**IN THE COURT OF APPEALS OF IOWA**

No. 2-561 / 11-0583
Filed October 3, 2012

**DARRYL WASHINGTON,**
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Des Moines County, Michael J. Schilling, Judge.

A postconviction relief applicant contends he received ineffective assistance of counsel when his attorney failed to advance certain arguments regarding the admissibility of his unrecorded confession. **AFFIRMED.**

William Monroe of Law Office of William Monroe, Burlington, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Amy Beavers, Assistant County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., Bower, J., and Miller, S.J.* Tabor, J. takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**VAITHESWARAN, P.J.**

Darryl Washington was arrested in Illinois in connection with an Iowa homicide. Iowa law enforcement officers interviewed Washington at one of the precincts of the Chicago Police Department but did not record the interview. The State of Iowa later charged Washington with first-degree murder. At trial, the officers who interviewed Washington recounted inculpatory statements Washington made during the Chicago interview. A jury found Washington guilty, and this court affirmed his judgment and sentence. *See State v*. *Washington*, No. 06-0908, 2007 WL 2710826 (Iowa Ct. App. Sept. 19, 2007).

Washington filed an application for postconviction relief, raising several ineffective-assistance-of-counsel claims. Among them was a claim that his trial attorney was ineffective in failing to argue that Illinois law required the videotaping of his police interview and precluded the admission of his statement in the absence of videotaping. The district court denied his application following an evidentiary hearing.

On appeal, Washington raises a single issue containing two alternate arguments. He asserts (1) he was "denied effective assistance of counsel because no objection was made to his statements based upon 725 Illinois Statute (ILCS) 5/103.2" and (2) this court should follow Illinois's lead based on "Policy Considerations."[1] He raises the issue under an ineffective-assistance-of-

[1] The State suggests the "policy considerations" issue is a "free-standing argument" that was not raised as an ineffective-assistance-of-counsel claim and was not preserved for our review. As noted, we believe this is simply an alternate contention related to his invocation of Illinois law, rather than an independent argument. Because the Illinois videotaping requirement was clearly raised as an ineffective-assistance-of-counsel claim, we will address the "policy considerations" argument as if it were under this heading.

counsel rubric.[2] To prevail, Washington must show that counsel breached an essential duty and that prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984); *State v*. *Griffin*, 691 N.W.2d 734, 736–37 (Iowa 2005). Our review of these claims is de novo. *State v*. *Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

### *I. Illinois Statute*

An Illinois law provides that any "statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding" brought under specified code sections, unless "(1) an electronic recording is made of the custodial interrogation; and (2) the recording is substantially accurate and not intentionally altered." 725 Ill. Comp. Stat. 5/103-2.1(b) (2005).[3] This provision presumes the inadmissibility of an un-videotaped statement but states the presumption "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." *Id.* at 5/103-2.1(f). In contrast, Iowa law encourages the videotaping of custodial interrogations but does not require it or presume the inadmissibility of un-videotaped statements. *See State v*. *Madsen*,

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[2] Washington makes tangential reference to other matters, such as prosecutorial misconduct, none of which are included in his statement of issues. We conclude those matters are not properly before us either because they were not properly raised in this court or were not preserved for our review.

[3] The Illinois legislature enacted this statute in 2003 but delayed its effective date until July 2005. *See People v. Amigon*, 940 N.E.2d 63, 72 (Ill. 2010). Washington's interrogation took place on July 26, 2005, eight days after the effective date. *See People v. Amigon,* 903 N.E.2d 843, 848 (Ill. App. Ct. 2009) ("[W]e find support that the statute applies only to custodial interrogations that take place on or after the effective date of the statute."); *People v. Buck*, 838 N.E.2d 187, 205, (Ill. App. Ct. 2005) ("[T]he legislature opted not to make section 103–2.1 effective until July 18, 2005.").

813 N.W.2d 714, 721–22 (Iowa 2012) (encouraging the videotaping of custodial and noncustodial interviews when it is practicable to do so); *State v*. *Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006) (encouraging the electronic recording of custodial interrogations).

Iowa law enforcement officers conceded their Illinois interview of Washington was a custodial interrogation. They also conceded that they declined to videotape the interview. Washington argues that this omission required suppression of the statements under the Illinois videotaping statute. We find that statute inapplicable.

As the State points out, the Illinois statute applies to criminal proceedings brought under specifically enumerated Illinois code sections. *See* 725 Ill. Comp. Stat. 5/103-2.1(b) (stating that the statute applies to criminal proceedings brought under "Section 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.2, or 9-3.3 of the Criminal Code of 1961 or under clause (d)(1)(F) of Section 11-501 of the Illinois Vehicle Code"). Washington was charged with a crime under Iowa law. *See* Iowa Code § 707.2 (2005) (first-degree murder). Therefore, the statute, by its terms, does not apply to Washington's custodial interrogation.[4]

Additionally, we agree with the State that "the admissibility of evidence is generally governed by the law of the forum state." *See Brooks v*. *Engel*, 207

[4] Even in Illinois criminal proceedings, the law contains a number of exceptions, including an exception for spontaneous statements and "a statement made during a custodial interrogation that is conducted out-of-state." 725 Ill. Comp. Stat. 5/103-2.1(e)(iv), (vii). Had we found that the Illinois law applied to Washington's custodial interrogation, we would have been required to address some of these exceptions as well as the question of whether the presumption of inadmissibility was overcome by evidence that the statement was voluntary. *See id.* at 5/103-2.1(f). In light of our conclusion that the law does not apply to this Iowa criminal proceeding, we find it unnecessary to address these issues.

N.W.2d 110, 113 (Iowa 1973) ("[P]rocedural matters and matters pertaining to the remedy to be applied must be determined by the law of the forum."). There is no question that Iowa is the forum state, and Washington does not argue otherwise.

We recognize that there are exceptions to the application of forum-state law. Specifically, the Restatement (Second) of Conflict of Laws states:

> The judge should therefore, as a general rule, apply the local law of his own state. The exceptional situations where some other law is applied, either as a general rule or at least on occasion, include privileges against the disclosure of confidential information (§ 139), integrated contracts (§ 140) and the statute of frauds (§141).

Restatement (Second) of Conflict of Laws § 138 cmt. a (1971). Washington focuses on "privileges against disclosure of confidential information," noting that the interrogation implicated his privilege against self-incrimination. *See id.* § 139.[5] Comment b to section 139 forecloses Washington's argument. Stating:

> A privilege of a different sort is that against self-incrimination. *It is governed by the local law of the forum* or, stated in other words, by the local law of the state where the communication will be required to be made if the claim of privilege is denied.

(Emphasis added.)

Washington also cites two Iowa opinions that he contends support a different conclusion than the district court reached. *See State v. Davis*, 679

[5] Restatement (Second) of Conflict of Laws section 139 provides:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

N.W.2d 651 (Iowa 2004); *State v*. *Eldrenkamp*, 541 N.W.2d 877 (Iowa 1995). Those opinions are inapposite.

In *Davis*, the court was asked to review an Iowa court's ruling suppressing evidence obtained pursuant to a defective Missouri search warrant. *Davis*, 679 N.W.2d at 657 (analyzing Missouri Revised Statute section 542.276(10)(2)). The court began by noting that Missouri recognizes a good faith exception to the exclusionary rule. *Id*. at 658. Under the good faith exception, "'evidence seized pursuant to a warrant issued by a detached and neutral magistrate should not be excluded, irrespective of the actual validity of the warrant, so long as the officer conducting the search acted in objectively reasonable reliance on that warrant.'" *Id.* at 659 (quoting *State v*. *Brown*, 708 S.W.2d 140, 145 (Mo. 1986)). The court stated that Iowa does not recognize this exception because the exception denigrates the "'integrity of the judicial process and an individual's right under our state constitution to be free from government conduct ultimately determined to be unlawful.'" *Id.* at 658 (quoting *State v*. *Prior*, 617 N.W.2d 260, 268 (Iowa 2000)). The court held that "the good faith exception as recognized by the Missouri courts applies to the Missouri searches." *Id.* at 659. The court, accordingly, reversed the suppression ruling.

Washington's contention that the holding of *Davis* militates in favor of applying Illinois law is appealing at first blush. But, the rationale behind that holding does not apply here. *Davis* involved the issuance of a Missouri search warrant under Missouri law for property located in Missouri. Missouri law clearly applied to the warrant application. Here, in contrast, Washington happened to be interviewed in Illinois, but the Illinois statute, by its terms, did not apply to the

interrogation, and the crime took place in Iowa. For that reason, we conclude *Davis* does not assist Washington.

The same is true of *Eldrenkamp*. While that case, like this one, encompassed activity in Illinois as well as Iowa, the similarity ends there. *See Eldrenkamp*, 541 N.W.2d at 879. *Eldrenkamp* involved the application of the physician-patient privilege rather than the privilege against self-incrimination, and Illinois, rather than Iowa, was found to have the most significant relationship. *Id.* at 881–82. As indicated above, the Restatement (Second) of Conflicts of Laws provides that the privilege of self-incrimination is "governed by the local law of the forum." Restatement (Second) of Conflict of Laws § 139 cmt. b.

Because the Illinois videotaping statute did not apply to Washington's custodial interrogation, his attorney did not breach an essential duty in failing to raise it as a ground for suppression. Washington's ineffective-assistance-of-counsel claim, therefore, necessarily fails.

***II. Policy Considerations***

Washington alternately argues that we should require videotaping of custodial interrogations as a prerequisite to admitting subsequently-obtained statements. The Iowa Supreme Court has declined to take this step. *Madsen*, 813 N.W.2d at 721–22 ("We did not say in [*Hajtic*] that unrecorded confessions were inadmissible, and we decline Madsen's invitation to take that step now."); *Hajtic*, 724 N.W.2d at 456 (encouraging but not requiring videotaping). In light of this case law and the absence of an Iowa statute mirroring the Illinois statute, we also decline Washington's invitation. We further conclude that counsel was not ineffective in failing to raise these policy considerations.

We affirm the district court's denial of Washington's application for postconviction relief.

**AFFIRMED.**