

IN THE COURT OF APPEALS OF IOWA

No. 7-910 / 07-0553
Filed January 16, 2008

MONTEZ LEWIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Nancy Tabor, Judge.

Applicant appeals the district court's summary judgment ruling that dismissed applicant's postconviction relief claims. **AFFIRMED.**

Patrick O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Christen Douglass, Assistant Attorney General, and Michael J. Walton, Acting County Attorney, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Montez Lewis appeals the district court's entry of summary judgment dismissing his postconviction relief application. Lewis contends he received ineffective assistance of trial counsel because his attorney failed to discuss certain exculpatory evidence with him. Lewis argues that he would not have pleaded guilty to attempted murder if he had been aware of this evidence and he would have prevailed at a trial. The district court granted the State's motion for summary judgment finding, among other things, that the claim failed because Lewis failed to prove he was prejudiced by his counsel's conduct. We affirm.

I. BACKGROUND. On the evening of July 21, 2002, Lewis was a passenger in one of two cars that drove by a gathering of people on Harrison Street in Davenport. The occupants of the cars were searching for a person named Miller. Miller was spotted with a group of people and passengers inside the cars began shooting. Nine-year-old Deanna Shipp was killed by one of the bullets. Lewis and six others were charged with first-degree murder, willful injury, and intimidation with a dangerous weapon with the intent to injure or provoke fear or anger in another. On January 14, 2003, as a result of a plea agreement, Lewis pleaded guilty to one count of attempted murder in exchange for dismissal of the other charges against him. Lewis waived his right to file a motion in arrest of judgment and was sentenced immediately. Lewis did not file a direct appeal.

On September 26, 2003, Lewis filed an application for postconviction relief challenging his guilty plea on several grounds. On March 14, 2005, the district court dismissed the action finding that Lewis was not entitled to postconviction relief because Lewis was properly advised of his right to challenge his plea at the

sentencing hearing and Lewis failed to file a motion in arrest of judgment or direct appeal to challenge the plea and sentence. The court also determined Lewis's claims lacked merit.

On February 15, 2006, more than three years after his conviction, Lewis filed a second application for postconviction relief. On October 19, 2006, the district court dismissed all of Lewis's claims except for one. The court did not dismiss Lewis's claim that his trial counsel was ineffective for failing to discuss with him certain diagram evidence showing the trajectory of the bullets. Lewis considered this evidence to be exculpatory and claims he would not have pleaded guilty if his attorney had discussed the diagrams with him. Lewis did not know about the diagrams until 2006 when he compared his file with that of another person involved in the shooting who was also serving a sentence at the Iowa State Penitentiary.

The State filed a motion for summary judgment on the remaining claim arguing there was no genuine issue of material fact to dispute at trial because, among other things, no prejudice can be shown. The State maintains that the trajectory evidence is irrelevant to Lewis's conviction since the State was prosecuting Lewis under joint criminal conduct and transferred intent theories. According to the State, since they never planned to prosecute Lewis as the actual shooter, but as a participant in the crime, the actual trajectory of the bullets is immaterial. They also argued that Lewis's guilty plea cannot be set aside because the diagram evidence is not "newly discovered." The court granted the State's motion finding Lewis had "no evidence to factually support an outcome determinative element of [his] claim."

II. STANDARD OF REVIEW. Postconviction relief proceedings are reviewed for errors at law unless the claims are of a constitutional nature. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Postconviction claims based on newly discovered evidence are reviewed for errors. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994). A claim that one was deprived of the constitutional right to effective counsel is reviewed de novo. *Id.* “[W]e make our own evaluation of the totality of the circumstances in a de novo review.” *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). A summary judgment can be granted in a postconviction relief action “when . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Iowa Code § 822.6 (2005). A genuine issue of material fact “is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper.” *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998).

III. NEWLY DISCOVERED EVIDENCE. Most postconviction relief claims must be filed within three years after a person is convicted. Iowa Code § 822.3. This statute of limitations “does not apply to a ground of fact or law that could not have been raised within the applicable time period.” *Id.* Newly-discovered evidence claims fall within this exception to the statute of limitations. *Whitsel*, 525 N.W.2d at 863. Lewis must prove four elements to be eligible for a new trial due to discovery of new evidence. Lewis must show:

- (1) that the evidence was discovered after the verdict;
- (2) that it could not have been discovered earlier in the exercise of due diligence;
- (3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and

(4) that the evidence probably would have changed the result of the trial.

Id.

In *State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998), the Supreme Court held that “new evidence, unless it is ‘intrinsic¹ to the plea itself’ does not provide grounds to withdraw a guilty plea.” “A plea of guilty waives all defenses or objections which are not intrinsic to the plea itself.” *Speed*, 573 N.W.2d at 596. A defendant’s assessment of the evidence against him and subsequent discovery of flaws in the State’s case relate to a tactical aspect of the plea decision. *Id.* These considerations do not relate to the determination of whether a plea is entered knowingly and voluntarily. *Id.* A guilty plea can only be attacked on the grounds that it was not knowing and voluntary and that the discovery of new evidence is irrelevant to this inquiry. *Id.*

Lewis argues his decision to plead guilty was based on incomplete information because he did not know of the claimed exculpatory evidence. “Any subsequently-discovered deficiency in the State’s case that affects a defendant’s assessment of the evidence against him, but not the knowing and voluntary nature of the plea, is not intrinsic to the plea itself” and cannot be used as grounds to attack the plea. *Id.* Lewis does not argue his plea was not knowing or voluntary. In accepting Lewis’s plea, the court complied with Iowa Rule of Criminal Procedure 2.8(2)(b) in fully advising Lewis of his rights and ensuring that he was making the plea voluntarily and knowingly. Lewis does not claim there were flaws in the plea proceeding. The district court was correct in

¹ Defined as “Belonging to a thing by its very nature; not dependent on external circumstances; inherent; essential.” Black’s Law Dictionary 842 (8th ed. 2004).

granting the State's motion for summary judgment because, as a matter of law, Lewis's guilty plea cannot be vacated due to his new appraisal of the State's evidence.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. Lewis also claims that he received ineffective assistance of counsel because his attorney permitted him to enter a guilty plea without discussing with him the diagram evidence. A guilty plea can be challenged despite the failure to file a motion in arrest of judgment if the failure was due to ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Although ineffective assistance of counsel claims are generally not waived by a guilty plea, the alleged error must relate to the knowing and voluntary requirements of the plea and "if the undercurrent of the ineffective assistance claim is an issue designed to question the validity of the conviction, it, too, is waived." *State v. LaRue*, 619 N.W.2d 395, 398 (Iowa 2000). Since Lewis's claim pertains to whether he made an uninformed decision to plead guilty, it implicates the knowing requirement of a guilty plea and we will consider it. See *id.* at 397 ("A defendant does not waive the claim that his plea was uninformed or involuntary.").

To prove an ineffective assistance of counsel claim, a postconviction relief applicant must demonstrate by a preponderance of evidence "both ineffective assistance and prejudice." *Ledezma*, 626 N.W.2d at 142 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We presume the attorney acted competently and the applicant must prove the attorney "performed below the standard demanded of a reasonably competent attorney." *Id.* The prejudice requirement is met when the applicant

shows that “there is a reasonable probability that, but for counsel’s errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.” *Irving v. State*, 533 N.W.2d 538, 541 (Iowa 1995). Both elements need not be addressed and “[i]f the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.” *Id.* at 142. “[W]here a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty.” *Brooks*, 555 N.W.2d at 448.

Counsel’s failure to investigate and fully inform a defendant is not per se ineffective assistance of counsel. *Irving*, 533 N.W.2d at 541. In *Irving*, Irving, a postconviction applicant argued his guilty plea was uninformed because his attorney failed to investigate and inform him of the possibility of suppressing a confession. *Id.* The court found no prejudice because there was ample evidence to convict Irving without using impermissible evidence. *Id.*

Lewis claims he would not have pleaded guilty because the trajectory diagrams show the bullet that killed Deanna Shipp may not have come from the car in which he was a passenger. The State was prosecuting Lewis under theories of joint criminal conduct and transferred intent. At the plea proceeding, the court generally explained the State’s theory to Lewis, asked Lewis if he understood these theories, and told him that if he chose to go to trial, the State would have to prove these theories with witnesses and evidence. Lewis was made aware he was not being prosecuted as the principal shooter.

To convict under a theory of joint criminal conduct, the State must prove the following elements:

1. Defendant must be acting in concert with another.
2. Defendant must knowingly be participating in a public offense.
3. A “different crime” must be committed by another participant in furtherance of defendant’s offense.
4. The commission of the different crime must be reasonably foreseen.

State v. Hohle, 510 N.W.2d 847, 848 (Iowa 1994). Lewis admitted that he and his co-defendants gathered in two cars with firearms and went driving to look for Miller. He admitted they located Miller amidst a large group of people and shots were fired from both cars. He agreed that he knew other passengers in both cars carried firearms and knew one of his co-defendants intended to shoot and kill Miller. These facts show that Lewis acted in concert with others in the commission of the attempted murder of Miller regardless of which car the bullets came from. The murder of a bystander is a reasonably foreseeable consequence of this conduct. Lewis has failed to demonstrate that there is a reasonable probability that, but for his attorney’s failure to show and discuss the diagrams with him, the result of the proceeding would have been different. See *Ledezma*, 626 N.W.2d at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The trajectory diagrams would not have provided Lewis a viable defense at trial.

We affirm the district court’s grant of summary judgment.

AFFIRMED.