jackson's motion for acquittal. The pro se application further alleged appellate counsel was ineffective for failing to raise each of the above claims on direct appeal.

Ryan Genest was appointed as Jackson's postconviction counsel. Following discussions with Jackson concerning the nine challenges raised in Jackson's pro se application, Genest filed an amended application for postconviction relief that pared the issues down to five.¹ These included trial counsel's (1) failure to move to suppress the identification as a product of an impermissibly suggestive photographic array, (2) failure to find and offer an alibi witness, (3) failure to file and present an alibi defense, (4) failure to depose the State's witnesses in advance of trial, and (5) failure to call an expert witness to demonstrate the unreliability of the identification of Jackson.

¹ At the postconviction hearing, Jackson testified that he had discussed the issues that were not included in the amended application with Genest, and concurred with Genest's conclusion that the culled issues were without merit.

A deposition of Jackson's trial counsel, David Morse, was provided to the postconviction court and revealed the following: Initially, Jackson had informed Morse that his cousin could vouch for his whereabouts the night of the crime. Morse ultimately halted his efforts to prepare an alibi defense when Jackson's cousin informed Morse that he had been drunk on the evening in question and did not remember seeing Jackson until well after the crime had been committed. Morse therefore decided not to subpoena Jackson's cousin and did not file a notice of alibi with the court.

Prior to abandoning the alibi defense, attorney Morse believed that it would be prudent to withhold the name of the potential alibi witness until Jackson's cousin could be contacted and his story verified. Knowing that he would be required to disclose the defense witness list in exchange for the opportunity to depose the State's witnesses, Morse decided not to depose Clair in advance of trial. Morse defended this strategy on the ground that Clair's statements to police were sufficiently complete to permit effective cross-examination of her eyewitness identification of Jackson.

As noted above, Clair had initially told police that she was unable to identify the third intruder. Armed with this apparent admission, and the fact that police were unable to link any physical evidence to Jackson, Morse decided not to file a motion to suppress Clair's identification based upon the photo array.²

² Morse further explained his decision against filing a motion to suppress the identification based on the photo array. He testified that he researched the issue and formed the professional judgment that a motion to suppress would be meritless where the only feature that distinguished Jackson from the other men in the photo array was his relatively darker skin tone.

Morse testified that under the circumstances, he preferred a trial strategy calling for impeachment of the officer who compiled the photo array on the ground that the photo array was unreliable because it did not comply with best practices. In furtherance of this strategy, Morse obtained a copy of a federal publication describing preferred practices for obtaining a valid identification, and a copy of a Des Moines Register article describing a study that called into question the reliability of eyewitness identifications. Professor Gary Wells, who was a contributing author of the federal publication and whose study was described in the Register article, was not contacted by Morse nor was Wells secured as an expert witness for the defense.

Morse defended his failure to secure an expert on eyewitness identifications by testifying of his belief that Clair's earlier statements suggesting her inability to identify the third masked man would be sufficient to undermine her eventual identification of Jackson. Morse also testified that he believed there was a strong possibility that the district court, in its discretion, would not have received expert testimony on the issue if it had been presented. Further, Morse noted the defense strategy was to rely heavily on Jackson's alibi claim until that potential defense was eventually severely compromised by the changing story of a potential alibi witness.³

³ It is unclear from the record exactly when the alibi defense strategy ultimately unraveled. Morse's statements suggest that he had some difficulty contacting Jackson's cousin. When he did have in-person contacts with that potential witness, Morse received conflicting stories. Although he initially indicated that he would be able to provide an alibi for Jackson, the potential witness abruptly changed his story as the trial loomed closer, indicating that he was drunk on the night of the burglary and could not recall if Jackson had been with him at the relevant time.

The district court concluded each of Jackson's claims of ineffective assistance were the product of reasonable trial strategy and professional judgment and were therefore without merit. Jackson obtained new counsel who filed this appeal and a motion urging our supreme court to order a limited remand to the district court for development of a record on the four claims of ineffectiveness presented in Jackson's pro se application for postconviction relief but not presented to the court by postconviction counsel. On July 8, 2005, our supreme court denied Jackson's limited remand motion.

Jackson appeals from the postconviction ruling, claiming the district court incorrectly concluded the five issues of ineffective assistance raised in the amended application are without merit. Jackson also asserts that postconviction counsel was ineffective in failing to properly investigate, raise in the amended application for postconviction relief, and present evidence on claims asserted in Jackson's pro se application.

II. Scope of Review.

We review postconviction relief proceedings on claimed error. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, because of the constitutional implications inherent with claims of ineffective assistance of counsel, our review here is de novo. *State v. Mapp*, 585 N.W.2d 746, 747 (Iowa 1998).

III. Discussion.

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In assessing counsel's conduct we note that "[i]mprovident trial strategy,

miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel.” *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). We generally presume counsel is competent, and we are reluctant to subject a reasonable trial strategy to a critique based on hindsight. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

The defendant bears the burden of demonstrating ineffective assistance of counsel, and both prongs of the claim must be established by a preponderance of the evidence before relief can be granted. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To prove prejudice from an alleged breach, Jackson must convince us “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If Jackson fails to meet his burden with respect to either prong, his claim is without merit, and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

A. Ineffective Assistance Claims Raised By PCR Counsel.

We first address those claims raised by postconviction counsel and ultimately denied by the district court.

1) *Failure to Suppress Photo Array Identification.*

Jackson claims he was denied effective assistance because trial counsel failed to file a motion to suppress Clair’s identification as a product of an impermissibly suggestive photo array. Trial counsel Morse testified that he researched the issue and concluded that the relatively darker skin tone of

Jackson as compared to the other men in the array was insufficient to sustain a motion to suppress.

We note that our supreme court has held that “even rather startling differences between defendant’s characteristics and those of others depicted in a photo display have not resulted in a finding of suggestiveness.” *State v. Neal*, 353 N.W.2d 83, 88 (Iowa 1984) (finding no suggestiveness in a photo array where defendant was the only subject who fit the height range related to police by the victim). We believe the skin-tone difference among the subjects in the photo array at issue here was not as striking as the height difference present in *Neal*, and as such we conclude the photo array was not so impermissibly suggestive as to render inadmissible the identification based thereon. *Id.* Because counsel could not have breached an essential duty by failing to object to admissible evidence, the district court properly denied postconviction relief based on this claim of ineffective assistance of trial counsel.

2) *Failure to Depose the State’s Witnesses.*

Jackson claims he was denied effective assistance because trial counsel failed to depose the State’s witnesses, especially Heather Clair, the eyewitness. We note from the onset that Jackson has failed to state what useful information would have been gleaned had Morse conducted depositions, nor how such information would have affected the outcome of the trial. *See State v. Dunbar*, 515 N.W.2d 12, 15 (Iowa 1994) (denying claimant’s postconviction application based on trial counsel’s ineffectiveness because claimant failed to propose what an investigation would have revealed if it had been undertaken or how the result of the trial would have been affected). Thus we are unable to ascertain whether

Strickland prejudice could have resulted from this claimed error by trial counsel. Because we conclude Jackson has failed to meet his burden of demonstrating a reasonable probability that a different outcome would have been achieved but for Morse's failure to depose the State's witnesses, we find no error on this issue. *Ledezma*, 626 N.W.2d at 142.

3) *Failure to Subpoena Alibi Witness and Present Alibi Defense.*

We similarly conclude the circumstances of this case did not generate a duty on the part of trial counsel to either subpoena Jackson's alleged alibi witness or present an alibi defense at trial. Morse made repeated attempts to contact Jackson's cousin to determine whether the cousin could vouch for Jackson's whereabouts at relevant times during the evening of the burglary. Morse ultimately learned that the cousin would not provide favorable alibi testimony, and properly concluded that a subpoena was unwarranted and that presentation of an alibi defense without a credible alibi witness would be fruitless and ultimately detrimental to Jackson's defense. Accordingly, we conclude trial counsel's strategy surrounding Jackson's claimed alibi was reasonable under the circumstances of this case. Jackson's claim to the contrary is without merit. *Wissing*, 528 N.W.2d at 564.

4) *Failure to Secure Expert Witness.*

The last of Jackson's claims raised at his postconviction hearing concerned trial counsel's failure to secure Dr. Wells as an expert witness to challenge the reliability of eyewitness identifications. Trial counsel Morse testified that he did not believe expert testimony was necessary to cast doubt on the reliability of Clair's identification. Morse noted Clair's initial statement to

police indicated that she did not see the third intruder's face. As we have noted above, Morse also believed he would be able to employ during cross-examination of the State's witnesses a federal publication describing preferred methods of obtaining a valid identification and a copy of a Des Moines Register article describing a study that called into question the reliability of eyewitness identifications. In short, Morse believed he could successfully challenge Clair's identification by impeaching the witness with her own statement, and by cross-examining the State's witnesses with the substance of the federal study and the Register article.

We conclude the strategy chosen by trial counsel, although imperfect and ultimately unsuccessful, was reasonable under the circumstances. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

B. Ineffective Assistance of PCR Counsel.

We next address Jackson's assertion that his postconviction counsel was ineffective in failing to properly investigate, plead, and prove certain claims raised in the pro se application for postconviction relief. There is some evidence tending to prove that Jackson and his postconviction counsel, Genest, discussed each of these claims and decided that only those included in the amended application were meritorious. But an even greater obstacle to Jackson's success on this issue is the fact that Jackson has provided this court with only a terse assertion that postconviction counsel failed to adequately investigate and present each of the claims made in the pro se application. We deem this presentation inadequate as a matter of law either to demonstrate prejudice or to preserve the claims for potential future postconviction proceedings. *See Dunbar*, 515 N.W.2d

at 15 (declining to preserve allegations of ineffective assistance of post conviction counsel for future postconviction proceeding where the applicant merely alleges a general failure to investigate and fails to state how competent representation would have altered the outcome).

AFFIRMED.