IN THE COURT OF APPEALS OF IOWA

No. 3-249 / 12-0642
Filed May 15, 2013

ANGEL VEGA-SANCHEZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Angel Vega-Sanchez appeals from the dismissal of his postconviction relief application. **AFFIRMED.**

Darren D. Driscoll of the Law Office of Johnson, Kramer, Good, Mulholland, Cochrane & Driscoll, P.L.C., Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Ricki N. Osborn, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Angel Vega-Sanchez shot his wife in the head in front of witnesses and was convicted of first-degree murder. He appeals from the dismissal of his postconviction relief application. We conclude Vega-Sanchez has failed to establish either trial or postconviction counsel were ineffective and therefore affirm.

I. Background Facts and Proceedings.

The facts leading to Vega-Sanchez's first-degree murder conviction are set out in *State v. Vega-Sanchez*, No. 10-0116, 2011 WL 441677 (Iowa Ct. App. Feb. 9, 2011). We affirmed the conviction and his application for further review was denied by the supreme court.

On June 22, 2011, Vega-Sanchez filed an application for postconviction relief, asserting that his right to contact the Mexican Consulate had been violated. He also argued his trial counsel was ineffective in failing to get an interpreter for him and in failing to call several witnesses.

A hearing was held on March 8, 2012, at which Vega-Sanchez testified, as did his trial counsel, James Koll, investigating officer Agent Larry Hedlund, and jail administrator Steve Ellefritz. The district court denied the postconviction application concluding Koll's decision not to call certain witnesses was for strategic reasons; Vega-Sanchez did not require an interpreter because he spoke and understood English; and Vega-Sanchez did, in fact, contact the Mexican Consulate, which did not intervene in his trial.

Vega-Sanchez appeals.

II. Scope and Standards of Review.

Vega-Sanchez's appeal is based upon his claims of being denied a fair trial and ineffective assistance of counsel. "We typically review postconviction relief proceedings on error. However, when the applicant asserts claims of a constitutional nature, our review is de novo." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001) (citations omitted). We give weight to the lower court's findings concerning witness credibility, but are not bound by them. *Id.*

III. Discussion.

On appeal, Vega-Sanchez claims that the district court erred in concluding his trial counsel was not ineffective in failing to obtain an interpreter and in failing to notify Vega-Sanchez of his right to contact the Mexican Consulate. Further, Vega-Sanchez contends the failure to inform him of his right to notify the Mexican Consulate is ineffective assistance of counsel per se and prejudice should be presumed. He also asserts postconviction counsel was ineffective in failing to present witnesses and evidence showing how he was prejudiced by trial counsel's failure to notify him of his consular notification rights.

A. Interpreter. Vega-Sanchez contends that trial counsel was ineffective in failing to obtain an interpreter. To establish a claim of ineffective assistance of counsel, the applicant must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See id.* at 142. Vega-Sanchez argues that the totality of circumstances suggests he required an interpreter to understand the proceedings and thus counsel was ineffective in failing to obtain a Spanish-language interpreter. *See generally id.* at 149-50 ("Without a competent

and impartial interpreter to assist defendants in their understanding of criminal proceedings, defendants will be unable to adequately confront witnesses or present a defense."). The trial court rejected this claim, as do we.

Vega-Sanchez acknowledged in the district court that he had been in the United States for fifteen years and regularly communicated in English with his wife and his in-laws. He also communicated in English with attorney Koll, Agent Hedlund, and jail personnel. Koll testified that he was aware that Vega-Sanchez's primary language was Spanish, and that he considered and discussed with Vega-Sanchez the need for an interpreter, but after speaking with Vega-Sanchez on numerous occasions he was convinced an interpreter was not necessary. Hedlund, too, testified that Vega-Sanchez appeared to understand and speak English without the need for an interpreter. Vega-Sanchez has not established he required an interpreter to understand the criminal proceedings and aid in his own defense and has thus failed to establish the requisite prejudice.

B. Consulate notification. Article 36 of the Vienna Convention requires that all detained foreign nationals to be advised of their right to contact their consulate. *See generally*, Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 Geo. Immigr. L.J. 185 (1999). In *Ledezma*, 626 N.W.2d at 150, our supreme court stated that "all criminal defense attorneys representing foreign nationals should be apprised of Article 36."[1]

[1] The *Ledezma* court explained:

However, our supreme court has held "the notification requirements of the Vienna Convention do not involve a fundamental right of the defendant" and rejected the argument that suppression of evidence obtained in violation of the Vienna Convention was required. *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003).

In *State v. Lopez,* 633 N.W.2d 774, 783 (Iowa 2001), our supreme court held there must be a showing of actual prejudice for a criminal defendant to have any remedy for the violation of consular notification rights under the Vienna Convention. In spite of the *Lopez* holding, the applicant claims that any failure by counsel to inform a defendant of consular-notification rights should be considered as ineffective legal assistance per se, with prejudice being presumed as recognized under international law. We agree with the State, however, that this claim of per se ineffectiveness was not raised in the district court and is thus not properly before us. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (noting the "'fundamental doctrine of appellate review that issues must ordinarily

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> When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws. *See Strickland* [*v. Washington*], 466 U.S. [668,] 690 [(1984)] (counsel has duty to investigate all relevant laws and facts). Trial "[c]ounsel for foreign nationals should always inquire whether the client has been made aware of his right to contact consul, and, if not, [counsel] should advise hi[s] [client] of this right." Springrose, [14 Geo. Immigr. L.J.] at 188-89. We believe all criminal defense attorneys representing foreign nationals should be aware of the right to consular access as provided by Article 36, and should advise their clients of this right. Criminal defense attorneys are not equipped to provide the same services as the local consulate. *Id.* at 195. Consular officials can eliminate false understandings and prevent actions which may result in prejudice to the defendant. *Id.* Thus, consular access may very well make a difference to a foreign national, in a way that trial counsel is unable to provide. *Id.*

626 N.W.2d 152.

be both raised and decided by the district court before we will decide them on appeal'" (citation omitted)).

In any event, this court is not in a position to overturn the supreme court's *Lopez* decision. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). Consequently, to establish counsel was ineffective, Vega-Lopez must prove he suffered actual prejudice as a result of a consular notification violation.

To prove he suffered prejudice as a result of a consular notification violation, "the defendant has the burden of establishing that (1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) there was a likelihood that the contact with the consulate would have resulted in assistance to him." *Lopez*, 633 N.W.2d at 783 (internal quotation marks, corrections, and citations omitted).[2] Further, "'it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction *without some showing that the violation had an effect on the* trial.'" *Id.* (citation omitted).

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[2] In *Ledezma*, 626 N.W.2d at 151, the court outlined the evidence presented in that postconviction trial:

> . . . Salvador A. Cicero, an officer of the Mexican Consulate, detailed how a foreign national defendant would benefit from exercising his consular rights. Cicero testified that a Mexican consular officer would explain the significant differences between the American and Mexican criminal justice systems, as well as the severity of the charges. An officer would be available to address the general obstacles presented by cultural barriers, and to monitor the case and assist with interpretation. An officer would help the foreign national to obtain a greater understanding of the charges and maximum sentence, which knowledge would aid the foreign national when considering plea offers and the presentation of his defense.

Here, Koll testified he spoke to Vega-Sanchez about contacting the consulate "early on" in the criminal proceedings. Koll also testified that he had researched the issue and discussed notification with Vega-Sanchez, but because Iowa is not a death penalty case, Koll did not know of any assistance the consulate could offer.

Even if we presume that trial counsel did not advise Vega-Sanchez of his right to contact the consulate promptly, the record establishes Vega-Sanchez *did know* of his right to contact the consulate and *did contact* the Mexican consulate. Moreover, Vega-Sanchez has offered no evidence there was a likelihood that the contact with the consulate earlier would have resulted in assistance to him. Vega-Sanchez argues that postconviction counsel was ineffective in failing to present such evidence of prejudice.

We agree with Vega-Sanchez that the duty to present evidence of prejudice due to a consular notification violation is clear pursuant to *Lopez*. But to prove postconviction counsel was ineffective, Vega-Sanchez must prove not only that counsel failed in an essential duty, but that "but for counsel's errors, the result of the proceeding would have been different." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). This he has failed to do.

Vega-Sanchez cites *Medellin v. Texas*, 552 U.S. 491, 503 (2008), for the proposition that the Vienna Convention requires a hearing to determine whether a defendant's consular-notification rights have been violated and the appropriate remedy for that violation, "*regardless of whether state procedural rules might otherwise prevent review*." (Emphasis added.) This is contrary to the *Medellin*

holding that "neither [the International Court of Justice's (ICJ) decision in *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 12] nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions." *Medellin*, 552 U.S. at 498-99. The *Medellin* court concluded that the ICJ's *Avena* decision is not enforceable in domestic courts. *See* 552 U.S. 524-532.

We affirm the dismissal of Vega-Sanchez's application for postconviction relief.

AFFIRMED.