

IN THE COURT OF APPEALS OF IOWA

No. 6-127 / 05-0545
Filed May 10, 2006

FLOYD V. CONNER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen Romano,
Judge.

Floyd V. Conner appeals the district court's ruling denying his petition for
postconviction relief. **AFFIRMED.**

Susan Stockdale, Colo, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney
General, John Sarcone, County Attorney, and Steve Foritano, Assistant County
Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Floyd V. Conner appeals the district court's ruling denying his petition for postconviction relief. He argues he received ineffective assistance of both trial and appellate counsel when both attorneys failed to make various arguments in his defense. We affirm.

I. Background Facts and Proceedings

Conner was charged by trial information with one count of ongoing criminal conduct in violation of Iowa Code sections 706A.1, 706A.2(1)(c) and (d) (2001), and five counts of forgery in violation of sections 715A.1, 715A.2(1)(d), and 715A.2(2)(a)(3). He was tried and convicted by a jury. He was sentenced to a term not to exceed twenty-five years for the ongoing criminal conduct charge and five years for each forgery charge. The sentences for forgery were to run consecutively, but concurrently with the ongoing criminal conduct sentence. Conner appealed his conviction arguing both insufficiency of the evidence and ineffective assistance of counsel. *State v. Conner*, No. 02-0971 (Iowa Ct. App. June 26, 2003). The court of appeals affirmed his conviction and preserved his ineffective assistance claims for postconviction relief. *Id.*

Conner filed a petition for postconviction relief in February 2004. The district court denied his petition on March 29, 2004. Conner appeals.

II. Standard of Review

We generally review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo.

Nguyen v. State, 707 N.W.2d 317, 322-23 (Iowa 2005) (noting claims alleging ineffective assistance are constitutionally derived and thus reviewed de novo).

III. Merits

Conner argues he received ineffective assistance of counsel when his appellate and trial attorneys (1) failed to argue his trial information was constructively amended after both parties had rested; (2) failed to argue that one of the jury instructions changed the State's burden of proof; and (3) failed to adequately argue during his motion for judgment of acquittal that the State did not prove an element of the charged offense. Conner also argues his trial counsel was ineffective for failing to argue the State did not prove he was involved in a criminal "enterprise."¹

We analyze both ineffective assistance of appellate counsel claims and ineffective assistance of trial counsel claims with the same test. In order to show his counsel was ineffective, Conner must show (1) his counsel breached an essential duty and (2) the breach prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699.

In reviewing an ineffective assistance of counsel claim, we are to consider the totality of the evidence. *Id.* at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

¹ The State argues that Conner failed to preserve the last two issues for appellate review. The State, however, did not argue the issue of preservation in the district court. In fact, we cannot locate any argument from the State in the record. Because we cannot find an argument, and the postconviction court addressed Conner's claims, we conclude the State waived its claims of error preservation. See *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

The test we employ for the first element is objective: whether counsel's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1997). We start with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052, 80 L. Ed. 2d at 694. Further, "counsel has no duty to raise an issue that has no merit." *State v. Griffin*, 691 N.W.2d 734, 737 (2005). The test for the second element is whether there is a reasonable probability that, without counsel's errors, the outcome of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2052, 80 L. Ed. 2d at 698. A reasonable probability is one that undermines confidence in the outcome. *Id.*; *Kone*, 557 N.W.2d at 102. We only presume prejudice if counsel completely fails to subject the prosecution's case to meaningful adversarial testing. *United States v. White*, 341 F.3d 673, 678 (8th Cir. 2003).

On direct appeal, Conner raised ineffective assistance with respect to only two claims.² He raises neither of those claims here. Normally, a claim not raised in direct appeal may not be raised in postconviction relief proceedings.³

² On direct appeal, Connor claimed there was insufficient evidence to convict him of either forgery or ongoing criminal conduct. *State v. Connor*, No. 02-0971 (Iowa Ct. App. June 25, 2003). Specifically, he argued "(1) there was insufficient evidence of the 'specified unlawful activity' required to prove ongoing criminal conduct under section 706A.2 because there was a lack of evidence the alleged activity occurred on a 'continuing basis,' and (2) there was insufficient evidence to prove he had an intent to defraud, a required element of forgery under section 715A.2(1)." *Id.* In the alternative, he asked the court of appeals to preserve his claim of ineffective assistance of counsel as to both issues if it found neither was preserved for direct appellate review. *Id.* The court concluded neither issue was preserved, and preserved his ineffective assistance claim for postconviction proceedings. *Id.*

³ Iowa Code section 814.7 (2005) states that ineffective assistance of counsel claims need not be raised in direct appeal in order to be preserved. However, the final judgment in Conner's postconviction relief action was filed prior to July 1, 2004, the date

Ledezma, 626 N.W.2d at 143. Ineffective assistance of counsel can be a sufficient reason for not raising the issue previously. *Id.* Therefore, to show his appellate counsel's alleged deficient performance prejudiced him, Connor must show he would have prevailed on his ineffective assistance of trial counsel claim in direct appeal. *Ledezma*, 626 N.W.2d at 143. Before we can determine whether error has been properly preserved, we must analyze the merits of his ineffectiveness of trial counsel claims. *Id.*

A. Constructive Amendment of Trial Information

Conner argues there was a constructive amendment to his trial information. He claims the Code sections under which he was charged, sections 706A.2(1)(c) and (d), require the State to prove he was operating as part of an enterprise. Conner argues that element was eliminated from the jury instructions. Instead, the jury instructions mirror the elements necessary for a violation under section 706A.2(4). Conner claims the constructive amendment was improper because it both charged him with a new crime and prejudiced his defense.

Sections 706A.2(1)(c) and (d), the sections listed under the charge of ongoing criminal conduct in Conner's trial information, state:

c. It is unlawful for any person to knowingly conduct the affairs of any enterprise through specified unlawful activity or to knowingly participate, directly or indirectly, in any enterprise that the person knows is being conducted through specified unlawful activity.

d. It is unlawful for any person to conspire or attempt to violate or to solicit or facilitate the violations of the provisions of paragraph "a," "b," or "c."

the statute came into effect. Therefore, section 814.7 does not apply in this case. See *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003).

Iowa Code § 706A.2(1)(c)-(d). The jury instruction that explained the charge, however, read differently. It does not include the element of enterprise. It states:

Instruction No. 22

As to Count I, the state must prove all of the following elements of Ongoing Criminal Conduct:

1. On or about January 2002, the Defendant committed two or more of the following acts:
 - a. Forgery involving a check on the account of David Rugger made payable to Robert Cagney, and/or
 - b. Forgery involving a check on the account of David Rugger made payable to Steve Welsh, and/or
 - c. Forgery involving a check on the account of David Rugger made payable to Sarah Whipple, and/or
 - d. Forgery involving a check on the account of David Rugger made payable to Eugene Milder, and/or
 - e. Forgery involving a check on the account of David Rugger made payable to Mike Forsythe.
2. The Defendant committed the forgeries with the specific intent of financial gain; and
3. The Defendant committed the forgeries on a continuing basis.

If the state has proven all of these elements, the Defendant is guilty of Ongoing Criminal Conduct. If the state has failed to prove any of these elements, the Defendant is not guilty.

Instead, the instruction mirrors the crime in Iowa Code section 706A.2(4). That section describes the same crime of ongoing criminal conduct, but eliminates the element of enterprise:

4. *Acts of specified unlawful activity.* It is unlawful for a person to commit specified unlawful activity as defined in section 706A.1.

Iowa Code § 706A.2(4).

Conner does not argue that a constructive amendment to his trial information is erroneous.⁴ Instead, he argues his claim as if the State had

⁴ See *United States v. Collins*, 350 F.3d 773, 775 (8th Cir. 2003) (noting when a jury instruction operates as a constructive amendment to an indictment because the

moved to amend the information, and the court had granted the motion. We therefore address his claim according to his argument.

A trial information may be amended to correct errors or admissions in form or substance as long as (1) no wholly new and different offense is charged and (2) the substantial rights of the defendant are not violated. *State v. Waters*, 515 N.W.2d 562, 567 (Iowa 1994); Iowa R. Crim. P. 2.4(8) and 2.5(5). The rule's language about "a wholly new and different offense" does not preclude the State from amending an information to allege a different means of committing the crime. *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981). This is so even when the crime alleged in the original information and the new means alleged in the amendment are separate divisions of the Code. See *id.* The substantial rights of the defendant are violated if, to meet the charge in the amended information, the defendant must change trial strategies. *Waters*, 515 N.W.2d at 567.

First, we must conclude the constructive amendment did not charge Conner with a wholly new and different offense. It is clear to us that 706A.2(1) and 706A.2(4) describe the same crime, but different means of committing it. Both prohibit "specified unlawful activity."⁵ Section 706A.2(1), however, prohibits specified unlawful activity influenced enterprises, while section 706A.2(4) simply prohibits specified unlawful activity. *State v. Olsen*, 618 N.W.2d 346, 350-51 (Iowa 2000). Both sections are a B felony. Upon conviction, both are subject to

defendant's Fifth Amendment right to be charged by a grand jury has been violated); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999) (noting a constructive amendment to an indictment is reversible error per se if the jury instructions allowed the jury to convict the defendant of an offense different from or in addition to the charged offense).

⁵ "Specified unlawful activity" is defined as "any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of the state in which it occurred and under the laws of this state." Iowa Code § 706A.1(5).

the same punishments. See *State v. Williams*, 305 N.W.2d 428, 431 (Iowa 1981) (using punishment as a factor to determine whether a statute charges separate offenses or different means of committing the same offense).

Second, we conclude Conner's substantial rights were not violated by the amendment. The paragraph accompanying the ongoing criminal conduct charge in his trial information gave him notice of his crime. Further, the minutes of testimony reflect what elements the State intended to prove. See *State v. Dalton*, 674 N.W.2d 111, 119-20 (Iowa 2004) (concluding the trial information read in conjunction with the minutes of testimony gave the defendant sufficient notice of the Code section charged). Finally, Conner argues his defense was compromised because his trial strategy was to argue the State failed to prove all the elements of the crime. A jury, however, is to weigh each element individually. Since we determined there was no new offense charged but only a new means alleged, Conner was only deprived of the argument that the State could not prove he committed the crime in a certain way. That does not deprive the State of the argument he committed it in another way. We therefore conclude Conner's substantial rights were not prejudiced.

Because we conclude no new offense was charged and Conner's rights were not violated, we conclude he was not prejudiced by his counsel's failure to raise the issue.

B. *Failure to Object to Jury Instruction*

Conner argues his counsel should have objected to Jury Instruction No. 18. He alleges the jury instruction lessened the State's burden of proof. The instruction reads as follows:

Instruction No. 18

Evidence has been received concerning other wrongful acts alleged to have been committed by the Defendants such as possession of stolen property and theft of mail. The Defendants are not on trial for those acts.

This evidence must be shown by clear proof and can only be used to show the defendants' knowledge, motive, intent, plan, and preparation.

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing knowledge, motive, intent, plan or preparation.

Conner admits this instruction is correct as to the rules of evidence and the admissibility of evidence of prior bad acts and other wrongful acts. Three other instructions clearly stated that it was the State's burden to prove Conner's guilt beyond a reasonable doubt. Further, the jury was instructed that it must consider all the instructions together. We therefore conclude the instruction did not alter the State's burden of proof. As a result, his trial counsel was under no duty to raise the issue.

C. Motion for Judgment of Acquittal

Conner argues his counsel failed to argue during his motion for judgment of acquittal that the State had failed to prove his constructive possession of documents related to the forgery charges.

At trial, counsel for Conner's co-defendant first raised the issue of insufficient evidence to show possession. After the court concluded it would submit the issue to the jury, Conner's attorney stated,

Your Honor, if I didn't already, I'm getting to the point where I've made enough record, just to clarify my motion for judgment of acquittal, I would join in the same grounds that [co-defendant's counsel] just articulated about continuing enterprise or agency as

well as the other arguments he made without restating them in their entirety.

(Emphasis added.) The court determined there was ample evidence to create a question for the jury. It denied the motion on the same grounds as it denied Conner's co-defendant's motion.

Thus, we conclude counsel did raise the issue of possession. Though it may not have been argued as strenuously as Conner now wishes, counsel did not completely fail to subject the prosecution's case to adversarial testing. *White*, 341 F.3d 673, 678 (8th Cir. 2003). We therefore conclude Conner was not prejudiced.

D. Failure to Argue "Enterprise"

As we concluded above, an enterprise was only one of the ways the State could have argued Conner committed the crime of ongoing criminal conduct. Because the State did not present that argument, we conclude his counsel had no duty to argue against it.

IV. Conclusion

Because we conclude ineffective assistance of counsel claims would have been meritless on direct appeal, we conclude his appellate counsel had no duty to raise them. His ineffective assistance of appellate counsel claim therefore fails. The district court's ruling denying him postconviction relief is affirmed.

AFFIRMED.