

IN THE COURT OF APPEALS OF IOWA

No. 9-681 / 08-1370
Filed October 7, 2009

CREIG SHELTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Plaintiff-Appellee.

Appeal from the Iowa District Court for Hancock County, Colleen D. Weiland, Judge.

Creig Shelton appeals from the district court order denying his application for postconviction relief. **AFFIRMED.**

Rachel Antonuccio and Rockne Cole of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, and Karen R. Kaufman Salic, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Creig Shelton appeals from the district court order denying his application for postconviction relief. He contends the application should have been granted because his appellate counsel was ineffective. He also contends the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to disclose a deal it made to procure witness testimony.

Shelton was convicted of first-degree murder and first-degree robbery in 2002. On direct appeal, his convictions were affirmed. *State v. Shelton*, No. 02-0673 (Iowa Ct. App. Sept. 24, 2003). On December 7, 2006, Shelton filed an application for postconviction relief, alleging his appellate counsel was ineffective in failing to raise (1) the prosecutor's denial of "use immunity" to a potential witness and (2) admission of the DNA evidence over objection. He also alleged the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when it failed to disclose it had granted a "deal" to one of its witnesses in exchange for testimony.

Following a trial, the district court entered its ruling denying Shelton's application for postconviction relief. The court found appellate counsel's failure to raise the issues of "use immunity" and the admission of the DNA evidence was not a breach of an essential duty, but a strategic decision based on sound reasoning and analysis, having concluded neither issue had any merit. The court also found Shelton failed to show the existence of any "deal" between the State and its witness.

Shelton appeals. 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, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

We first address Shelton's claims of ineffective assistance of counsel, which we review de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). A person claiming ineffective assistance of counsel must show (1) counsel breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984). To show prejudice, one must demonstrate counsel's errors were such that they "undermine the confidence in that outcome." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

We conclude appellate counsel was not ineffective in failing to raise the two issues advanced by Shelton. Shelton sought an order directing a codefendant to testify in his trial. The request was denied. In order to succeed on the claim regarding use immunity,¹ Shelton's appellate counsel would have had to show the prosecutor denied the witness immunity to intentionally distort the factfinding process (1) by intimidating or harassing the witness to discourage his testimony, or (2) by refusing to grant immunity solely to keep exculpatory evidence from the jury. *State v. Simpson*, 587 N.W.2d 770, 773 (Iowa 1998).

¹ Use immunity may be granted to compel a witness to give self-incriminating testimony while at the same time prohibiting the use of such testimony in a subsequent prosecution of the witness. *State v. Fox*, 491 N.W.2d 527, 533 (Iowa 1992).

Shelton is unable to show the requisite prosecutorial misconduct to succeed on his claim. Therefore, appellate counsel was not required to raise the issue on direct appeal. *State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (holding trial counsel was not ineffective for failing to pursue a meritless issue).

In order to succeed on a claim the district court erred in admitting DNA evidence because of a flaw in the chain of custody, appellate counsel would have had to show the trial court abused its discretion because there was a reasonable probability tampering, substitution or alteration of evidence occurred. *State v. Biddle*, 652 N.W.2d 191, 196 (Iowa 2002). The evidence in question was inside the victim's home, which had been secured by padlock and locked. When the evidence (drinking glasses, beer cans, and cigarette butts) was retrieved the house was still secured. There is no showing the evidence inside the home had been tampered with or disturbed. Because it had no merit, appellate counsel had no duty to raise the issue.

Finally, we conclude the district court did not err in denying Shelton's claim the State violated *Brady* by failing to disclose information regarding a "deal" in exchange for Joline Johnson's testimony. The court found "Shelton has failed to show that an agreement or deal between the State and Johnson ever existed." The prosecutor denied any such deal was made and the court found Johnson's account to be inconsistent. We find no error.

We affirm the district court's denial of Shelton's application for postconviction relief.

AFFIRMED.