UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

THERON TEARLE MONTGOMERY, Petitioner, vs. TERRY MAPES, Respondent.	No. C02-2023-MWB **REPORT AND RECOMMENDATION**

I. INTRODUCTION

On April 17, 2002, Theron Tearle Montgomery ("Montgomery") filed a petition in this court pursuant to 28 U.S.C. § 2254, challenging his conviction for first degree robbery in the Iowa District Court in and for Black Hawk County. (Doc. No. 1) The merits of Montgomery's petition are presented to this court by a brief filed by the respondent Terry Mapes ("Mapes") on November 5, 2002 (Doc. No. 11), and a brief filed by Montgomery on November 29, 2002 (Doc. No. 14).

On November 22, 2002, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition. (Doc. No. 13) The court finds the matter has been fully submitted, and turns to a consideration of the merits of Montgomery's petition.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY IN STATE COURTS OF IOWA

On August 6, 1993, Montgomery was charged with first-degree robbery in a trial information, filed in the Iowa District Court in and for Black Hawk County. Montgomery waived his right to a jury trial, and the case was tried to a district court judge on December 15, 1993. After a two-day trial, the judge issued a written order in which he found Montgomery guilty of first-degree robbery. *See* Order, *State v. Foell*, Case No. FECR043986 (Black Hawk Cty., Mar. 14, 1994) ("March 1994 order") (Doc. No. 15, item 1). Montgomery exhausted all of his state appellate and post-conviction remedies, and then commenced this action in federal court.

In its decision affirming the denial of Montgomery's application for post-conviction relief, the Iowa Court of Appeals described the background facts of the case as follows:

> The Farris Pawn Shop in Waterloo, Iowa was robbed in August of 1993. Bronson Cunningham and Dennis Hofmann were working at the shop at the time. Hofmann was inside the store assisting a customer, Chris O'Connell, and Cunningham was outside working on a soda machine. Cunningham testified he saw three individuals run from a blue University of Northern Iowa (UNI) van which was parked a short distance from the store. He described all three individuals as black males, with handguns, wearing dark clothing, and partially masked. Two of them ran by Cunningham into the shop and the third waved him into the store where all three occupants were forced onto the floor. Duct tape was placed over their eyes and around their hands. They could hear glass breaking and boxes being moved. Hofmann told the robbers how to open the cash register and to get the money out. After approximately ten minutes the front door slammed.
>
> At this point O'Connell got his tape off, ran outside, and saw the UNI van going through the parking lot of a neighboring business, Zephyr Transport, and out onto the

road. O'Connell got into his car and began to chase the UNI van, at which point he saw a police car turn and start to pursue the van so he returned to the pawnshop. Hofmann had got up and pushed an alarm button as soon as the robbers had left. He then got his tape off in time to see O'Connell run outside, and to see the van going around the corner.

Mike Ott, an employee of Zephyr Transport, had seen the UNI van pull up and saw two masked individuals get out, one with a gun, and then a third individual, also with a gun, follow them. He was able to observe they were all three young, black males with black shirts and masks on. Ott also saw another individual in the van who eventually pulled it up to the door of the pawnshop. Ott noted the van's license plate number.

Officer Shoars was dispatched to a possible robbery on the morning in question. He proceeded toward the scene of the robbery and as he approached the vicinity he was flagged down and told that the blue van had just crossed the East 11th Street bridge and headed towards the east side. He turned around and proceeded after the van. He followed, at some distance, until he saw it turn right on Fowler Street where he lost sight of it. Officer Shoars turned onto Fowler Street and proceeded down to the 400-block at which point he saw two black males looking from around the corner of the house at 415 Fowler Street. One had on all dark clothing while the other, who was taller, had on dark pants and a light colored shirt. Shoars testified that when it appeared they thought he had seen them they took off running. Shoars then turned at the end of the block, proceeding north to Courtland Street where he observed one of the same two black males casually walk out and up onto the porch of 420 Courtland and sit down. This individual was later identified as Montgomery. Shoars approached Montgomery and advised him he was investigating a robbery and he fit the description of one of the suspects. Shoars then asked Montgomery to accompany him to his patrol car and back to the pawnshop.

> Approximately, five to ten minutes after the robbery Shoars returned to the pawnshop with Montgomery for a "show-up." Each of the three victims identified Montgomery as one of the robbers. Based on this eyewitness identification Montgomery was charged with robbery in the first degree.

Montgomery v. State, 2001 WL 540126 at *1-*2 (Iowa Ct. App., May 23, 2001). The court presumes these facts to be correct. *See* 28 U.S.C. § 2254(e)(1) (1996).

Montgomery raises two issues in this section 2254 action. First, he claims his trial attorney was ineffective in not moving to exclude from admission into evidence at the trial the show-up evidence from the scene of the robbery, and other identification testimony and circumstantial evidence he claims was linked to him only by the show-up testimony. (*See* Doc. Nos. 1 & 11) Montgomery argues his attorney's ineffectiveness constituted cause and prejudice in connection with his conviction on the robbery charge. Second, he argues his appellate counsel was ineffective in filing a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 13 L. Ed. 2d 493 (1967), in which counsel asserted Montgomery's claim was frivolous and sought to withdraw. Montgomery argues his appellate counsel should have raised and preserved the issue of his trial counsel's ineffectiveness. (*See* Doc. Nos. 1 & 11)

In affirming the denial of Montgomery's application for postconviction relief, the Iowa Court of Appeals noted "counsel is not ineffective for failing to raise meritless issues or to make questionable or meritless objections or motions." *Montgomery*, 2001 WL 540126 at *3 (citing *State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998); *State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984)). The court correctly noted that if Montgomery's attorney failed to exclude admissible evidence, counsel's performance was not deficient. *Id.* (citing *State v. Neal*, 353 N.W.2d 83, 86 (Iowa 1984)).

The Iowa court analyzed the show-up in detail, and concluded the identification procedure was not impermissibly or unnecessarily suggestive, and, based on the totality of the circumstances, there was no substantial likelihood of irreparable misidentification. *See id*. at *4-6. The court therefore found that because Montgomery had "failed to establish by a preponderance of the evidence that the identification procedures were unconstitutional," his attorney could not have been ineffective in failing to file a motion to suppress the identifications. *Id*. at *6. Similarly, because the evidence was admissible, the Iowa court concluded Montgomery could not have been prejudiced by his counsel's failure to seek to exclude the evidence. Because the Iowa court found trial counsel was not ineffective, the court therefore concluded Montgomery's appellate and postconviction relief attorneys also were not ineffective in failing to address the issue. *Id*.

In the present action, Montgomery renews his argument that his trial counsel was ineffective in failing to seek suppression of the show-up evidence, and his appellate counsel was ineffective in failing to raise and preserve the issue of trial counsel's ineffectiveness. The respondent Mapes disagrees. The court now turns to consideration of the issue.

III. DISCUSSION

A. Applicable Law

In considering a claim of ineffective assistance of counsel, the court uses the two-pronged test formulated by the United States Supreme Court in *Strickland v. Washington*:

> *First*, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

> trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Even if the defendant shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* *See Boysiewick v. Schriro*, 179 F.3d

616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

B. Application of the Law to Montgomery's Claims

Applying the above standards to the facts of the present case, the court finds Montgomery has failed to show that he was prejudiced by his counsel's performance. The Iowa Court of Appeals decided the issue base solely on the "cause" prong of the *Strickland* analysis. On the facts of this case, this court is not convinced the appellate court's findings

concerning the validity of the show-up evidence were correct. In fact, Montgomery's arguments to the contrary are persuasive. (*See* Doc. No. 11) However, because the court finds Montgomery has failed to satisfy the "prejudice" prong of the analysis, the court will not address the validity of the show-up evidence further.

In the trial court's written opinion following Montgomery's bench trial, the court found, "[T]he very strong circumstantial evidence [in this case] would be sufficient to establish beyond a reasonable doubt the defendant's participation in this robbery. *This conclusion is reinforced when coupled with the eyewitness identifications that occurred*." March 1994 Order, p. 14 (emphasis added). Thus, the court made a specific finding that even without the show-up evidence, the evidence in the record established Montgomery's guilt beyond a reasonable doubt. Montgomery argues the trial court relied on circumstantial evidence that was only linked to him by the allegedly tainted eyewitness identifications. The court has reviewed the record and the findings of the trial court and can find no such link. Among other factual findings, the trial court pointed to the following circumstantial evidence that was not linked in any way to the show-up identifications (*see id*. at 3-7):

- Mike Ott, an employee at a nearby business, saw three young, adult, black males wearing masks get out of the UNI van and go into Farris Pawn Shop. Ott noted the license plate number of the van
- Mary Wilson lives just around the corner from 415 Fowler in Waterloo, Iowa. At 10:00 a.m. on the morning of the robbery, she saw the blue UNI van pull up in front of her house, and saw four young, black males get out and run. Two of the men ran beside her house and around to the back.
- At about 10:00 a.m., Officer Shoars saw the van, lost sight of it for five to ten seconds, and then saw two black males looking around the corner of the

house at 415 Fowler. When they saw the officer, they started running. Officer Shoars turned at the end of the block and saw one of the two black males "casually walk out and up onto the porch at 420 Courtland and sit down. He identified [Montgomery] as the person he observed and was the same individual he had observed at 415 Fowler." March 1994 Order, at 5.

- Officers Harned and Duggan found a black T-shirt and black Raiders jacket outside the house at 415 Fowler. They found a loaded handgun and glove in the shrubbery at the adjacent house at 419 Fowler. They found another loaded handgun and a second glove, not a mate to the first glove they found, in the backyard area of 413-415 Fowler, toward Mary Wilson's residence.
- In addition to the above, the details of Montgomery's statement to police was not substantiated by the times and locations of his purported whereabouts relative to the time and location where he was picked up by Officer Shoars. *See id.* at 7-9.

As noted by the trial court, these facts present "very strong circumstantial evidence" that was reinforced by the eyewitness identifications. The finder of fact determined the evidence was sufficient to convict Montgomery even without the show-up evidence. Therefore, even if Montgomery's trial counsel was ineffective in not seeking to suppress the evidence of the show-up, it would have made no difference in the outcome of the trial. As a result, Montgomery has failed to show he was prejudiced by his counsel's failure to seek to suppress the show-up evidence, and his claim must fail.

Because Montgomery's trial counsel was not ineffective, Montgomery also cannot show his appellate counsel was ineffective in failing to raise the issue of trial counsel's effectiveness.

The court finds the opinions of the Iowa courts were not contrary to existing Supreme Court precedent, and did not represent an unreasonable application of the law to the facts of the case. The Iowa courts correctly identified *Strickland* as controlling, and analyzed Montgomery's claim properly pursuant to the *Strickland* cause and prejudice analysis. Further, court finds the Iowa courts' determination of the facts in light of the evidence was not unreasonable. Accordingly, the court finds Montgomery's petition for writ of *habeas corpus* should be denied.

IV. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Montgomery has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

V. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[1] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), within ten days of the service of a copy of this Report and Recommendation, that Montgomery's petition be denied.

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[1]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

IT IS SO ORDERED.

DATED this 9th day of February, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT