IN THE COURT OF APPEALS OF IOWA

No. 6-622 / 05-1755
Filed December 13, 2006

DENY BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Deny Brown appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9208 (2005).

VAITHESWARAN, J.

Deny Brown appeals the district court's dismissal of his application for postconviction relief. Brown contends "newly discovered evidence" entitles him to a new trial. We affirm.

I. Background Facts and Proceedings

Almost thirty years ago, Des Moines police discovered a body riddled with three bullets. Years later, an inmate named James Burrows implicated Deny Brown. Brown was charged with first-degree murder.

Prior to trial, three other inmates agreed to testify against Brown. After the third of these inmates came forward, Brown's attorney advised him to stipulate to a trial on the minutes of testimony rather than proceed with a jury trial. Brown agreed to this course of action. The district court found him guilty of second-degree murder and sentenced him to an indeterminate prison term of twenty years. On direct appeal, the Iowa Supreme Court affirmed this judgment and sentence. *State v. Brown*, 656 N.W.2d 355, 358 (Iowa 2003).

Brown filed an application for postconviction relief.[1] Brown alleged: (1) ineffective assistance of trial counsel in failing to ensure he could hear everything at the proceedings and in failing to investigate and call witnesses; (2) ineffective assistance of appellate counsel in failing to adequately raise the issue of ineffective assistance of trial counsel; and (3) the existence of newly discovered evidence.

[1] Brown actually filed several documents with the court, among which was an amended application for postconviction relief filed by appointed counsel.

Brown testified at the postconviction hearing. He also introduced the deposition transcripts of co-defendant Gary Thrasher, inmate James Patterson, and one of his trial attorneys. He argued that the transcripts of Thrasher and Patterson amounted to newly discovered evidence.

The district court rejected Brown's claims for relief. The court analyzed the newly discovered evidence claim in conjunction with Brown's first ineffective-assistance-of-counsel claim, stating "the applicant has also made a claim related to 'newly discovered evidence,' which is being made as part of his claim of ineffectiveness of trial counsel in failing to adequately investigate the availability of favorable witnesses." The court concluded that trial counsel's investigation was not "deficient in the abstract, let alone so deficient so as to constitute ineffective assistance of counsel."

On appeal, Brown contends "the district court erred in failing to grant postconviction relief on the grounds" of "newly discovered evidence, namely the testimony of James Patterson and Gary Thrasher." Alternately, Brown argues that, if the issue was not properly preserved for our review, "the failure to take adequate steps to present and to preserve this issue constitutes the ineffective assistance of postconviction counsel." We address the error preservation issue first.

II. Error Preservation

Because the district court only analyzed the newly discovered evidence claim under an ineffective-assistance-of-counsel rubric and not as an independent claim for relief, it was incumbent upon Brown to seek an enlargement of the court's findings and conclusions if he wished to pursue the

independent claim of newly discovered evidence. *See* Iowa R. Civ. P. 1.904(2). He did not do so. Therefore, error was not preserved. *Starling v. State*, 328 N.W.2d 338, 342 (Iowa Ct. App. 1982).[2] Accordingly, we focus on Brown's alternate contention that postconviction counsel was ineffective in failing to obtain findings and conclusions on his independent claim of newly discovered evidence. Our review of this issue is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Ineffective Assistance of Postconviction Counsel

To establish ineffective assistance of counsel, the applicant must prove that counsel's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

The first question is whether postconviction counsel performed deficiently when she failed to obtain separate findings and conclusions on Brown's newly discovered evidence claim. If this claim lacked merit, counsel had no obligation to pursue it. *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998).

To prevail on his newly discovered evidence claim, Brown would have had to make several showings, including a showing that the evidence was discovered after the verdict. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991). Evidence

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[2] The district court made detailed findings on the claimed newly discovered evidence but all these findings were in connection with the court's analysis of Brown's first claim: whether trial counsel was ineffective in failing to investigate and call witnesses. The applicable standard for consideration of a newly discovered evidence claim in the ineffective assistance-of-counsel context differs from the standards for considering such a claim independently. *See Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003) (setting forth factors).

known to a defendant during trial but unavailable to the defendant because the witness invoked his Fifth Amendment privilege against self incrimination, may not be considered newly discovered evidence that would warrant a new trial. *Id*.

Co-defendant Gary Thrasher's testimony was precisely such evidence. Trial counsel testified by deposition that he attempted to call Thrasher as a witness, but Thrasher's counsel refused to allow it. It is clear, therefore, that the evidence was not discovered after the verdict and, accordingly, could not have been deemed "newly discovered." For this reason, postconviction counsel did not act deficiently in failing to obtain separate findings and conclusions on the claim that Thrasher's testimony was newly discovered evidence.

We turn to James Patterson's testimony. Patterson testified by deposition that he was in the same cell as Burrows. According to Patterson, Burrows said he had information about a crime and could "pin" it on anybody he wanted to if he knew where the person was. Burrows said he was going to "hang" the crime on Brown because Brown was "sleeping with" Burrows's girlfriend. Patterson testified he could not believe anything Burrows said and Burrows could not be trusted.

We agree with Brown that Patterson's testimony "gives the court a motive for Burrows' attempt to incriminate Applicant in his crime." However, this fact was already evident from the minutes of testimony. Specifically, Burrows admitted he was involved in the crime but blamed Brown for the murder. As a potential co-defendant, Burrows had every incentive to implicate Brown. As this evidence was already in the record, evidence of another motive to implicate Brown was "merely cumulative or impeaching" and would not likely have

changed defense counsel's advice to forgo a jury trial. *Jones*, 479 N.W.2d at 274. We also note that Patterson did not controvert the testimony of two other inmates, whose deposition transcripts were introduced at the trial on the minutes of testimony and who implicated Brown in the crime. As the Iowa Supreme Court noted in its opinion on Brown's direct appeal, the other two inmates testified that Brown told them of his involvement in the crime. *Brown*, 656 N.W.2d at 359, 362 nn.3 & 4. Therefore, it was improbable that Patterson's testimony would have altered defense counsel's advice to stipulate to a trial on the minutes of testimony instead of proceeding with a jury trial. *Jones*, 479 N.W.2d at 274. We conclude Brown's newly discovered evidence claim lacked merit and postconviction counsel was not ineffective in failing to seek and obtain separate findings and conclusions on this claim.

We affirm the district court's dismissal of Brown's postconviction relief application.

AFFIRMED.