IN THE COURT OF APPEALS OF IOWA

No. 2-286 / 10-0775
Filed July 25, 2012

WILLIAM JOSEPH PINEGAR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Appeal from the denial of postconviction relief and from the ruling on admission of juror affidavits. **AFFIRMED.**

Marc Elcock of Elcock Law Firm, P.L.C., Osceola, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

William Pinegar appeals from the district court ruling denying his application for postconviction relief and from the ruling on admission of juror affidavits. He contends the court erred in not finding his trial attorney was ineffective and in ruling the juror affidavits were inadmissible. We affirm.

I. Background Facts and Proceedings.

> On January 19, 2004, Polk County Deputy Sheriff Cass Bollman attempted to stop a vehicle driven by Pinegar for speeding. According to Bollman's version, he initially activated his lights and later his siren in an effort to stop Pinegar's vehicle. Bollman testified he pursued Pinegar after Pinegar failed to stop and in the course of the pursuit Pinegar ran stop signs, red lights, and drove at speeds in excess of the posted speed limits. Pinegar's vehicle eventually collided with another vehicle, drove through a fence, struck a tree, and came to rest on its passenger side. Melissa Sayles, a passenger in Pinegar's vehicle, was ejected from the vehicle and died of resulting head injuries. Police officers found a semi-automatic pistol near her body. Troy McDaniels, another passenger in Pinegar's vehicle, was also injured.
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> Pinegar told investigators he used methamphetamine and marijuana earlier that day. A subsequent blood test confirmed the presence of both substances, as well as amphetamines, in his system.
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> Pinegar and McDaniels told investigators that Sayles had also used methamphetamine that day. They also told investigators that Sayles told Pinegar not to stop because the vehicle was stolen and threatened Pinegar with a pistol if he refused to comply. Although McDaniels initially told investigators he did not see the pistol or hear any shots fired, he testified Sayles fired the pistol out of the window in the course of the pursuit. Bollman testified he did not see or hear any gunshots from Pinegar's vehicle during the pursuit.
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> After Pinegar's trial, trial counsel discovered for the first time that State's exhibit 37, a woman's style wallet that was admitted into evidence, contained two notes apparently written by Sayles to "Billy." Testimony at trial revealed Pinegar and Sayles had an on-again-off-again romantic relationship. Pinegar's trial counsel obtained affidavits from two jurors indicating the jurors had discovered the notes, discussed them during deliberations, and at

> least one juror commented that Sayles would not have held a gun to the head of someone she loved.

State v. Pinegar, No. 06-0258, 2007 WL 4321968, at *1-2 (Iowa Ct. App. Dec. 12, 2007).

In 2008 Pinegar filed an application for postconviction relief, alleging his trial attorney was ineffective in failing to examine the contents of the wallet, State's Exhibit 37, before it was admitted into evidence. As proof of the prejudicial effect the two notes in the wallet had on the jury, Pinegar sought to introduce affidavits of two jurors. Following an evidentiary hearing on Pinegar's application in January 2010, the court in February ruled the juror affidavits "do not further the inquiry here as to whether appellant's trial counsel was ineffective." In April, the court issued its ruling denying Pinegar's application for postconviction relief. The court found the notes in the wallet "were neither extraneous nor prejudicial." The court determined Pinegar's trial attorney "did not breach an essential duty by failing to find or object to cumulative evidence."

II. Scope and Standards of Review.

Postconviction proceedings are actions at law and generally reviewable on error. *Daughenbaugh v. State*, 805 N.W.2d 591, 593 (Iowa 2011). Claims an attorney did not provide effective assistance, being constitutional in nature, are reviewable de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). "To establish an ineffective-assistance-of-counsel claim, a claimant must demonstrate '(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.'" *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011) (citations omitted). A claimant must prove both elements by a preponderance of

the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). "If either element is not met, the claim will fail." *State v. Kehoe*, 804 N.W.2d 302, 305 (Iowa Ct. App. 2011). We begin with a "strong presumption" an attorney's representation "fell within the wide range of reasonable professional assistance." *Id.*

III. Merits.

We address Pinegar's claims in reverse order because our resolution of the juror affidavit claim affects our analysis of his ineffective-assistance claim.

A. Admissibility of Juror Affidavits. Pinegar offered affidavits from two jurors concerning the notes in the wallet and the effect they had on jury deliberations, seeking to demonstrate prejudice from his trial attorney's failure to discover and examine the notes in the wallet before the exhibit was admitted into evidence. Iowa Rule of Evidence 5.606(b) sets forth the bounds of allowable juror testimony:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The court concluded the notes were not extraneous prejudicial information and would not be considered by the court in deciding whether to grant postconviction relief.

On appeal, Pinegar argues the affidavits do not go to the internal workings of the jury, but confirm the jury was "given letters that were not presented at trial nor admitted as evidence." He further argues the letters "were not subjected to inspection and inquiry by the defense and should be considered prejudicial." The prejudice he claims is the notes showed the nature and strength of the relationship between Pinegar and Melissa Sayles, the passenger in the vehicle who died in the accident. Pinegar's compulsion defense at trial was based on his claim Sayles pointed a gun at his head and told him not to stop when the police officer attempted to stop the vehicle. He offered the affidavits to show the notes convinced a juror Sayles would not threaten Pinegar with a gun.

The police detective testifying at trial identified State's Exhibit 37 as "a black wallet *with miscellaneous papers in it*. I believe a woman's style wallet." (Emphasis added.) Although the "miscellaneous papers" were not specifically identified, they were part of State's Exhibit 37. The term "extraneous" in rule 5.606(b) refers to information not in the record and not presented as evidence in court. *See Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 653 (Iowa 1995). Examples might be a newspaper a juror brought into the jury room, exhibits not admitted at trial, or a juror's personal familiarity with a location.

Because the notes were admitted at trial as part of State's Exhibit 37, the postconviction court correctly concluded they were not "extraneous prejudicial information." Accordingly, the affidavits of the jurors concerning the notes and any effect they may have had on the jury and its deliberations are inadmissible under rule 5.606(b). The court did not err in excluding them and not considering them in deciding whether to grant postconviction relief to Pinegar.

B. Ineffective Assistance. Pinegar contends his trial attorney was ineffective in not discovering and examining the notes in the wallet. Neither Pinegar nor the other passenger, Troy McDaniel, mentioned Sayles threatening Pinegar with a gun if he stopped the car when they were interviewed shortly after the incident. McDaniel's testimony at trial that Sayles pointed her gun at Pinegar's head and threatened him was inconsistent with his prior statements and not credible. There was evidence Pinegar and Sayles had an "on-again, off-again" relationship. We see no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011) (citation omitted). We conclude Pinegar has not demonstrated prejudice. His ineffective-assistance claim fails. *See Kehoe*, 804 N.W.2d at 305.

AFFIRMED.

Mullins, J., concurs specially; Potterfield, J., dissents.

MULLINS, J. (concurring specially)

I respectfully submit that I agree in part with the dissent, but agree with the decision by the majority to deny the postconviction application.

I would find that the juror affidavits were admissible under rule 5.606(b) for the limited purpose of determining whether the contents of the wallet contained "extraneous prejudicial information [that] was improperly brought to the jury's attention." I would further find that even though the contents of the wallet were referenced by the officer that laid the foundation for admissibility of the wallet generically as "miscellaneous papers," their content was not extraneous, but had independent relevance. I agree with the dissent that counsel was ineffective for failing to examine the "miscellaneous papers." Based on all the evidence presented, however, and specifically excluding under rule 5.606(b) that portion of the juror's affidavit that purports to indicate the juror was influenced, I would find that Pinegar has not demonstrated prejudice. Accordingly, I would affirm the denial of his postconviction application.

POTTERFIELD, J. (dissenting)

I respectfully dissent from the majority's opinion. Although I agree with the majority that the jurors' affidavits are inadmissible to the extent they state the effect of the notes on the deliberations, those portions of the affidavits that indicate the jurors found and read the extraneous notes are admissible under rule 5.606(b). Further, I would find that counsel failed in his duty to Pinegar by neglecting to examine the contents of the wallet, and allowing the "miscellaneous papers"[1] to go to the jury without scrutiny. Finally, I would find that Pinegar has proved the necessary prejudice.

I. Rule 5.606(b).

Iowa Rule of Evidence 5.606(b) states in pertinent part that a juror may not testify "to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment" except "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The majority finds the notes neither extraneous nor prejudicial within the meaning of rule 5.606(b).[2] I disagree. The rule "provides that juror affidavits may be used to impeach a verdict by showing that extraneous prejudicial information was improperly brought to the jury's attention

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[1] The wallet contained the following papers: a two-page note addressed to "billy," a draft of that same note, two papers with a name and address, a to-do list, a Target gift card, U.S. Cellular and United Methodist Ministers' Service Credit Union business cards, a bail bondsman's card with court appearance information, a public defender's card, and two car dealership vehicle information key ring tags.

[2] The district court stated "[w]hile the notes may be extraneous in that they were introduced into the jury room without the knowledge of the trial court and counsel, they are not necessarily prejudicial."

but may not be used to establish the effect of this extraneous information on the course of the jury's deliberations." *State v. Henning*, 545 N.W.2d 322, 324 (Iowa 1996). Our supreme court has stated that extraneous information referred to in rule 5.606(b) means "information that was not part of the record and not presented in court." *Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 653 (Iowa 1995) (finding evidence presented to the jury but later withdrawn from the jury's consideration not extraneous).

The notes found in a "woman's style wallet" were given to the jury as part of an exhibit admitted at trial, but had not been separately identified or admitted. They are extraneous in the same way that documents, not admitted as evidence but contained in an exhibits notebook which goes to the jury, are extraneous. The fact that they were contained within the wallet does not insulate the "miscellaneous papers" from Pinegar's claim his counsel should have discovered their presence before permitting the wallet to be admitted without objection.

I would also find the notes to be prejudicial under rule 5.606(b)'s exception for extraneous and prejudicial information. Our supreme court has stated that the test is an objective one "to determine whether the extraneous information would prejudice a typical juror." *Henning*, 545 N.W.2d at 324–325 (citations omitted). "The standard has been expressed in terms of whether the material was of a type more likely than not to implant prejudice of an indelible nature upon the mind." *State v. Mayberry*, 411 N.W.2d 677, 685 (Iowa 1987).

From an objective point of view, the jury would have reasonably assumed the notes were provided to them because they were relevant to the fact issues it was their duty to decide. A typical juror would then have attempted to determine

the relevance. The jury may have assumed these notes were written by Sayles to Pinegar, since Pinegar's name was William and the notes were addressed to "Billy." The jury further may have speculated the notes were expressions of a relevant state of mind of the victim of a vehicular homicide shortly before her death, although the notes were not dated or signed. Certainly the notes were likely to tip the scales in favor of the State.

A typical juror may similarly have speculated that the court and counsel intended the notes to supply information about Sayles's relationship to Pinegar, which would be relevant to Pinegar's defense. The relationship between Sayles and Pinegar was an intrinsic and critical factor in Pinegar's defense, which Pinegar had a fundamental right to present. *State v. Clark*, 814 N.W.2d 551, 561 (Iowa 2012) ("The right to present a defense is so fundamental and essential to a fair trial that it is accorded the status of an incorporated right through the Fourteenth Amendment's Due Process Clause."). The jurors may have believed that the notes indicated Pinegar behaved cavalierly toward Sayles over time, implanting prejudice against Pinegar in a juror's mind. I would find that the extraneous notes read by the jury prejudiced Pinegar's defense within the meaning of rule 5.606(b).

II. Ineffective Assistance of Counsel.

Pinegar's counsel failed in his duty by neglecting to examine the contents of the wallet and allowing it to be submitted to the jury. However, this is not enough to constitute reversible error; Pinegar must also show he was prejudiced by this error. *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). In terms of

prejudice for purposes of his claim of ineffective assistance of counsel, Pinegar must prove by a preponderance of the evidence

> a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . . This is because the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. In other words, a person's right to counsel is only implicated when attorney error undermines the reliability and fairness of the criminal process.

Id. at 251 (citations and quotation marks omitted).[3]

In its finding that Pinegar has not shown prejudice, either under rule 5.606(b) or under the ineffective-assistance-of-counsel test, the majority simply speculates the notes were cumulative to one item of testimony that Sayles and Pinegar had an on-again, off-again relationship. In finding no prejudice occurred, the district court and the majority assume that the notes were written by Sayles to Pinegar and would have been admissible if offered to reflect Sayles's state of mind when the notes were written. But the notes are not dated nor signed nor addressed other than to "Billy," and Pinegar claimed to have no knowledge of them.

Further, the wallet that was admitted as Exhibit 37 does not contain identification connecting it to Sayles, and although it was described by the officer as a "woman's style" wallet, it may have been believed by the jury to have

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[3] Pinegar does not raise his claim in terms of structural error discussed in *Lado*, although an error that allows extraneous information to be presented to the jury may result in a criminal proceeding so unreliable that the claimant is excused from the need to show actual prejudice. *See id*. at 252.

belonged to Pinegar.[4] The checkbook in the car apparently belonged to the dealership from which the car was stolen. The detective was unable to recall whether the "woman's style" wallet and checkbook were found in the front or back seat of the car. Without more information, the notes would not have been relevant, even if they otherwise might have been admissible under an exception to the hearsay rule. Further, also included in the wallet were a bail bondsman card and public defender card. These items, if the jury believed they were Pinegar's, were tantamount to evidence that Pinegar had a pending criminal charge, had posted bail, and had appointed counsel. Those obvious conclusions drawn from the "miscellaneous papers" were clearly prejudicial.

Precisely because the jurors may have indulged in speculation about the importance, meaning, and ownership of the wallet contents, reasonably believing the papers were provided to them for a relevant purpose, I would find prejudice. Although Pinegar's defense was weakened by the inconsistencies in the first statements he and McDaniel made to the police, his defense was corroborated by the presence of a handgun and the stolen car. The papers, particularly without foundation or information as to their connection, if any, to the facts at issue, prejudiced Pinegar's defense and undermine confidence in the jury's guilty verdict.

I would reverse the denial of postconviction relief and remand for a new trial.

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[4] A black Cyclones wallet identified by the detective as belonging to Pinegar and containing Pinegar's social security card was admitted as Exhibit 36.