IN THE COURT OF APPEALS OF IOWA

No. 7-099 / 06-0752
Filed June 13, 2007

PAUL EUGENE WELCH, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Appanoose County, Annette J. Scieszinski, Judge.

Applicant appeals the district court's denial of his request for postconviction relief from his convictions for second- and third-degree sexual abuse. **AFFIRMED.**

Allen A. Anderson of Spayde, White & Anderson, Oskaloosa, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Rick L. Lynch, Special Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

In 2001, Paul Welch was convicted of eight counts of sexual abuse in the second degree and eleven counts of sexual abuse in the third degree. The case involved two victims, A.J., who was fifteen years old, and C.B., who was eight or nine years old. Welch's convictions were upheld on direct appeal. *See State v. Welch*, No. 01-1891 (Iowa Ct. App. Aug. 14, 2002).

Welch filed an application for postconviction relief. He filed a motion for partial summary judgment on the ground that the prosecuting attorney, Robert Bozwell, was disqualified to prosecute him by reason of his prior representation of Welch. In 1993 Welch had been accused of indecent contact with a child, and Bozwell, then a private attorney, had represented him. Welch was acquitted of the charge. Bozwell went on to become the county attorney for Appanoose County, and was the prosecuting attorney in the 2001 criminal case against Welch for sexual abuse.

The district court denied Welch's motion for partial summary judgment. The court noted Welch did not raise this issue at the time of his criminal trial. The court went on to address the merits of the claim, however, under a theory of ineffective assistance of counsel. The court concluded Bozwell did not have a duty to recuse himself because the two cases were completely unrelated. The court noted the 1993 case involved different victims, witnesses, and facts than the 2001 case. The court determined Welch failed to show he was prejudiced because Bozwell was the prosecuting attorney. The court concluded Welch

failed to show he received ineffective assistance due to counsel's failure to object to Bozwell's involvement in the case.

The case proceeded to a hearing on Welch's claims for postconviction relief. Welch and Bozwell testified at the hearing.[1] The district court found Welch was not entitled to postconviction relief. The court reiterated its conclusions regarding Welch's claim of prosecutorial misconduct due to Bozwell's failure to recuse himself. Welch also claimed Bozwell withheld evidence which would have been helpful to the defense. The court found a Missouri police report should have been disclosed to Welch, but concluded there was no reasonable probability the result of the trial would have been different if it had been disclosed. The court found Welch's claims about a missing e-mail were too speculative.

The court determined Welch failed to show ineffective assistance due to (1) counsel's failure to seek to sever the counts regarding A.J. from those of C.B. or (2) counsel's failure to call certain witnesses. The court concluded Welch failed to show he was prejudiced by counsel's actions. The court rejected Welch's claim he was entitled to a new trial due to false testimony. Furthermore, the court denied Welch's claim the State tampered with a defense witness. Welch appeals the district court's denial of his claims for postconviction relief.

II. Undisclosed Evidence

It is a violation of due process when the State fails to disclose evidence that may be favorable to a criminal defendant. *Harrington v. State*, 659 N.W.2d

[1] Welch's defense counsel at the criminal trial, Stephen Richardson, was not called to testify at the postconviction hearing.

509, 516 (Iowa 2003) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963)). In order to show a due process violation, there must be evidence (1) the prosecution suppressed evidence, (2) the evidence was favorable to the party raising the issue, and (3) the evidence was material to the issue of guilt. *State v. Piper*, 663 N.W.2d 894, 904 (Iowa 2003). Because a constitutional issue is involved, our review is de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

A. One of the victims, A.J., first gave a police report in Missouri. Missouri officials soon determined the incidents had taken place in Iowa, and told her to give a report in Iowa. Welch did not receive a copy of the Missouri police report until after his conviction. He claims the report would have been important to his defense because he could have used inconsistencies between the report and A.J.'s testimony to impeach her during the criminal trial.

At the postconviction hearing Bozwell testified he did not recall whether he had ever seen the Missouri police report. He testified his general practice was to have an open-file policy for defense attorneys, stating, "If I would have had it, I would have given it to Mr. Richardson." Thus, evidence the prosecution knowingly suppressed evidence is lacking. However, knowledge of exculpatory evidence by the police is imputed to the prosecutor. *Kyles v Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490, 508 (1995)

Although the state should have disclosed this report, we agree with the district court's analysis that the evidence was not material to the issue of guilt. Evidence is considered material when there is a reasonable probability that

disclosure of the evidence would have changed the result of the proceeding. *Piper,* 663 N.W.2d at 905. The district court concluded that Welch was not prejudiced by the State's failure to give him a copy of the report. The court found very minor inconsistencies between A.J.'s testimony and the report. The court stated, "The report would not have amounted to material evidence, and it is unlikely that Welch's trial preparation and strategy would have been adjusted if the report had been earlier discovered." After reviewing the Missouri report, we agree that disclosure would not have changed the result.

B. Welch also contends the State should have disclosed information about an e-mail to him. Bozwell testified that prior to the criminal trial he became aware one of the child victims had been sent an e-mail which the child's mother considered to be a veiled threat, and the child victim never saw the e-mail. He stated he was not aware of any written reports about the e-mail which could have been turned over to Welch. The e-mail was lost, and the specific contents and the sender of the e-mail are unknown.

The district court determined Welch's arguments on this issue were too speculative to show his due process rights were violated. Welch has not shown the e-mail would have been favorable to the defense, or that it was material to the issue of guilt. We conclude Welch has failed to show a due process violation.

III. Ineffective Assistance

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, claimant must show (1) the attorney failed to perform an

essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We presume that counsel is competent and that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Welch contends Bozwell engaged in prosecutorial misconduct by failing to recuse himself from the prosecution of the criminal case for sexual abuse.[2] He states Bozwell could have learned of matters during his 1993 representation of Welch that assisted during the later prosecution. Our supreme court has stated:

> It is generally understood an attorney may not participate in the prosecution of a criminal case if, by reason of personal relations with an accused, he has acquired knowledge of facts on which the prosecution is based or which are closely interwoven therewith, or has formally appeared for defendant . . . .

State v. Orozco, 202 N.W.2d 344, 345-46 (Iowa 1972). In order to be entitled to relief on this ground, a defendant must show prejudice to the substance of the case. *State v. Callender*, 444 N.W.2d 768, 769 (Iowa Ct. App. 1989).

In the present case Welch does not point to any evidence indicating Bozwell "acquired knowledge of facts on which the prosecution [was] based . . .", s*ee Orozco*, 202 N.W.2d at 345-46, nor do we find any. Bozwell's acquaintance with Welch arose from a different criminal case in 1993, which involved entirely different circumstances. We conclude Welch has not shown he

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[2] Like the district court, we question whether Welch preserved error on this issue because it was not raised during his criminal trial. Following the example of the district court, we consider whether Welch received ineffective assistance due to counsel's failure to raise the issue of prosecutorial misconduct.

received ineffective assistance due to counsel's failure to raise an objection based on prosecutorial misconduct.

B. Welch claims his defense counsel was ineffective because he failed to file a motion to sever the cases of the two alleged victims. At the postconviction hearing, Welch testified his defense counsel told him, "If we blow [A.J.'s] testimony out of the water, [C.B.'s] will crumble." Welch testified he agreed with this assessment at the time, but had since changed his mind. Bozwell testified he believed defense counsel had a tactical reason for not wanting to sever the cases because A.J. "probably carried more baggage . . . ." Bozwell agreed with defense counsel's judgment, stating that because he had not severed the case to begin with, the case was more difficult to prosecute.

Generally, we will not second-guess reasonable trial strategy, *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995), and there is no reason to do so here. We conclude counsel's strategic decision was a reasonable one in these circumstances. We conclude Welch has failed to show he received ineffective assistance of counsel on this issue.

C. Welch asserts he received ineffective assistance because his defense counsel did not call all of the witnesses that he felt were important to his case. Ten witnesses testified for the defense at Welch's criminal trial. Welch now claims that if three more witnesses had been called, the jury might have acquitted him.[3] The district court determined the supposed testimony of the three witnesses would have been cumulative to the evidence presented in the

[3] Significantly, none of the three witnesses testified at the PCR trial, so we are left with only Welch's version of what their testimony may have been.

criminal trial. *See Taylor v*. State, 352 N.W.2d 683, 687 (Iowa 1984) (stating withholding cumulative evidence ordinarily not prejudicial). The court concluded Welch had failed to show the result of the criminal trial would have been different if the additional witnesses had been called. We concur in the court's conclusion. Welch has failed to show he was prejudiced by counsel's failure to call these three witnesses.

IV. Other Issues

A. Welch contends Bozwell purposely presented false testimony against him at the criminal trial.[4] It is a violation of due process for a prosecutor to knowingly present false testimony at a criminal trial. *State v. DeVoss*, 648 N.W.2d 56, 64 (Iowa 2002). Where false testimony has been presented in a criminal case, the conviction will be reversed if there is any reasonable likelihood the false testimony could have affected the decision of the jury. *State v. Kolbert*, 638 N.W.2d 653, 659 (Iowa 2001).

At the postconviction hearing Welch presented a pro se document which outlined alleged inconsistencies in the testimony of State witnesses at the criminal trial. Welch's claims relate to trivial or insignificant details, such as specific dates or where A.J. first told her parents about the abuse. Welch has

[4] The issues of false testimony and witness tampering were not raised on direct appeal, and Welch offers no reason for failing to raise them earlier. Generally, postconviction proceedings do not provide applicants with the means to litigate claims that should have been raised on direct appeal. *See Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Although it is not clear that the State raised an error preservation argument before the district court in the postconviction proceedings, we may consider that issue on our own. *Top of Iowa Co-op. v. Sime Farms, Inc.,* 608 N.W.2d 454, 470 (Iowa 2000). We choose to bypass that option and deal with the merits here.

presented no evidence to show false testimony was presented at his criminal trial. We conclude he is not entitled to a new trial on this ground.

B. Finally, Welch raises a claim of witness tampering. Tampering with a witness is prohibited by Iowa Code section 720.4 (2001). *See State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). During the criminal trial, Kerri, a defense witness testified as follows:

> Q. Kerri, this social worker that we're talking about, did she ever say anything to you about testifying in this trial? A. She told me not to testify for Paul.
> Q. Why did she tell you that? A. I don't know. She told me to stay out of it and not to testify for him.
> Q. And you're here today to tell the truth, correct? A. Yeah.

At the postconviction hearing Welch testified he believed the social worker's statements to Kerri could have had a chilling effect on her testimony.

As the district court points out, Kerri testified for Welch at the criminal trial. There is no evidence to show the social worker's alleged statements to Kerri adversely affected her testimony. Welch has not shown Kerri's testimony would have been different if the statements by the social worker had not been made. Welch has not presented sufficient evidence of witness tampering.

V. Pro Se Filing

On March 13, 2007, Welch filed a pro se amendment to the appendix. We determine this pro se filing is untimely under Iowa Rule of Appellate Procedure 6.13(2), and do not consider it.

We affirm the district court's decision denying Welch's application for postconviction relief.

AFFIRMED.