

IN THE COURT OF APPEALS OF IOWA

No. 6-468 / 05-2107
Filed September 7, 2006

MAURICE MONTEZ CURRIE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Carl D. Baker,
Judge.

Maurice Currie appeals from the denial of his application for
postconviction relief. **AFFIRMED.**

Lawrence B. Cutler of Craig & Smith, L.L.P., Eldora, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews and Douglas D.
Hammerand, Assistant Attorneys General, Richard N. Dunn, County Attorney, for
appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

Maurice Currie appeals from the denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

At approximately nine o'clock on the morning of December 11, 2001, the bookstore at Ellsworth Community College in Iowa Falls was robbed at gunpoint. The first customer of the day was Jonathan Harrell, who sold several used books back to the bookstore. Minutes after Harrell exited the store, the lone cashier noticed a black hand reach inside the door, turn off the lights, exit, and reappear pointing a shiny handgun at her. The robber demanded money and left with a cashbox containing \$3217.

Earlier that same morning, a student named Laith Hassan was walking to the office of his instructor, Professor Greg Metzen, in "Kruse Main" – the same building that housed the college bookstore. As he entered the building, Hassan noticed a "huge" African American male standing at the top of the stairs leading down to the bookstore. According to Hassan's trial testimony, he believed this "huge" man did not want him in the building.¹ Hassan also noticed a second black male who appeared to be surveilling the doors at the far entrance to Kruse Main.

At the top of the open stairwell, Hassan heard the door to the bookstore close, and then he heard the distinctive noise of a bullet being chambered into a

¹ Hassan would later identify the "huge" man as Robert Mosley, Maurice Currie's college roommate. Mosley, a football player, is six feet, two inches tall and weighs approximately 220 pounds.

gun.² As Hassan continued to descend the stairs towards his instructor's office and the bookstore, he noticed a third man emerge from the direction of the bookstore and approach the stairwell. The man was wearing a distinctive, shiny black coat and a ski mask with holes for the mouth and the eyes. Hassan testified that he could see the masked man's eyes very clearly through the mask. Shortly before reaching the bottom of the stairs, the masked man noticed Hassan, abruptly changed directions, and left running.³

Harrell, the bookstore's first customer, was arrested the same day after police retrieved his receipt from the bookstore's trash.⁴ He denied any involvement in the robbery, but he did inform police that he had seen Maurice Currie and Robert Mosley in Kruse Main shortly before the robbery occurred. According to Harrell, Currie had been wearing a shiny black coat that matched the description given by Hassan.

² Hassan had ten years of military experience in Iraq prior to his immigration to the United States and testified that he is very familiar with the sound of a gun chambering a round.

³ Hassan was later shown a photographic array of five men: three African American males and two Caucasian males. This initial array did not include Maurice Currie's picture. Hassan identified one of the African American males as someone who looked like the masked man he had seen. Investigators then placed these five photos together with other photographs in a second photographic array, which did include Currie's picture. When investigators placed a paper cutout resembling the ski mask in front of each photo, Hassan identified Currie as the masked man he had encountered on the stairwell.

⁴ At the time of the robbery, Professor Gregory Metzen was art instructor to both Harrell and Hassan. In a voluntary statement to the police following the robbery, Metzen stated that before Hassan arrived at his office by the bookstore, Harrell had come to talk about his grade in Metzen's class. Harrell informed Metzen that he had just finished selling back his books and would be leaving town that afternoon. Metzen described Harrell as acting nervous, as if anxious to leave. A few minutes after Harrell left, Hassan entered the office and described to Metzen his curious encounter with the masked man on the stairs. After speaking with Hassan for a few minutes, the bookstore clerk entered the office and informed Metzen that she had just been robbed at gunpoint.

Several hours after the robbery, Nikki Juhl drove Currie to a nearby convenience store. When Juhl noticed Currie pull a “wad” of \$20 bills from his pocket, Juhl inquired about a debt Currie owed her, which he promptly repaid. Juhl testified she was surprised to see Currie with that much money because he rarely had any to spare. Shortly thereafter, Currie was seen wearing brand new clothes and was heard bragging about his recent purchase of an X-Box video game system valued at the time at nearly \$400. Currie also had recently incurred expense for repairs to his car.

Two days after the robbery, Mosley approached one of his professors and admitted his involvement in the robbery. The professor put Mosley in contact with police to whom Mosley disclosed the names of the other men – all teammates on the college football team – who were involved. According to Mosley, on December 10, Currie had approached his teammates with a plan to rob the bookstore during its book “buy-back,” when the store could be expected to have on hand thousands of dollars in cash. Currie told them he was low on cash and needed money to repay the money he had borrowed to pay for his car repairs. Currie proposed that Harrell would scout the bookstore, while Mosley and another teammate would act as lookouts. Another teammate would be waiting outside in the getaway car.

Immediately after the robbery, Mosley met up with his teammates to divide the money. Mosley received \$300 for his participation in the crime, while Currie kept the largest share for himself.

A subsequent search of Mosley and Currie's dorm room revealed a ski mask that matched Hassan's description of the mask worn by the robber.

Mosley told police Currie had recently purchased the mask at a local Wal-Mart. After a search of the dorm room of the alleged getaway driver, police found a shiny black jacket stuffed behind a dresser that matched Hassan's description of the coat worn by the robber and Mosley's description of the coat Currie wore on the day of the robbery. Police also discovered the bookstore's cashbox discarded under an ice machine in the basement of Currie's dorm.

Currie was arrested in Des Moines at his girlfriend's home and later charged with first-degree robbery. Police found a loaded silver handgun on a nightstand in the home. The handgun's loading action made a distinctive clicking noise when a round was chambered. An X-Box gaming system was also found in the home.⁵ Police officers observed at the time of the arrest that Currie had fresh tattoo markings on his body.

At his jury trial, Currie testified that he awoke very early on the day of the robbery, went for a car ride by himself, and smoked some marijuana. He claimed he arrived at a friend's home at approximately 9:00 a.m. that morning and returned to his dorm room by 10:15 a.m.⁶ Currie admitted he had recently had tattoo work done, repaired his car, and repaid certain debts. Currie explained, however, that he had (1) borrowed money for the car repairs, (2) borrowed the X-Box from a friend, (3) won approximately \$150 shooting dice the night before the robbery, and (4) recently sold his used textbooks for \$86. Currie claimed he had

⁵ Currie's girlfriend informed police that the X-Box was on loan from a friend, while the handgun was hers, but given to her by an undisclosed friend. Police testified that she hesitated when asked whether the handgun was from Currie.

⁶ Currie's friend corroborated this timeline at trial.

used his gambling winnings and the proceeds from his book sales to repay debts and purchase the new body art. Currie denied recently purchasing new clothing.

The jury found Currie guilty of first-degree robbery, and the district court sentenced him to twenty-five years in prison. On direct appeal, this court affirmed the conviction, but preserved several claims of ineffective assistance of counsel for possible postconviction relief. After a hearing, Currie's postconviction relief application, which included a request for a new trial based on newly discovered evidence, was denied by the district court in all its respects.

On appeal, Currie alleges trial counsel was ineffective in failing to (1) properly investigate Professor Metzen's observation of Harrell's nervous demeanor, (2) obtain expert testimony on the unreliability of eyewitness identifications, (3) object to several items of hearsay evidence relative to Currie's motive, (4) zealously cross-examine Mosley about allegations of narcotics possession and special deals with police in exchange for favorable testimony, and (5) permitting Currie to falsely testify that he did not know who had committed the robbery. Lastly, Currie contends the district court erred in denying his newly discovered evidence claim.

II. Scope and Standard 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 of those claims is de novo. *State v. Mapp*, 585 N.W.2d 746, 747 (Iowa 1998).

We review for abuse of discretion the district court's denial of Currie's request for a new trial based on a claim of newly discovered evidence. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997).

III. Discussion.

A. Ineffective Assistance of Counsel.

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 therefore are reluctant to subject a reasonable trial strategy to a critique based in 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, Currie 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 Currie fails to meet his burden with respect to either prong, his

claim is without merit and must be rejected. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

1) *Failure to Investigate.*

Currie contends his trial counsel failed to properly investigate Professor Metzen's observation of Harrell's nervous demeanor. Currie notes that Metzen's statement to police was available before trial and would have cast doubt on Harrell's initial denial of involvement in the robbery if brought to light during Currie's trial. After de novo review, we believe this fact was, at best, of marginal importance to the defense. Harrell's nervous display after selling his books was consistent with the State's theory of the case, in which Harrell played the role of scout for the impending robbery. Metzen's statement places Harrell in his office well before Hassan observed a masked man at the stairwell, and there is no suggestion in the record that Hassan's description of either man he encountered matched that of Harrell. As such, nothing in Metzen's statement would suggest Harrell was the gunman, and trial counsel's failure to bring Metzen's statement to light during the trial could not reasonably be expected to have brought about Currie's acquittal. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Accordingly, this claim of ineffectiveness must fail.

2) *Failure to Secure Eyewitness Identification Expert.*

Currie also contends his trial counsel was ineffective in failing to obtain expert testimony to challenge Hassan's identification. While we acknowledge the method used by investigators to obtain the identification in this case was unorthodox, Currie has failed to demonstrate how using the paper cutout to simulate the conditions under which Hassan encountered the robber was unduly

suggestive. Hassan testified he got a very good look at the robber's eyes through the mask, and when that feature was isolated, Hassan claimed to be able to identify Currie. We note that Hassan's description of the shiny black jacket worn by the robber matched a jacket that belonged to Currie. The handgun found with Currie (1) matched the description provided by the bookstore cashier of the handgun used in the robbery and (2) created the distinctive sound while it was being loaded that was described by Hassan. While Hassan's identification implicated Currie as the gunman, we find persuasive trial counsel's opinion that the identification was not particularly compelling because of the methodology employed to produce it. Given the other strong evidence of Currie's involvement in planning and executing the crime, we do not believe the failure to call an identification expert to discredit the identification methodology affected the outcome of the trial. We therefore conclude this claim of ineffectiveness is without merit, both because trial counsel had no duty to present the testimony of an identification expert under the circumstances of this case and because the failure to present such evidence did not affect the outcome.

3) *Failure to Object to Hearsay.*

Currie's next claim asserts his trial counsel was ineffective in failing to object to two items of hearsay evidence presented through the State's witnesses. In the first of these, Chief of Police Douglas Strike repeated the substance of Mosley's earlier testimony that Currie had told Mosley he was low on cash and had borrowed money to pay for car repairs. While it is true that a properly lodged hearsay objection may have been meritorious, we cannot agree with Currie's assertion that the outcome of the trial was affected by Chief Strike's recounting of

Currie's hearsay statement that had already been disclosed to the jury through Mosley's testimony. Furthermore, Currie himself testified about his need to borrow money to pay for car repairs. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996) (stating "prejudice is not established where substantially similar evidence has been admitted but not objected to").

The second item of hearsay evidence was presented through the testimony of Chief Strike and Officer Ronald Kuhfus. After Mosley denied from the stand telling investigators that Currie had initially planned to rob a convenience store, the State called Strike and Kuhfus to testify that Mosley did indeed tell them about Currie's discussion of such an alternative crime. At the postconviction hearing, trial counsel defended his decision not to object to the responsive testimony by Strike and Kuhfus because it (1) tended to cast doubt on the credibility of Mosley, the State's primary witness, and (2) supported the defense's strategy of portraying Mosley as the person trying to "pin" the robbery charge on Currie. We conclude trial counsel's decision not to object to this hearsay evidence was the product of reasonable trial strategy. See *Wissing*, 528 N.W.2d at 564. Furthermore, Mosley's detailed testimony about Currie's involvement in the robbery of the bookstore was far more incriminating than testimony indicating Currie had at one time also discussed the idea of robbing a convenience store. We therefore conclude Currie has failed to prove the prejudice prong on this particular claim of his counsel's ineffectiveness.

4) *Failure to Properly Cross-examine Mosley.*

Currie next asserts that trial counsel failed to cross-examine Mosley about allegations that narcotics were seized by police during the search of the dorm

room Mosley shared with Currie. Currie contends evidence that drugs were found in the room he shared with Mosley could have raised doubt as to the truthfulness of Mosley's claim that he had not received a deal for leniency from prosecutors in exchange for his cooperation at Currie's trial. While trial counsel acknowledged a rumor that drugs were found during the dorm room search, he testified that no drug charges were ever filed against Currie and no police record demonstrates that drugs were in fact found in the dorm room. Trial counsel defended his decision to leave the subject out of his cross-examination because he was concerned Mosley could plausibly deny possession of drugs that were never documented in the records of law enforcement officers. Furthermore, an attempt to cross-examine Mosley as to undocumented allegations of dorm-room drug possession had only speculative impeachment value at the high cost of exposing his roommate Currie to potentially prejudicial other bad acts evidence. We therefore conclude the decision by trial counsel to forego cross-examination on this subject was the product of a reasonable trial strategy. *See id.*

5) *Failure to Properly Question Currie.*

After Currie denied his own involvement in the robbery, Currie's trial counsel asked if he knew who the real perpetrator was. Currie now claims he told his defense counsel prior to trial that Mosley committed the robbery and that Mosley threatened Currie against disclosure of such knowledge. According to Currie, Mosley's threat of harm⁷ caused Currie to deny knowledge of the perpetrator's identity on the witness stand. Currie contends his trial counsel

⁷ Mosley's uncle is a Black Hawk county political figure who, according to Currie, had "the juice" or power to harm Currie in some way.

either (1) should not have asked the question because counsel knew Currie had been threatened into silence and therefore would not answer truthfully, or (2) should have followed up on Currie's denial in an attempt to prove Currie had been threatened by Mosley.

At the postconviction hearing, trial counsel denied that Currie ever told him Mosley perpetrated the robbery. Trial counsel testified that he advised Currie against testifying because Currie had told him many inconsistent stories about his knowledge of the robbery. However, counsel respected his client's strong preference and called Currie to testify. After a careful de novo review of the record, we find credible trial counsel's testimony on this issue. We find neither a breach of duty by trial counsel nor prejudice resulting from trial counsel's question or Currie's answer. Accordingly, this claim of ineffective assistance must be rejected.

B. Newly Discovered Evidence.

Currie's final claim on appeal asserts entitlement to a new trial based on evidence suggesting Mosley received immunity in connection with the robbery and the drugs found in his residence after the robbery in exchange for testimony against Currie.⁸ The claimed new evidence comes in the form of a deposition of Jane Andrew, who was Mosley's girlfriend at the time of the robbery and who is now a "close friend" of Currie. Andrew's deposition testimony serves to recant her earlier trial testimony, given during cross-examination by defense counsel, as

⁸ The State presented evidence in the postconviction proceeding that Mosley was not granted immunity, but he was not charged.

to her belief that Mosley could still be charged and tried for his involvement in the robbery.

Viewing Andrew's deposition with the appropriate critical eye,⁹ we cannot agree with Currie that the evidence warrants a new trial. In order for Currie's claim to prevail, he must demonstrate that had the evidence been presented in his trial, the result probably would have been different. *State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984). While Andrew's deposition, if true, would indeed call into question Mosley's motive for testifying against Currie, we believe this "new" evidence does nothing to call into question the compelling evidence tending to prove Currie was the gunman, including (1) Currie's several purchases and debt payments in close temporal proximity to the robbery, (2) Hassan's identification of Currie, (3) Currie's possession of a silver handgun matching that used by the robber, (4) Currie's ownership of a shiny black jacket matching that worn by the gunman, and (5) the discovery of the bookstore cashbox in Currie's dormitory. Finding no showing of such prejudice as would justify reversal of the conviction and a new trial, the district court did not abuse its discretion in denying Currie's request for a new trial based on Andrew's deposition testimony. Because we conclude the motion based on this new evidence was without merit, we also conclude postconviction counsel was under no duty to pursue a specific ruling on the motion so as to preserve error. See *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998).

IV. Conclusion.

⁹See *State v. Taylor*, 287 N.W.2d 576, 578 (Iowa 1980) (noting that motions asserting newly discovered recantation evidence should be carefully scrutinized and that the district court is not required to believe the recantation).

After reviewing each of Currie's claims on appeal from his postconviction hearing, we conclude that none of them is meritorious. Our confidence in the fairness of Currie's criminal trial is not undermined. Because the district court properly denied all of Currie's claims for postconviction relief, we affirm his conviction and sentence.

AFFIRMED.