IN THE COURT OF APPEALS OF IOWA

No. 8-649 / 07-0048
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL LEE BELL, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

Michael Bell appeals from the judgment and sentence entered upon his convictions of first-degree harassment and domestic assault. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Salvner, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

A jury convicted Michael Bell of harassment in the first degree and domestic abuse assault after a trial on November 27 and 28, 2006. The State presented the testimony of two police officers and the complaining witness. Two eyewitnesses who had been subpoenaed by the State did not come to court. Bell was the only defense witness.

The evidence showed that Bell and Leticia Hall began a relationship in July 2006. Shortly thereafter, Bell moved into Hall's Des Moines duplex, which Hall shared with three other adults: Steven Culler, Jennifer Boylan, and Culler's mother, Cynthia.[1] On the night of September 19, 2006, Hall drove Bell to the store to buy beer around 5:00 p.m. They returned to the residence, where Bell and the roommates consumed the beer.

The witnesses disagree on the sequence of events that followed. Hall claims that around 9:00 p.m. Bell demanded that Hall drive him to get marijuana or more alcohol. Hall testified that when she refused, Bell threatened to retrieve his gun and shoot everyone in the duplex. Hall also asserts that Bell hid her purse and car keys. Bell then pinned her arms behind her, forced her to the floor, and put her in a headlock. While all of the roommates argued, Hall claims that she went upstairs to her room. After about an hour, she called the police.

Bell's version of the facts is quite different. He claims that around 10:00 p.m. his roommates told him to ask Hall to take him to buy more alcohol for them. When he asked, Hall refused. Bell asserts that his roommates then wanted him

[1] Hall's six-year-old son, and Boylan and Culler's two children also lived in the duplex.

to force Hall to give them a ride to get alcohol, and when he was unwilling to do so, a verbal argument ensued between Bell, Boylan, Culler, and Culler's mother. Bell testified that Boylan went upstairs to talk to Hall, who then called the police. Bell denied that he made any threats or acted in a physically aggressive manner.

Two police officers, Mann and Newman, responded to Hall's call. As the officers approached the duplex, they could hear a "loud verbal argument" inside. Officer Mann testified that the scene inside the duplex was "rather chaotic." One of the residents told Mann that Bell had a gun. Mann testified that Hall informed him that Bell had assaulted her. According to Mann, the other residents said Bell had threatened them.

Bell was charged with domestic assault causing bodily injury in violation of Iowa Code section 708.2A (2005) and first-degree harassment in violation of Iowa Code section 708.7(2). The jury convicted Bell of first-degree harassment and the lesser included offense of domestic assault. The court sentenced him immediately after the verdict was returned.

When Bell was released from jail the following month, two of his roommates, Boylan and Culler, told him they had given the prosecutor exculpatory information the morning of trial. Boylan and Culler both signed an affidavit dated December 28, 2006, stating that Boylan had called prosecutor Mike Salvner on the morning of November 27, 2006. According to the affidavit, on that morning Boylan told the prosecutor she was unable to appear in court in compliance with her subpoena. The affidavit also stated that Boylan told the prosecutor that Bell had not threatened them the night of his arrest nor did they witness any assault on Hall. The affidavit further stated that Salvner responded

to this information by telling Boylan that she and Culler did not need to come to court to testify. The affidavit was attached to Bell's notice of appeal.

The Iowa Supreme Court granted Bell's unresisted motion for a limited remand to the district court so that a record could be created on any potential claim arising from the affidavit. After hearing on July 18, 2007, the district court found that Salvner's actions did not constitute prosecutorial misconduct. Bell now appeals from his conviction and sentencing, arguing that the prosecution engaged in misconduct by withholding material evidence in the form of Boylan and Culler's exculpatory statements, in violation of *Brady*.[2] Bell also argues that his counsel was ineffective for failing to interview Boylan and Culler or file a discovery motion before trial.

II. Standard of Review

Because Bell's claim involves his constitutional right to due process, our review of the district court's ruling on the asserted *Brady* violation is de novo. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

The right to effective assistance of counsel is also a constitutional right, and therefore we review ineffective assistance of counsel claims de novo as well. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

"[T]he court's findings on credibility of the witnesses are entitled to considerable deference." *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994).

[2] The United States Supreme Court held in *Brady v. Maryland* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218.

III. *Brady* Violation

Bell first argues that the prosecutor suppressed exculpatory evidence material to the issue of his guilt in violation of *Brady*. To establish a *Brady* violation, Bell must prove: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt. *Harrington*, 659 N.W.2d at 521-22. We find that the record does not support Bell's claim that Boylan communicated exculpatory evidence to Salvner. The purpose of *Brady* is to "assure that the defendant will not be denied access to exculpatory evidence only known to the Government." *United States v. LeRoy*, 687 F.2d 610, 619 (2nd Cir. 1982). *Brady* does not stand for the proposition that the State must "supply a defendant with all the evidence in [its] possession which might conceivably assist the preparation of his defense." *Id.*

The record made at the remand hearing included the testimony of Boylan and Culler and the prosecutor's professional statement. The testimony of Boylan and Culler differed from their affidavit. After hearing the evidence, the district court was convinced that Boylan's testimony about the date on which she spoke to the prosecutor was not credible and that she had not given the prosecutor exculpatory information.

Boylan testified that she began calling the prosecutor the morning of trial to say that she could not come to court because she and her children were facing eviction proceedings. Boylan further testified that she talked to Salvner that same day and told him, "I hadn't really seen anything because what [Hall] said had happened, [Hall] said it happened upstairs, which I don't believe her, but I

didn't see anything really. So [Salvner] said I didn't need to be there." Culler testified that his information about the phone conversation came from Boylan.

Salvner acknowledged a phone conversation with Boylan, which he contended took place after the case was submitted to the jury on November 28, 2006. However, Salvner's professional statement to the district court did not directly contradict Boylan's account of the phone conversation. Salvner's recollection of the phone call with Boylan was, "I don't believe anything she told me on the telephone was exculpatory whatsoever." Salvner stated that Boylan did not deny that any of the alleged acts had occurred. Salvner told the court that "everything Boylan told [him] on the phone [was] consistent with the police reports." Salvner further stated his understanding was that, as Bell's friend, Boylan did not want to be involved and she was worried about the consequences of failing to appear on her subpoena. Salvner did not report the phone conversation to defense counsel.

The essence of Boylan's testimony at the remand hearing was that she told the prosecutor that she did not see anything that happened upstairs, and that she would not believe the testimony of the complaining witness, Hall. The incident took place downstairs, where Boylan and Bell both were located, according to testimony at trial. Boylan's opinion as to the veracity of Hall was not material to Bell's guilt or innocence. The district court found that Boylan "did not provide any exculpatory evidence favorable to the Defendant." We agree that Boylan's statements to the prosecutor on the phone did not meet the requirements that they were both favorable to Bell and material to the issue of his

guilt. We find that Bell did not show that the prosecutor suppressed exculpatory evidence.

IV. Ineffective Assistance of Counsel

Bell claims that his counsel was ineffective for failing to investigate and for failing to file a motion for discovery. To prevail on a claim of ineffective assistance, Bell must prove that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In order to establish the first element of the test, Bell must show that his counsel did not act as a "reasonably competent practitioner" would have with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Id*.; *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). To satisfy the second element of the test, Bell must show that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Simmons*, 714 N.W.2d at 276. Courts are encouraged to dispose of an ineffective assistance claim under the second prong of the test when possible. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa Ct. App. 1987).

We find that prejudice did not result from counsel's failure to investigate or file a motion for discovery. Because we found the evidence at issue was not exculpatory, it would not have changed the result of the proceeding. Therefore, there is no need to evaluate the first prong of the test for ineffective assistance because we conclude no prejudice resulted. Accordingly, we affirm the district court.

AFFIRMED.