

**IN THE COURT OF APPEALS OF IOWA**

No. 1-492 / 10-1328  
Filed August 24, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**PAUL JAMES HILL,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Woodbury County, James D. Scott,  
Judge.

Paul James Hill appeals from the judgment and sentence entered on his  
conviction to child endangerment resulting in death. **AFFIRMED IN PART,  
VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney  
General, Patrick Jennings, County Attorney, and Jill Esteves, Assistant County  
Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Danilson, JJ.

**DANILSON, J.**

Paul James Hill appeals from the judgment and sentence entered on his conviction following a jury trial to child endangerment resulting in death, in violation of Iowa Code sections 726.2(1) and 726.6(4) (2009). Hill contends his counsel was ineffective for failing to file a motion to suppress his statements to police on the grounds that his *Miranda* rights were violated and the statements were involuntarily made. Because we do not believe the present record is sufficient to resolve Hill's claim, we preserve his ineffective assistance claim for possible postconviction relief proceedings. However, we vacate the portion of Hill's sentence that requires payment of \$6000 in reimbursable attorney fees and remand for a restitution hearing to set the attorney fee reimbursement in an amount not to exceed \$3600, the maximum fee for a class B felony.

**I. Background Facts and Proceedings.**

On the morning of February 17, 2009, Hill was alone with his four-month-old daughter, T.H., at the Sioux City home he shared with T.H.'s mother, Kayla. Hill called Kayla twice at work around 8:10 a.m. Kayla did not answer, but called him back at 8:14 a.m. Hill said T.H. was gasping for breath. Kayla told him to call 911. Hill called 911 at 8:21 a.m.:

HILL: My four-year-old daughter, she's not—she has a pulse, but she's taking like six seconds or something between breaths and she's not really responding and she's really limp.

OPERATOR: Okay. Do you know what happened to her?

HILL: I don't know. I was putting her in the car seat to go to work, and she was gasping like noise breathing out.

Kayla and her mother arrived home as Hill was talking to the 911 operator. T.H. was on the floor. Firefighters soon arrived and began treating T.H.

Paramedics arrived and transported her to Mercy Medical Center, where she was admitted at 8:40 a.m. She was then life-flighted to the Children's Hospital in Omaha, Nebraska. T.H. was pronounced dead at 3:18 p.m. Her death was the result of lacerations to the mesenteric artery. She also had rib fractures and subdural hemorrhaging.

At approximately 6:00 p.m. that evening, Hill spoke with Sioux City police detectives Ryan Bertrand and Bruce Hokel, as well as Iowa Department of Human Services worker Chantel Rol, in the hospital break room. Detective Bertrand immediately read Hill his *Miranda* rights and asked if he understood those rights. Hill said he understood and agreed to speak to the group.

After some preliminary questions, Hill described his morning with T.H. After he got himself ready for work, Hill picked T.H. up from her bassinet and changed her diaper. Her stool was liquidy, but she was not fussy. While changing her diaper, Hill noticed "a big bruise" on T.H.'s stomach. Hill stated, "[S]he's making this like crying face, but she's not crying. And it seemed like she was breathing okay." Hill continued to explain:

[S]he was—her head was going back and forth like this and—well, I picked her up. She kind of took a deep breath. And when I laid her, I held her like this [on his shoulder with her head up] and . . . grabbed the car seat, put it on the table. And when I laid her down, she did a gasp like [imitating], like that. And, wow, that's kind of—she's never done that before. I was like—kind of messed around with her a little bit. She kind of was looking around, bobbing her head back and forth. And when I took her out, she was limp. Then she started kind of losing color in her lips. And that's when I laid her on the couch. And from there I don't know why I tried calling Kayla again. It wouldn't pick up. And then she called.

Detectives Bertrand and Hokel told Hill his version of the events did not coincide with what the doctors were saying had happened to T.H. At that time,

doctors believed T.H.'s spleen had been injured. The detectives pressed Hill to tell the truth and often asked questions together. The manner of the questioning was hostile, intimidating, and demanding. Hill maintained he did not do anything, but also stated that no one else could have been responsible for T.H.'s injuries. He repeatedly denied hurting the child.

After approximately four and a half hours, Hill admitted his involvement in T.H.'s injuries and death. He stated that he had gotten frustrated with T.H.'s snowsuit that "was too bulky" and the carseat that "wouldn't buckle," and admitted he might have hit or pushed too hard on T.H. while he was trying to buckle her in the car seat. He explained that as he was trying to buckle the car seat, he "grabbed it, and it was—I don't think I did it too hard, but I just did it real quick." He later admitted that "frustration" hit him for a "split second" and he "definitely did it too hard . . . [t]here's no maybes about it." He also said he "freaked out" afterwards and may have shaken T.H. to try to revive her. Hill insisted he was not mad at T.H. and had not purposely tried to hurt her. He asked detectives what was going to happen to him and how long he was going to go to prison. He apologized for not admitting what had happened earlier and explained that he "never really thought till you mentioned the car seat. It hit me. I was just scared. Did you go tell my parents?"

The next day, Dr. Thomas Carroll, the county medical examiner, performed an autopsy on T.H. Dr. Carroll observed three bruises on T.H.'s abdomen. When he opened T.H.'s abdomen, he discovered a large volume of blood and two lacerations to T.H.'s mesentery. Dr. Carroll opined the injuries were the result of blunt force trauma by "some instrument or fist" to T.H. An x-ray

indicated several rib fractures, which Dr. Carroll determined occurred several days prior to T.H.'s death. Finally, Dr. Carroll observed a severe, closed-head injury to T.H.'s brain, which he opined occurred at the same time as the mesentery injuries. Dr. Carroll opined T.H.'s death was caused by the laceration to her abdomen, an inflicted injury. However, he further stated T.H. could have died from the closed-head injury alone. Dr. Carroll stated the manner of T.H.'s death was homicide, and "she died from inflicted injury."

The State charged Hill with child endangerment resulting in death (Count I) and multiple counts of child endangerment (Count II). Following an eight-day bench trial, the district court found Hill guilty of child endangerment resulting in death and acquitted him of the offense of multiple counts of child endangerment. Hill now appeals.

## **II. Ineffective Assistance of Counsel.**

Hill argues his counsel was ineffective in failing to file a motion to suppress or object at trial in regard to his statements to officers. Hill bases his claim of ineffective assistance of counsel on two grounds: (1) his statements were made after he invoked his right to remain silent and (2) his statements were involuntary.

To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). The applicant must overcome a strong presumption of counsel's competence.

*Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); see also *Cullen v. Pinholster*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 1388, 1404, 179 L. Ed. 2d 557, 560-61 (2011).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearnse*, 748 N.W.2d 211, 214 (Iowa 2008). We prefer to allow the parties to explore the matter in postconviction relief proceedings. *Id.*; *State v. McCoy*, 692 N.W.2d 6, 14 (Iowa 2005) (“Our reason for not deciding such claims on direct appeal is because trial counsel has not had the opportunity to respond to the claim.”). Those proceedings allow an adequate record of the claim to be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims and explain his or her conduct, strategies, and tactical decisions. *Bearnse*, 748 N.W.2d at 214; *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). If we determine the claim cannot be addressed on appeal, we must preserve it for a possible postconviction relief proceeding. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Here, we are unable to analyze Hill’s claims<sup>1</sup> because no record has been made concerning the reasonableness of defense counsel’s tactical decisions or strategy, if any, for not filing a motion to suppress Hill’s statements. See, e.g., *McCoy*, 692 N.W.2d at 14 (finding record sufficient to address defendant’s claim

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<sup>1</sup> Specifically, Hill claims he invoked his right to remain silent several hours into the interrogation when he stated: “I don’t want to be here anymore,” “I want to leave,” “I want to go,” and “I’m done. I want to go.” Hill argues that because Detectives Bertrand and Hokel did not immediately end the interrogation after these statements, his Fifth Amendment right to silence was not scrupulously honored.

Hill further contends his later incriminating statements were involuntary, because the admissions followed the detectives advising him that if he could explain what happened to the child, and if his explanation “matched the facts,” then he would have “a future.” He argues the detective’s statements contained implied promises of leniency and rendered his confession involuntary and inadmissible.

of counsel's ineffectiveness in failing to file motion to suppress only after a hearing before the district court on the defendant's claim). As our supreme court has observed:

We have said we should not decide a claim such as is made here without an adequate factual basis to support it. There are cases when incompetency is so glaring that we are justified in saying so upon an examination of the record. Ordinarily, we should be slow to do so on what amounts to an ex parte hearing . . . .

This holding is without prejudice to [the defendant's] right to raise this issue by application for postconviction relief, where a full evidentiary hearing may be had and where counsel will have an opportunity to respond to defendant's charges.

*State v. Tejada*, 677 N.W.2d 744, 753 (Iowa 2004) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)). Following this reasoning, we decline Hill's invitation, at this juncture, to conclude no possible tactic or strategy could exist to explain defense counsel's actions (or inactions) in this case.

### **III. Reimbursement of Attorney Fees.**

Hill also contends the district court imposed an illegal sentence by ordering him to pay reimbursement of \$6000 in attorney fees, an amount exceeding the legal limit for a class B felony. See Iowa Code § 815.4; Iowa Admin. Code r. 493-12.6(1). The State agrees and concedes the court should have required Hill to pay \$3600, the statutory limit for a class B felony. We therefore vacate the portion of Hill's sentence that requires payment of \$6000 in reimbursable attorney fees and remand for a restitution hearing to set the attorney fee reimbursement in an amount not to exceed \$3600.

### **IV. Disposition.**

We preserve Hill's ineffective assistance of counsel claim for possible postconviction proceedings. We vacate the portion of Hill's sentence concerning

the amount of the reimbursable attorney fees and remand for a restitution hearing.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**