IN THE COURT OF APPEALS OF IOWA

No. 2-735 / 11-0944
Filed October 31, 2012

DALE JACKSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

A postconviction relief applicant contends that the State withheld exculpatory evidence in the form of a letter written by the victim and that he received ineffective assistance of counsel. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee State.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

A district court found Dale Jackson guilty of third-degree sexual abuse in connection with a sex act he performed at the Iowa State Fairgrounds on nineteen-year-old J.G. This court affirmed Jackson's judgment and sentence on direct appeal. *State v. Jackson*, No. 04-1871, 2006 WL 778709, at *6 (Iowa Ct. App. Mar. 29, 2006). Jackson applied for postconviction relief, primarily asserting that the prosecution suppressed exculpatory evidence. The district court denied the application following an evidentiary hearing. This appeal followed.

I. Exculpatory Evidence Claim

The underlying facts are summarized in this court's prior opinion. As we explained, J.G. was a young man with autism or Asperger's syndrome, who verbalized at a twelve-year-old level and comprehended at a nine-year-old level. Jackson worked at a booth at the Iowa State Fair and convinced J.G.'s mother to let J.G. spend the night with him at the fairgrounds. According to J.G., Jackson committed a sex act on him that night.

At trial, J.G. testified that, following the commission of the sex act, he left Jackson's tent and reported the incident to officers on the fairgrounds. He additionally testified that, after he returned to his home in Minnesota, he "started remembering more details" and recorded these details in a letter, which he sent to the officers.

Following this testimony, Jackson's attorney expressed surprise over the letter's existence. The prosecutor responded that he was not planning on introducing the letter. He nonetheless showed J.G.'s attorney a copy. After

reviewing it, J.G.'s attorney formally objected to its admission. Neither he nor the prosecutor questioned J.G. about the letter's contents or moved for its admission.

Jackson asserts that the prosecutor's "failure to disclose the Minnesota letter was a violation of the right to receive exculpatory evidence as guaranteed by the Iowa and United States Constitutions," in violation of *Brady v*. *Maryland*, 373 U.S. 83 (1963). *Brady* held "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." 373 U.S. at 87.

The district court determined that *Brady* was not implicated because the letter was not suppressed. We agree.

Evidence is considered suppressed "when information is discovered after trial which had been known to the prosecution but unknown to the defense." *Harrington v*. *State*, 659 N.W.2d 509, 522 (Iowa 2003) (internal quotation marks omitted). At the postconviction relief hearing, Jackson's attorney testified that he first saw the letter *at* trial, not *after* trial. He also testified that he would not have wanted the letter admitted at trial, and he would not have asked questions about "some of th[e] stuff" contained in the letter. He stated, "Whether it's true or not, I wouldn't want [the triers of fact] hearing it."

A cursory review of the letter, which was admitted at the postconviction relief hearing, underscores the attorney's concern. In it, J.G. discussed statements made by Jackson about prior sex acts he committed with other teenage boys.

Because the letter was produced at trial and Jackson's attorney had an opportunity to review it and decide what course of action to take, we conclude the evidence was not suppressed. *See State v*. *Bishop*, 387 N.W.2d 554, 559 (Iowa 1986) (stating that where evidence is "disclosed during trial and at a meaningful time, due process has not been denied"); *see also State v*. *Veal*, 564 N.W.2d 797, 810 (Iowa 1997) ("Evidence is not considered 'suppressed' if the defense is able to take advantage of it at trial."), *overruled on other grounds by State v*. *Hallum*, 585 N.W.2d 249 (Iowa 1998).

In light of our conclusion that the letter was not suppressed, we need not address the remaining elements of Jackson's *Brady* claim. *See Harrington*, 659 N.W.2d at 521–22 (requiring a showing that evidence was favorable to the defendant and the evidence was material to the issue of guilt.).

II. Ineffective-Assistance-of-Counsel Claims

In the alternative, Jackson contends his trial attorney was ineffective in failing to ensure he had all the written statements authored by J.G. prior to taking J.G.'s pretrial deposition. He additionally contends that, once the attorney learned of the letter, he was ineffective in failing to "seek a short adjournment . . . to consider whether to depose the witness about the statement."

To prevail, Jackson must show that counsel breached an essential duty and prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). On our de novo review of this constitutional issue, we are convinced counsel breached no essential duty. *See State v*. *Martin*, 704 N.W.2d 665, 668 (Iowa 2005) (setting forth the standard of review).

First, "[t]he State has a duty to disclose exculpatory evidence regardless of whether the accused requests it." *Aguilera v. State*, 807 N.W.2d 249, 252 (Iowa 2011). In this case, Jackson's attorney did not simply rely on the State's duty to disclose exculpatory evidence; he made a request for all documents authored by J.G. When he discovered he had not received the letter, he immediately lodged an objection.

Second, as discussed above, Jackson's trial attorney made a strategic decision not to question J.G. about the letter or introduce it, given the prior bad acts recounted in it. In light of his decision not to make use of the letter, no useful purpose would have been served by seeking a continuance for a re-deposition of J.G. *See Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998) ("Tactical decisions . . . are immune from subsequent attack by an aggrieved defendant claiming ineffective assistance of counsel.").

In reaching this conclusion, we have considered Jackson's argument that his trial attorney might have had more leeway to probe J.G. about the contents of the letter during a deposition outside the presence of the trier of fact and might have been able to use the answers to impeach J.G.'s trial testimony. In fact, during the pretrial deposition, Jackson's attorney did ask J.G. about a written statement he sent the officers after the incident.[1] J.G. responded by citing Jackson's comments about having "sex with other people" at "state fairs." At trial, Jackson's attorney elicited an admission from J.G. that J.G. did not initially disclose these comments to the officers. In short, he made use of the letter's contents without specifically referring to it or introducing it into evidence.

[1] It appears he did not have the written statement in hand.

Jackson nonetheless contends his trial attorney could have gone much further in impeaching J.G.'s trial testimony had he been privy, in advance of trial, to the actual language used by J.G. in the letter. He points to J.G.'s written admissions that Jackson's disclosures about his sex abuse history came before Jackson committed the sex act on J.G. He suggests a reasonable trier of fact would have been left to wonder why J.G. did not immediately leave the tent on learning of Jackson's predatory history. The problem with the argument is that Jackson's trial attorney could not have pursued this line of questioning at trial without mentioning Jackson's sex abuse history. As discussed, the attorney understandably had no desire to bring that history to the attention of the trier of fact.

In sum, we reiterate that Jackson's attorney was not ineffective in failing to ensure he had J.G.'s letters before trial or in failing to seek a continuance once he received the letter during trial.

We affirm the denial of Jackson's application for postconviction relief.

AFFIRMED.