

IN THE COURT OF APPEALS OF IOWA

No. 6-347 / 05-1155
Filed June 28, 2006

ERIS BARBIERI,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza Ovrom, Judge.

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

Jesse A. Macro, Jr., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert E. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee.

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

VOGEL, J.

Eris Barbieri appeals from the district court's order that denied his application for postconviction relief. Following a jury trial in December 2002, Barbieri was convicted of: (1) conspiracy to manufacture methamphetamine and (2) possession of ephedrine or pseudoephedrine with the intent to use it as a precursor to manufacture methamphetamine, in violation of Iowa Code sections 124.401(1)(b)(7) (2001) and 124.401(4), with an habitual offender enhancement pursuant to section 902.9(2). His convictions were affirmed on appeal. *State v. Barbieri*, No. 03-0246, (Iowa Ct. App. Jan. 28, 2004). Barbieri's postconviction relief (PCR) application raised three issues regarding ineffective assistance of his trial counsel pertinent to this appeal: (1) failure to move for judgment of acquittal on conspiracy to manufacture methamphetamine asserting a lack of corroboration of an accomplice or failure to request an instruction on corroboration of accomplice testimony; (2) failure to move for judgment of acquittal on the possession of a precursor; (3) and failure to move for a new trial based upon the two above issues. The district court concluded that Barbieri's postconviction claims were meritless and denied the application in June 2005, following a hearing on the matter. Upon our de novo review of Barbieri's ineffective assistance claims, *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001), we agree with the district court's disposition.

To show ineffective assistance of trial counsel, Barbieri has the burden to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). We affirm if proof of either element is lacking. *Id.*

The record reflects that the postconviction proceedings focused primarily on trial counsel's failure to challenge the corroboration of accomplice testimony as to the conspiracy to manufacture count by moving for judgment of acquittal or requesting the appropriate jury instruction. Barbieri's girlfriend and alleged accomplice, Sue Hervey, testified at trial that she and Barbieri were buying or stealing cold medication from Target and other stores in order to provide it to a third-party for the manufacture of methamphetamine, from whom they would subsequently receive a portion of the finished product. Barbieri's trial counsel testified that his best defense was to attack the conspiracy charge, a class B felony. He stated that any failure to challenge or instruct on corroboration of Hervey's testimony as an accomplice was an intentional strategy so as to distance Barbieri from Hervey's actions, minimizing the perception of the two working in concert to fulfill the disputed "pills-for-finished-product" agreement. This was a reasonable trial strategy. Furthermore, we conclude that Barbieri has not demonstrated prejudice, in that but for counsel's conduct the outcome of the proceeding would have been different. *Gant*, 597 N.W.2d at 504. Barbieri's admissions to police and other evidence obtained sufficiently corroborated Hervey's testimony to create a jury question on the conspiracy to manufacture charge. Barbieri admitted that he and Hervey were methamphetamine addicts, they had been in a hotel the night before using methamphetamine, and had visited various stores that day. The Target loss-prevention specialist supported Hervey's testimony that she took some boxes of cold medication, took the blister packs out and discarded the empty boxes in the store, then returned to take more boxes. Given the unrefuted and corroborated evidence, Barbieri fails to

show that a motion for judgment of acquittal or jury instruction on accomplice corroboration would have altered the outcome on this charge. We affirm.

As to Barbieri's second issue on the possession of a precursor charge, we agree with the State that the issue has not been preserved for our review. The record of the postconviction hearing reflects that most of the evidence and testimony focused on the accomplice/corroboration issue as to the conspiracy to manufacture charge. At the PCR hearing, defense trial counsel testified that knowing the large quantity of precursor in Barbieri's possession, he believed there was sufficient evidence to engender a jury question, and thus did not pursue a motion for judgment of acquittal on this charge. Postconviction counsel did not make any specific argument on the precursor motion for judgment of acquittal issue, beyond a general assertion that the charge was not proven beyond a reasonable doubt. On appeal from the postconviction action, Barbieri now makes a more specific argument that his trial counsel should have challenged the lack of evidence that Barbieri possessed the pseudoephedrine with the intent to personally manufacture the methamphetamine himself.¹ We conclude this argument was not raised before the district court during the postconviction hearing and therefore not preserved for our review. See *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997).

¹ Barbieri does not argue on appeal that postconviction counsel was ineffective for failing to more specifically raise and argue this issue before the district court. We also note that the "personally manufacture" argument relies upon our Supreme Court's decision in *State v. Truesdell*, 679 N.W.2d 611, 618 (Iowa 2004), which interpreted the intent element of 124.401(4) to require more than mere knowledge or belief that the precursor would be used to manufacture methamphetamine. This was not the state of the law at the time of Barbieri's trial in 2002, and the statute was subsequently amended by the legislature in 2004.

Barbieri's final issue on appeal is trial counsel's failure to move for new trial based upon the two preceding issues. The trial court should grant the motion only if the jury's verdict is contrary to the weight of the evidence. *State v. Shanahan*, 712 N.W.2d 121, 134-35 (Iowa 2006). A verdict is contrary to the weight of the evidence where "a greater amount of credible evidence supports one side of an issue or cause than the other." *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) (citation omitted). We agree with the PCR court's finding that trial counsel was not ineffective for failing to include the two issues discussed above as grounds for new trial, as Barbieri has not established prejudice on what the PCR court deemed to be issues without merit.

We therefore affirm the district court's denial of Barbieri's application for postconviction relief.

AFFIRMED.