

**IN THE COURT OF APPEALS OF IOWA**

No. 2-929 / 11-1906  
Filed January 9, 2013

**BRYON LYNN GAMBLE,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Story County, Timothy J. Finn,  
Judge.

Applicant appeals the district court decision denying his request for  
postconviction relief from his conviction for second-degree sexual abuse.

**AFFIRMED.**

Duane M. Huffer of Huffer Law, P.L.C., Story City, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney  
General, Stephen Holmes, County Attorney, and Paul G. Crawford, Assistant  
County Attorney, for appellee State.

Considered by Mullins, P.J., Bower, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**HUITINK, S.J.****I. Background Facts & Proceedings.**

Bryon Gamble was charged with six counts of sexual abuse in the second degree and one count of dissemination and exhibition of obscene material to a minor. Gamble was at that time living with a woman, and the victim of all of the offenses was the woman's ten-year-old daughter.

Pursuant to a plea agreement, Gamble entered a guilty plea to one count of second-degree sexual abuse, in violation of Iowa Code section 709.3(2) (2007). He was sentenced to a term of imprisonment not to exceed twenty-five years. He was also ordered to serve a special sentence pursuant to section 903B.1. Gamble's direct appeal was dismissed as frivolous under Iowa Rule of Appellate Procedure 6.1005.

On February 16, 2010, Gamble filed an application for postconviction relief, claiming he had received ineffective assistance of counsel and the State had engaged in prosecutorial misconduct. After a hearing, the district court denied his request for postconviction relief, finding his arguments were without merit. Gamble appeals the decision denying his request for postconviction relief.

**II. Ineffective Assistance.**

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing

reasonable trial strategy.” *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, Gamble must show that, but for counsel’s breach of duty, he would not have pleaded guilty. *Ennenga*, 812 N.W.2d at 708.

**A.** Gamble contends his defense counsel did not effectively review the evidence against him. He claims, although he and defense counsel reviewed a videotape of the victim’s statements about Gamble’s sexual activities with her, defense counsel never saw drawings the child made or a medical report.<sup>1</sup> Although the record indicates counsel was not aware of the items mentioned, there is testimony indicating counsel carefully reviewed the minutes of testimony, including a police report detailing the results of the victim’s medical evaluation and drawings made by the victim.

**B.** Gamble also asserts his defense counsel pressured him to plead guilty because she was planning on changing jobs and wanted to close up his file.<sup>2</sup> As the district court found, there was no evidence to support Gamble’s assertions other than his own “unsupported statements, suspicions, and innuendo.” We agree with the court’s conclusion there is no evidence defense counsel pressured Gamble into pleading guilty.

**C.** Gamble additionally claims defense counsel should have done more to determine his level of understanding about the criminal proceedings. He claims his plea was not voluntary because his medication for depression clouded his

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<sup>1</sup> The evidence additionally included a laboratory report that showed the DNA of Gamble and/or the mother on certain items but not the DNA of the victim.

<sup>2</sup> The evidence shows that on January 24, 2008, defense counsel informed the other members of her firm that she was leaving as of July 31, 2008. Gamble hired her to defend him around January 24, 2008. Gamble entered his guilty plea on February 29, 2008, and was sentenced that same day. Defense counsel stated she learned of an opening in early March 2008, and on March 13, 2008, she sent her resume to the entity where she was eventually hired.

thinking. He also points to his limited education and resulting inability to understand the nature of the plea proceedings.

Defense counsel testified she had represented Gamble in other proceedings, she was aware of his level of education, and prior to the guilty plea she discussed his rights and the possible sentence he was facing. She stated she had no indication Gamble had difficulty understanding what she was telling him. We conclude Gamble has failed to show his defense counsel should have done more to determine whether he understood the criminal proceedings. There is no credible evidence to show he was unable to understand them. Contrary to Gamble's claims, counsel did not breach any essential duty in this respect.

**D.** Gamble further claims defense counsel misadvised him about the special sentence under section 903B.1 because he was informed by the court he would be on parole for the rest of his life after his regular sentence was completed. On appeal, he contends under this section he could actually be on parole or work release and asserts defense counsel should have corrected this mistake.

Gamble's claims are based on section 903B.1 as amended in 2009. See 2009 Iowa Acts ch. 119, § 59. Gamble was sentenced on February 29, 2008, long before the language he now complains about relating to "work release" was added to the section. At the time of his guilty plea and sentencing, the court, the prosecutor, and defense counsel did not have an obligation to inform Gamble he could be placed on work release, because at the time he was sentenced the statute did not contain that language.

Gamble has, for the foregoing reasons, failed to establish his trial counsel was ineffective.

### **III. Prosecutorial Misconduct.**

Gamble claims he was denied due process based on prosecutorial misconduct. Our review of constitutional claims is de novo. *State v. Musser*, 721 N.W.2d 734, 741 (Iowa 2006). In order to prevail, defendant must show misconduct and that the misconduct resulted in prejudice to such an extent that he was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

**A.** Gamble claims the prosecutor engaged in misconduct under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by withholding exculpatory evidence. See *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003) (noting a failure by the State to disclose evidence violates due process). He contends the prosecutor improperly did not give defense counsel a copy of the medical report from the physical examination of the victim or the drawings made by the victim.

In order to establish a *Brady* violation, a defendant must show (1) evidence was withheld from the defendant; (2) the evidence was favorable; and (3) the evidence was material, such that there is a reasonable probability its disclosure would have changed the outcome of the case. *Aguilera v. State*, 807 N.W.2d 249, 252 (Iowa 2011); *State v. Tangie*, 616 N.W.2d 564, 571 (Iowa 2000). Gamble has the burden to show the materiality of the withheld evidence. See *Mark v. State*, 568 N.W.2d 820, 822 (Iowa Ct. App. 1997).

We first note there was no evidence the drawings were favorable to Gamble or were material. The victim drew a picture of Gamble's penis, showing it was curved. The victim's mother, who had been engaged in a relationship with

Gamble, confirmed he had a curved penis. Even if the prosecutor had improperly withheld the drawing from defense counsel, there is nothing to show the disclosure of the drawing would have changed the outcome of the case.

Also, concerning the medical report, Gamble has not shown the evidence was material, such that if it had been given to defense counsel, the result of the proceeding would have been different. It is clear defense counsel was aware of the result of the physical examination. “Exculpatory evidence is not ‘suppressed’ if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence.” *Aguilera*, 807 N.W.2d at 252-53 (citing *Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988)). Gamble has not shown prosecutorial misconduct based on a *Brady* violation.

**B.** Gamble again claims he was misadvised about the special sentence by the court and claims the prosecutor should have corrected the court’s misstatement. Gamble’s claims about the special sentence are not supported by the language of that statute at the time he was sentenced.

#### **IV. Bias of Court.**

Finally, Gamble claims the postconviction court was not impartial. Iowa Code of Judicial Conduct rule 51:2.2 provides, “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Rule 51:2.3 also provides that a judge should act “without bias or prejudice.”

Gamble’s complaints relate to the postconviction proceedings and do not allege any outside influence that would create bias. “Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor.” *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). “Judicial predilection

or an attitude of mind resulting from the facts learned by the judge from the judge's participation in the case is not a disqualifying factor." *Id.* Gamble has not shown the court was improperly biased in this case.

We affirm the decision of the district court denying Gamble's request for postconviction relief.

**AFFIRMED.**