

IN THE COURT OF APPEALS OF IOWA

No. 9-421 / 08-1057
Filed July 2, 2009

MCKINLEY LUE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Applicant appeals from the district court ruling dismissing his application
for postconviction relief. **AFFIRMED.**

Steven W. Stickle of Stickle Law Firm, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kelly G. Cunningham,
Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Applicant, McKinley Lue, appeals from the district court's ruling denying his petition for postconviction relief. Lue claims the district court erred in finding Lue's trial counsel did not provide ineffective assistance of counsel by (1) failing to object to inadmissible character evidence, (2) failing to object to prior bad acts evidence, and (3) failing to object to overly prejudicial evidence. He also contends the court erred in not finding the cumulative effect the attorney's errors at trial caused prejudice. Lastly, Lue argues the district court should have found Lue's appellate counsel ineffective for failing to challenge the sufficiency of the evidence.

I. BACKGROUND. Lue was charged with delivery of crack cocaine in violation of Iowa Code section 124.401(1)(c) (2003). The evidence at trial showed that officers witnessed what they believed to be an open air drug transaction when they saw a man approach a car in the street, appear to exchange something with the driver, place something in his pocket, and then walk away. One set of officers followed the car as it drove away and another set confronted the man who was on foot, later determined to be Dwayne Bennett. Bennett admitted he had just bought crack cocaine from the man in the car. He told officers he made the purchase from someone named "Tank" and gave them Tank's phone number.

The officers tracking the car followed it as it pulled up to a building. The driver left the car running, went into the building, and appeared to come back out and resume driving five to ten minutes later. The officers who arrested Bennett

contacted those following the car and confirmed a drug transaction occurred. The police stopped the car for a traffic violation, and the driver was identified as the applicant, McKinley Lue. Officers located a cell phone in the car. Officers with Bennett called the phone number for “Tank,” and the phone recovered from the car rung.

A jury found the applicant guilty of delivery of crack cocaine. We affirmed his conviction in *State v. Lue*, No. 04-0542 (Iowa Ct. App. February 24, 2005). The applicant filed a petition for postconviction relief on June 12, 2006, asserting various ineffective-assistance-of-counsel claims. After a trial on the claims, the district court dismissed the petition finding on each claim the applicant either did not prove counsel failed to perform an essential duty, or that any failure caused prejudice.

II. STANDARD OF REVIEW. A denial of postconviction relief is generally reviewed for errors at law. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999); *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995). However, when an applicant claims the denial of constitutional rights, we review de novo in light of the totality of the circumstances and the record before the postconviction court. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009); *Taylor v. State*, 752 N.W.2d 24, 27 (Iowa Ct. App. 2008).

To prevail on a claim of ineffective assistance of counsel, an applicant must prove by a preponderance of evidence that the attorney failed to perform an essential duty and the failure caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Anfinson v.*

State, 758 N.W.2d 496, 499 (Iowa 2008); *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). If an applicant fails to prove prejudice, we can dispose of the claim on that ground alone without deciding whether the applicant's counsel performed deficiently. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

III. ANALYSIS. Lue first contends his trial attorney rendered ineffective assistance by failing to object to testimony indicating Lue was a drug dealer. In questioning an officer, the State inquired about the officer's experience with respect to the use of nicknames by drug dealers. The officer testified that drug dealers tend to use fake names when conducting drug transactions and the police keep track of the nicknames discovered in the course of drug investigations. The officer testified that in the department's database, Lue was linked to the nickname "Tank." Lue contends this testimony was inadmissible character evidence. Lue also contends Bennett's testimony about making previous purchases of crack cocaine from "Tank" was inadmissible because it implied Lue had committed prior bad acts. He asserts the admission of the testimony regarding the use of nicknames and previous drug transactions was in violation of Iowa Rule of Evidence 5.404(b). This section provides:

b. *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b). Lue argues even if the testimony was admissible, it was overly prejudicial and should have been excluded under rule 5.403.¹

The State argues the testimony linking Lue to the nick name “Tank,” and describing previous drug transactions was admissible under rule 5.404(b) to establish identity and the relationship between Bennett and Lue. It also asserts even if this evidence was inadmissible, Lue suffered no prejudice.

Upon our de novo review of the record, we agree that this evidence was admissible under rule 5.404(b) and was not overly prejudicial under rule 5.403. Identifying “Tank” was vital to the case. The officer’s testimony was admissible for this purpose. Bennett’s testimony of arranging prior drug purchases with “Tank” was also admissible for this reason. It showed the relationship between Bennett and Lue and helped prove that Lue knew he was delivering drugs. See *State v. McDaniel*, 265 N.W.2d 917, 921 (Iowa 1978). This case is not like *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994), where the court deemed prior drug dealing activity was irrelevant in a trial for murder, sexual abuse, and kidnapping, and under such circumstances, was unfairly prejudicial. In this case, the testimony about the previous drug purchases is related to the charge disputed at trial. “[T]he state may show a continuous series of occurrences ‘to complete the story of the crime’ although other offenses come to light in the process.” *State v. Walters*, 426 N.W.2d 136, 141 (Iowa 1988) (quoting *State v. Fryer*, 243 N.W.2d

¹ Iowa Rule of Evidence 5.403 states,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1, 6 (Iowa 1976)). The probative value of the testimony is also not substantially outweighed by the danger of unfair prejudice under rule 5.403. Lue's attorney had no duty to object to admissible evidence. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) (“[T]rial counsel has no duty to raise an issue that has no merit”).

We have considered Lue's remaining claims and conclude that he has failed to prove he suffered prejudice due to any alleged errors committed by his trial or appellate counsel. To prove prejudice, Lue must show that absent counsel's errors, there is a reasonable possibility that the trial result would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 143. The State presented strong and direct evidence implicating Lue. Multiple officers witnessed the transaction and the buyer, Bennett, immediately admitted that he made a purchase of crack cocaine from the driver of the car. Lue was identified as the driver of the car and the phone number that Bennett called to arrange the purchase linked to a cell phone in Lue's possession at the time of arrest. Lue has failed to establish he suffered prejudice due any potential error and his claims of ineffective assistance of counsel fail. His application for postconviction relief was correctly dismissed.

AFFIRMED.