IN THE COURT OF APPEALS OF IOWA

No. 3-576 / 12-1206
Filed September 18, 2013

JONAS ALEXANDER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Jonas Alexander appeals the district court ruling denying his application for postconviction relief. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Gerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Jonas Alexander appeals the district court ruling denying his application for postconviction relief. Alexander argues he was entitled to a spoliation inference due to the destruction of video tapes showing his interrogation and confession, and his trial counsel was ineffective for failing to file a motion to suppress. Because Alexander cannot show either the videotapes were destroyed intentionally or there were any valid grounds to suppress his confession, we affirm.

I. Background Facts and Proceedings

Jonas Alexander was charged with robbery in the first degree, burglary in the first degree, felon in possession of a firearm, and two counts of forgery. Alexander reached a favorable plea agreement with the State and was sentenced to consecutive terms of imprisonment. The crimes occurred as follows: On May 4, 2004, Alexander posed as a flower delivery person at the home of Jane Martin. After Martin opened the door to her home, Alexander displayed a handgun and threatened to shoot Martin and her pet. An accomplice was allowed to enter the home from the rear. Alexander and the accomplice stole various items from Martin's home including checks. The checks turned up at a local casino the next day when three individual—including Alexander—while under surveillance, attempted to cash one of the checks. One of the three individuals, Julie Thompson, was arrested and informed police she had been recruited to commit the crimes by Alexander and his girlfriend, Rebecca Tracy,

who also appeared on the casino surveillance recording. Police later located Alexander, Tracy, and a silver handgun

Tracy was interviewed by the police. She identified Alexander as the individual who had posed as a flower delivery person and who had used the handgun. Tracy admitted she entered the victim's home from the rear and stole various items including the checks.

Alexander was interviewed and agreed with Tracy's statement to police. He contends, however, the police officer induced him to confess by promising to help him if he admitted his involvement in the crimes. Police also interviewed James Ochoa, who acknowledged acting as a lookout, driving the getaway car, and planning the crimes.

Christine Dalton[1] was appointed as Alexander's trial counsel.[2] Dalton reviewed the surveillance videos, which depicted Alexander at the casino with Tracy, and the expected testimony of the other co-conspirators. Dalton also viewed Alexander's taped confession and viewed it a second time with him. She did not believe there was any legal theory upon which the tapes could be suppressed. Dalton suggested Alexander accept a plea bargain which could reduce his sentence. Alexander pleaded guilty and was sentenced to a term of imprisonment not to exceed fifty years. He did not appeal.

Alexander filed his first application for postconviction relief, pro se, in November 2005. In it, he raised two grounds. First, he argued the consecutive

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[1] Christine Dalton was appointed to the bench in November 2006. For purposes of clarity and to avoid confusion, Judge Dalton will be referred to as "Dalton," in the opinion.

[2] Dalton represented Alexander in a murder trial in which he was acquitted. The murder trial was completed before Alexander pleaded guilty in this matter.

sentences imposed were unconstitutional. Second, he argued vindictiveness on the part of the prosecutor. Shortly thereafter, Dalton sent Alexander a letter that drew attention to two recent appellate court cases in which the police officer who questioned Alexander was found to have improperly obtained confessions by promises of leniency.

On August 20, 2007, Alexander sent his postconviction relief counsel, Jack Dusthimer, a letter concerning several issues he wished to address within the framework of the ineffective-assistance-of-counsel claim, including references to the videotaped confessions. The case was scheduled for trial on July 3, 2008. On the trial date an unreported motion to continue was granted at Alexander's request. On July 7, 2008, Dusthimer sent Alexander a letter containing an amended application addressing the issue of promissory leniency. The videotapes were destroyed on October 8, 2008. The amended application was filed pro se on January 13, 2009. Alexander filed a request for production of the tapes on January 13, 2009 and a request to compel discovery on March 30, 2009. The motion was never ruled upon because Alexander's counsel informed the court the discovery dispute was being resolved.

The postconviction relief trial was held on June 4, 2010. Alexander described his impression of the interrogation, including the promises of leniency. The application was denied and Alexander appealed. Several days later Alexander filed a pro se motion for new trial. Our supreme court remanded the case for consideration of the motion and the district court granted a new trial only on the issue of ineffective assistance of counsel. Alexander then retained his

current counsel, Steven Drahozal, who filed a motion for discovery sanctions based upon the missing tapes. The motion was denied.

The second trial was held on March 9, 2012. Dalton testified she had viewed the tapes and did not believe there was a legal basis upon which to file a motion to suppress. Dusthimer testified he did not remember whether the tapes were discussed in July 2008. Alexander testified once again about his recollection of the interrogation including promises of leniency.

The district court denied the application on April 5, 2012. Alexander filed a motion to enlarge or amend on the issue of spoliation, which was denied on June 14, 2012.

Alexander filed his notice of appeal on June 26, 2012. [3]

II. Standard of Review

Applications for postconviction relief are reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). Applications which present the issue of ineffective assistance of counsel, however, raise constitutional issues and are reviewed de novo. *Id.*

III. Discussion

Alexander argues his trial counsel was ineffective for not seeking to suppress his confession because of promissory leniency. Complicating this argument is the destruction of the tapes, which prohibits our review. Without the tapes we are unable to determine whether filing a motion to suppress would have

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[3] The Innocence Project of Iowa, represented by Kent A. Simmons, filed an amicus curiae brief in support of Alexander's application and appeal. In it, the Innocence Project advocates for changes in our preservation of evidence laws.

been proper or whether counsel was ineffective for failing to file the motion. Recognizing this difficulty, Alexander asks us to use the doctrine of spoliation to create an inference the tapes were harmful to the State's case.

A. Spoliation

The spoliation doctrine allows the finder of fact to infer, based upon the State's destruction of evidence; the evidence would have been adverse to the State's position. *See State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). "This inference is based on the rationale that a party's destruction of evidence is an admission by conduct of the weakness of [that party's] case." *Id.* Because the inference is based upon conduct, the destruction must be intentional. *See State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979). Our supreme court has cautioned that the inference should be used "prudently and sparingly" and only when the circumstances give rise to a common sense observation that the "evidence would have been unfavorable to the party." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 720 (Iowa 2001).

To employ the spoliation inference, Alexander must show: (1) the evidence once existed, (2) the evidence was possessed or controlled by the party responsible for its destruction, (3) the evidence would have been admissible at his trial, and (4) the evidence was destroyed intentionally. *See Hartsfield*, 681 N.W.2d at 630. The State does not dispute the first three elements. The only issue before us today is whether the evidence was destroyed intentionally.

Alexander made his first request for production of the tapes in January 2009, after the evidence had been destroyed. The State cannot be held responsible for destruction of evidence that was not requested. No party is required to hold evidence indefinitely. *See Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 491 (Iowa 2000). Though Alexander argues he requested the tapes in July 2008, we disagree. The July 3, 2008 hearing was not reported, so we unable to determine whether the tapes were discussed on that day. Alexander's counsel had no recollection of the matter, and Alexander's self-serving testimony is not convincing. Though the amended application Alexander later received from his counsel indicates some reference to the tapes, that standing alone is insufficient to conclude the State was aware the tapes would be needed for the postconviction relief case. The district court was not required to infer spoliation in this case.[4]

B. Ineffective Assistance

Alexander argues his trial counsel was ineffective for failing to file a motion to suppress the videotaped confession on the grounds of promissory leniency. He also argues the confession should have been suppressed because the confession was obtained after he invoked his right to counsel.

To succeed on a claim of ineffective-assistance-of-counsel, Alexander must show both ineffective assistance of counsel and prejudice by a preponderance of the evidence. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The ineffective assistance prong is established by showing counsel

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[4] Spoliation most often results in an instruction to the jury which may, but is not required to, apply the inference. *See Hartsfield*, 681 N.W.2d at 630

performed at a level that effectively denied the defendant the assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We presume counsel has performed effectively and avoid second-guessing. *Ledezma*, 626 N.W.2d at 142. The prejudice prong requires Alexander to demonstrate a reasonable probability the proceedings would have been different but for counsel's ineffective performance. *Id*. at 143. When the defendant has entered a guilty plea to the charges and later claims ineffective assistance of counsel, the prejudice prong requires a demonstration the defendant would not have pleaded guilty. *State v. Straw*, 709 N.W.2d 128, 137–38 (Iowa 2006). Cursory claims of prejudice from the defendant that he would have gone to trial but for the ineffective assistance of counsel are insufficient. *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002).

On each of Alexander's claims, we find insufficient evidence to sustain his claim. He has failed to provide credible evidence he was questioned despite having asked for counsel or that he was induced to confess by promises of leniency.[5] Like the district court, we place substantial weight on the testimony of Dalton, who viewed the tapes twice, including once with Alexander, considered their contents, and determined there was no legal theory upon which to file a motion to suppress. This is not a case where counsel failed to consider the possibility of a motion to suppress. *See, e.g., State v. McCoy*, 692 N.W.2d 6, 27

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[5] Alexander asks us to give greater weight to his testimony because the questioning officer in this case had been found, on at least two separate occasions, to have performed improperly during a custodial interrogation. *See State v. McCoy*, 692 N.W.2d 6, 27 (Iowa 2005); *State v Dennis*, No. 04-1614, 2006 WL 126794 (Iowa Ct. App. Jan. 19, 2006). Though these cases do establish past mistakes by a particular officer, they do not support an inference the office has performed improperly in all interrogations.

(Iowa 2005). Rather, counsel, who we presume acted competently, considered the evidence and law and reached a valid conclusion.

AFFIRMED.