

IN THE COURT OF APPEALS OF IOWA

No. 9-862 / 09-0499
Filed December 17, 2009

JOHN HUGHES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

John Hughes appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Lynn C. H. Poschner of Borseth Law Office, Altoona, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

John Hughes appeals from the denial of his application for postconviction relief. He alleges his trial counsel was ineffective in failing to (1) depose the victim prior to trial, and (2) consult with, retain, and call as a witness an expert in the area of Asperger's Syndrome. He additionally asserts the postconviction court erred in denying the application for postconviction relief because he offered newly discovered exculpatory evidence. Lastly, he asserts his postconviction relief counsel rendered ineffective assistance in failing to (1) depose trial counsel, and (2) present evidence on Asperger's Syndrome. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

I. Background Facts and Proceedings.

On the evening of November 12, 2001, while making a purchase at a Waterloo Kwik Star, Calvin Hastings was approached by Hughes. Hughes asked for marijuana and then for money. Hastings said he did not have any marijuana and did not give Hughes any money. When Hastings left the store, Hughes was waiting outside with another person. Hughes asked Hastings again for marijuana. Hastings again said no. Hughes asked Hastings to come over next to his car to talk. Just trying to be friendly, Hughes followed Hastings to a minivan. There was another man in the minivan. At that point, Hughes grabbed Hastings and screamed "Give me your money." Hastings broke free and was chased by Hughes and the two other men. Hastings tried to get in the back door of the Kwik Star, but it was locked. When Hughes and the two men caught up with Hastings, he was hit in the back of the head, on the cheek, and in the mouth. One of the men said "Get his wallet," and Hastings's wallet was taken from his

back pocket. The three men took off, and Hastings went back into the Kwik Star to report the robbery.

Hughes was convicted of robbery in the second degree pursuant to Iowa Code sections 711.1 and 711.3 (2001). On October 7, 2002, he was sentenced to fifteen years of imprisonment pursuant to sections 902.8, 902.9, and 911.2. The court found Hughes to be an habitual offender, and it sentenced Hughes to serve at least eighty-five percent of the maximum sentence pursuant to sections 902.12 and 903A.2(1)(b). On direct appeal this court affirmed Hughes's conviction and sentence. See *State v. Hughes*, No. 02-1751 (Iowa Ct. App. Oct. 29, 2003).

On June 17, 2004, Hughes filed a pro se application for postconviction relief claiming his trial counsel was ineffective for seven different reasons. Hughes was appointed counsel. The State filed a motion to dismiss. At Hughes's request, he was appointed substitute counsel. On April 27, 2005, the State's motion was heard and was granted in part and denied in part. On March 1, 2007, Hughes's counsel filed a motion to amend the application for postconviction relief "based upon the discovery of a new witness not previously available to testify at court." The motion was granted. Following a March 3, 2009 trial, the district court denied relief on all grounds.

Hughes now appeals, asserting the district court erred in failing to find his trial counsel rendered ineffective assistance, and in failing to grant postconviction relief based on newly discovered evidence. He further asserts his postconviction relief counsel rendered ineffective assistance.

To establish a claim of ineffective assistance of counsel, Hughes must show by a preponderance of the evidence that (1) counsel's performance fell outside the normal range of competency and (2) the deficient performance so prejudiced the defense as to deprive the criminal defendant of a fair trial. *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992). We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984). In order to show prejudice, Hughes must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

II. Ineffective Assistance by Trial Counsel.

On appeal, Hughes claims his trial counsel provided ineffective assistance for the failure to take a pretrial deposition of Hastings, and for failure to consult with, retain, and call an expert witness in the area of Asperger's Syndrome. Hastings, the victim, was not deposed prior to trial. At trial he testified he suffered from Asperger's Syndrome, a mental disorder, but he did not know what it was. No testimony was offered to describe the syndrome or how it might have affected Hastings. On appeal Hughes suggests that had his trial counsel deposed Hastings before trial, it would have been discovered Hastings suffered from a mental disorder and an expert in the field could have been retained and possibly offered evidence at trial regarding Hastings's ability to recall events and identify witnesses. The record is devoid of any information as to the effects of Asperger's Syndrome, or what an expert's testimony may have been. We will not

engage in speculation. Hughes has failed to meet his burden to show he was prejudiced.

III. Newly Discovered Evidence.

Hughes next contends he was entitled to postconviction relief based upon newly discovered evidence. See Iowa Code § 822.2(4) (2003).¹ On August 22, 2002, a hearing was held on Hughes's motion for a new trial and motion in arrest of judgment. At the hearing, Hughes's counsel requested leave to amend the motion for new trial to add an additional ground of exculpatory and newly discovered evidence. He stated:

Today Mr. Hughes told me some information that could be viewed as, at least part of that information, being new-discovered evidence.

What he told me was that an individual last week identified someone for him whom he is maintaining is the person who actually committed the robbery. That he didn't have the identity of that person until then. What I'd like to ask the court to consider is allowing defense leave to amend the motion for new trial and rescheduling it so we can try to locate a witness to call for that and make an evidentiary record in support of it.

The court continued the matter to allow defense counsel to locate and take a deposition of the witness.

On October 7, 2002, hearing was held on Hughes's motions. Defense counsel stated:

[T]he last time that we were here I indicated to the court, the reason the hearing got continued, that Mr. Hughes had told me of information that could be construed as constituting newly-discovered evidence, and in particular, the gravamen of what he told me was that an acquaintance had seen him in the jail and identified the person whom Mr. Hughes believed was the principal in the robbery.

¹ Now renumbered section 822.2(1)(d) (2007).

Now, this gets a little bit involved, but I'm going to try to explain what information I got about that. Mr. Hughes told me that this friend of his had been in the jail and seen someone through a window outside on the street and was able to identify that person by name. And Mr. Hughes indicated that he looked out the window and saw that person and agreed that that was the person who had committed that robbery.

. . . Information I got from Mr. Hughes was that he had the name of this individual whom he says was the principal in the robbery. But not that person's address. . . .

And I'll ask Mr. Hughes if he agrees with me, but I think at this point in time he elects not to pursue that ground and elects not to disclose the name and just simply wants to proceed with the rest of his motion in arrest of judgment, motion for a new trial

At that point, Hughes agreed with his counsel. The court then asked Hughes, "Is it correct that you do not wish to pursue the matter of the possible other perpetrator at this time?" Hughes responded, "Yes."

At the postconviction trial, Hughes testified that at the time of the October 7, 2002 hearing he just knew the witness's name was "L.C." but did not know his last name or address. He further testified that he did not learn of the witness's last name, Johnson, until the witness arrived at the Anamosa prison, sometime in 2006.

Also at the postconviction trial, Hughes offered an affidavit of L.C. Johnson, dated February 15, 2007, which was admitted over the State's objection. The affidavit stated:

It is my personal knowledge and sworn oath that I, LC Johnson pulled up to the Kwik Star on Broadway, and I saw Johnny talking to this white guy. I asked Johnny what was going on he said that the white guy was looking for some weed. I asked did he have some money. Johnny said that he did[.] I told both of them to come around the corner[.] When they came I asked where the money was. That when he gave me the money and I got back into the van drove off and didn't return so he was given nothing in return for the money. Johnny was unaware of what was about to happen."

L.C. Johnson testified at the postconviction trial. He refused to answer questions about the robbery. When questioned about the affidavit, he first said he might have signed the affidavit and then said he did. At first he did not “quite remember” what the affidavit said, and later said he did not remember what was said in the affidavit. He refused to answer any questions about the circumstances surrounding the creation of the affidavit.

Hughes asserts the affidavit is newly discovered evidence warranting postconviction relief under Iowa Code section 822.2. In addressing the issue, the postconviction court concluded Hughes

had ample opportunity to present the testimony of L.C. Johnson prior to his sentencing. [Hughes] chose to waive that right and as such the court finds that the allegation is not available to [Hughes] for post-conviction relief at this time.

We agree. In addition, Hughes has not shown that Johnson could not have been located prior to hearing on his motion for new trial. Also, the admissibility of the affidavit at a new trial is highly questionable, and even if it was admissible, Hughes has not met his burden to show that the affidavit or Johnson’s live testimony would probably have changed the verdict. Johnson refused to confirm the truthfulness of the affidavit, it is not consistent with the facts surrounding the robbery, and it is notable that this affidavit emerged only after the statute of limitations for the robbery had passed.

IV. Ineffective Assistance by Postconviction Counsel.

Hughes claims his postconviction counsel was ineffective for failing to depose or call as witnesses his trial and sentencing attorneys. The crux of this claim appears to be that no evidence was offered below to substantiate Hughes’s

testimony concerning the extent of his information regarding L.C. Johnson's identity at the time of the motion for new trial hearing. This claim is meritless as Hughes waived the issue of Johnson's testimony at the motion for new trial hearing.

Lastly, Hughes claims his postconviction counsel was ineffective for failing to present evidence on Asperger's Syndrome. Hughes has made no showing of what an expert might have said, or whether the testimony would have been helpful to his defense. Hughes has made no showing that Asperger's syndrome would in any way affect the competency of a witness to testify. Without any such a showing, Hughes has failed to meet his burden to establish a reasonable probability that, but for counsel's alleged failings, the result of the trial would have been different. He therefore failed to meet his burden to show he was prejudiced.

V. Disposition.

We affirm the district court's denial of Hughes's application for postconviction relief. Additionally, we find Hughes was not rendered ineffective assistance by his postconviction relief counsel, and we therefore deny his request for a new postconviction relief trial.

AFFIRMED.