IN THE COURT OF APPEALS OF IOWA

No. 8-268 / 07-0865
Filed May 14, 2008

ERIC PEPPERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Mitchell E. Turner, Judge.

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

Rockne O. Cole of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Eric Peppers appeals from the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings

In 1999 Eric Peppers was convicted of sexual abuse in the second degree, false imprisonment, and domestic abuse while displaying a dangerous weapon. On direct appeal, we noted the jury could have found the following facts: Peppers lived with his girlfriend Felicia Marshall. After using crack cocaine one morning, Peppers told Marshall he wanted to have sex. Although Marshall was reluctant, she began to undress to avoid a confrontation. As she did so, Peppers noticed discharge on her panty liner. Convinced Marshall had been having sex with his friend Preston Bradford, he rammed his fingers into her vagina to check for semen, while simultaneously hitting her and stabbing the bed with a kitchen knife. Soon, Bradford appeared at the apartment. After answering the door, Peppers returned to the bedroom and told Marshall to get dressed because he intended to take her to the country to "finish this."

Peppers then pushed Marshall toward and into his car, strapped her into the passenger seat, and began driving. As he drove, Peppers hit Marshall with his fists and a wire hanger. Marshall stated she could not escape because the passenger door would not open from the inside. To stop the assault, Marshall ultimately agreed she had slept with Bradford. Peppers then calmed down and decided to retaliate against Bradford by having him arrested for selling drugs. He drove to the police station to execute this plan. When they arrived there, Marshall sought help from an officer.

We affirmed Peppers's convictions, rejecting several of his ineffective assistance of counsel claims and preserving the remainder for postconviction relief proceedings. *See State v. Peppers*, No. 00-0283 (Iowa Ct. App. July 18, 2001).

Peppers filed an application for postconviction relief, claiming newly discovered evidence and multiple particulars of ineffective assistance of counsel. The newly discovered evidence consisted of Marshall's alleged recantation of her testimony that a knife was used during the sexual assault. The district court denied the application.

On appeal, Peppers claims: (1) Marshall's statement that she lied about whether he used a knife during the sexual assault is new evidence entitling him to a new trial and (2) trial counsel was ineffective in failing to (a) investigate and present the testimony of Megan Peppers, (b) object to Peppers's past history of cocaine usage, and (c) object to the State's improper impeachment of two defense witnesses by use of prior cocaine convictions.

II. Newly Discovered Evidence

Whether a new trial should be granted based on newly discovered evidence is within the district court's discretion, and our review is for an abuse of discretion. *State v. Frank*, 298 N.W.2d 324, 328 (Iowa 1980).

Iowa Code section 822.2(1)(d) (2007) provides for postconviction relief if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." "Newly discovered evidence" means "'evidence of a new and material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause after

the rendition of a verdict or judgment therein.'" *State v. Adamson*, 542 N.W.2d 12, 14 (Iowa Ct. App. 1995) (quoting Black's Law Dictionary 1043 (6th Ed. 1990)). To prevail on a claim of newly discovered evidence, the applicant must show the evidence (1) "was discovered after the verdict," (2) "could not have been discovered earlier in the exercise of due diligence," (3) "is material to the issues in the case and not merely cumulative or impeaching," and (4) "probably would have changed the result of the trial." *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991). A witness's recantation of his or her testimony is viewed with the utmost suspicion. *Carroll v. State*, 466 N.W.2d 269, 273 (Iowa Ct. App. 1990). A district court, therefore, is not required to believe a witness's recantation. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994).

The evidence of the alleged recantation in this case is based on the following facts: In May 2004 Marshall told Peppers's first postconviction counsel in a phone conversation that a knife had not been used at any time during the sexual assault. In August 2005 Marshall testified in a deposition that Peppers threatened her with a knife during the sexual assault. She, however, recanted her testimony that Peppers had stabbed the bed around her on the date of the sexual assault. According to Marshall, the bed had been stabbed a week prior to this incident. At the postconviction relief trial, Marshall testified consistently with her deposition testimony with one exception. According to Marshall, while the bed was cut before the date of the incident, it was also cut on the date of the incident. Michelle Bell, Peppers's friend, testified Marshall had told her in 2001 that the county attorney had tricked her into saying a knife had been involved. In addition, Megan Peppers, Peppers's sister, testified Marshall had told her in 2003

or 2004 she had lied about the knife. Marshall, on the other hand, denied she had made these statements.

The district court found and we agree that although the first and second elements of Peppers's newly discovered claim were met, the third and fourth elements were not. Regarding the third element, the evidence Peppers presents is impeaching and cumulative. Marshall has not recanted any part of her testimony other than how the knife was used, not whether it was used. The statements Marshall allegedly made to others constitute impeachment evidence, which goes to her credibility. Also, Peppers's trial counsel effectively pointed out during his cross-examination of Marshall that she did not mention the use of a knife to the police; therefore, additional testimony by others of Marshall's statements is cumulative.

Regarding the fourth element, Marshall's testimony at trial is not the only basis the jury could rely on to fulfill the elements of the crimes in which Peppers was convicted. Prior to either Peppers's or Marshall's return to the apartment, the police found a knife on the bed where the incident occurred and observed that the bedding had been slashed. Police also found a bent wire hanger in the car. The evidence of Peppers's guilt is fairly characterized as overwhelming.

Finally, the district court found and we agree Marshall's alleged recantation is not credible because Marshall may have been pressured to change her testimony by Peppers's family. We accordingly affirm on this issue.

III. Ineffective Assistance of Counsel

We review constitutional claims based on ineffective assistance of counsel de novo. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

To prevail on ineffective assistance of counsel claims, the applicant has the burden of proving by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, "the [applicant] must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, the applicant must show "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of ineffective assistance of counsel claims if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Even if we assume without deciding trial counsel breached an essential duty in any particular claimed, we are nevertheless required to affirm because Peppers has failed to prove the prejudice element of his ineffective assistance of counsel claims. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. On Peppers's direct appeal, we found the above-mentioned evidence supporting Peppers's convictions was overwhelming. *See State v. Peppers*, No. 00-283

(Iowa Ct. App. July 18, 2001). We reach the same conclusion here and also affirm on this issue.

AFFIRMED.