

IN THE COURT OF APPEALS OF IOWA

No. 6-777 / 05-1844
Filed October 25, 2006

CHARLES WATKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Charles Watkins appeals from the district court's denial of his application
for postconviction relief. **AFFIRMED.**

Christopher Kragnes, Sr. and Tiffany Koenig of Kragnes, Tingle & Koenig,
P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Charles Watkins appeals from the district court's denial of his application for postconviction relief. He contends the district court erred in dismissing his application because the State improperly destroyed evidence. He also contends his postconviction counsel rendered ineffective assistance. Normally, a trial court's denial of a postconviction relief action is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). Where, however, the applicant asserts violations of constitutional safeguards, such as effective assistance of counsel, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

Watkins was found guilty of first-degree kidnapping and second-degree theft for events that occurred on December 20, 1988. Watkins assaulted a woman and forced her to drive him to a park where he raped her. He then attempted to kill her and stole her vehicle. His convictions were affirmed on direct appeal in *State v. Watkins*, 463 N.W.2d 411 (Iowa 1990) and *State v. Watkins*, 494 N.W.2d 438 (Iowa Ct. App. 1992). The denial of his first application for postconviction relief was affirmed in *Watkins v. State*, No. 98-1099 (Iowa Ct. App. May 26, 1999).

This action was filed in September 2000 and was dismissed in October 2002. A motion to amend and enlarge and/or vacate, modify or correct the order filed later in October 2002 was denied in October 2005. The order denying the motion indicates the assigned judge attempted to determine what happened to

the motion during the intervening three years. She reports little success. However, the parties have submitted the matter in their appellate briefs on the merits of the postconviction relief application and we will address those issues.

Watkins first contends the court erred in denying his application for postconviction relief because evidence in his case was improperly destroyed or suppressed. He asserts exculpatory evidence in the rape kit was destroyed. We note at the outset that Watkins had the opportunity to have this evidence tested prior to trial but did not. He now believes testing of that evidence would exonerate him. However, the evidence has been destroyed.

Failure of the State to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can show bad faith. *Whitsel v. State*, 525 N.W.2d 860, 864 (Iowa 1994); *State v. Dulaney*, 493 N.W.2d 787, 791 (Iowa 1992).

Where the lost evidence is only *potentially* exculpatory, where by its nature the lost evidence cannot be evaluated by a fact finder, a due process violation will not be found in the absence of a showing of bad faith [I]f the exculpatory value of the lost evidence is suitable for evaluation by a fact finder, a due process violation will be found upon a showing that the evidence was exculpatory and its destruction was deliberate.

State v. Craig, 490 N.W.2d 795, 796-97 (Iowa 1992) (footnote omitted). There is no evidence the rape kit was improperly destroyed by the State in any attempt to withhold evidence from Watkins.

We conclude the district court properly denied Watkins's motion on this issue. The evidence presented at the postconviction hearing shows the evidence was lost in one of the following ways: (1) any biologic materials were consumed

during DNA testing, (2) the evidence may have been destroyed during the 1993 flood of the Des Moines River, or (3) the evidence was destroyed by a 1995 administrative order of the court. Furthermore, the evidence was only potentially exculpatory. Watkins has shown no bad faith on the part of the prosecution.

Watkins also claims newly discovered evidence of a hospital report was improperly withheld prior to trial. He alleges two women looking at Watkins's criminal files found a hospital report in the district court file that stated there was "**ABSOLUTELY NO SEMEN OF CHARLES WATKINS**" found on the victim's underwear. No such document is now in the district court file. At the hearing, affidavits of the two women were presented.

In order to prevail on a claim of newly discovered evidence, a postconviction applicant must show: (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) its admission would likely change the result if a new trial were granted. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994). Even assuming the hospital report in question exists and states what the affidavits purport it to state, the evidence is merely cumulative. An Iowa Department of Criminal Investigation criminalist testified that she did not find seminal fluid on the victim's undergarment.

Finally, Watkins argues a police report was improperly withheld in which two witnesses state Watkins was not in the bar where the victim was before the attack. Assuming *arguendo* that this evidence existed and was withheld, we

conclude the evidence was not exculpatory. There was no claim made that Watkins was in the bar with the victim. Rather, the testimony at trial was that Watkins was seen on the street walking behind the victim after she left the bar. Watkins cannot show the admission of the police report would have changed the result if a new trial were granted.

Watkins also contends his postconviction counsel rendered ineffective assistance. To prevail on a claim of ineffective assistance of counsel, he must show that his attorney's performance fell outside the normal range of competency, and the deficient performance so prejudiced his case as to give rise to a reasonable probability that, but for counsel's alleged errors, the outcome of the proceedings would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). There is a strong presumption counsel performed competently, and the claimant has the burden to prove that counsel was ineffective. *Id.* An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Watkins complains that postconviction counsel only focused on the issue of retesting the evidence in the rape kit and not on the other issues before the postconviction court. We have previously concluded that these other issues have no merit. Accordingly, Watkins was not prejudiced by any failure of counsel to pursue those claims.

Watkins also complains that in addressing the issue of retesting, counsel failed to consider Iowa Rule of Criminal Procedure 2.21(5), which sets forth the procedure for destroying evidence. Again, we cannot find Watkins was

prejudiced by this failure. As stated above, the destruction of the evidence did not violate due process as the evidence was only potentially exculpatory. We cannot find counsel was ineffective.

We affirm the denial of Watkins's application for postconviction relief.

AFFIRMED.