IN THE COURT OF APPEALS OF IOWA

No. 7-833 / 06-1627
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROSETTA TAYLOR
a/k/a ROSETTA VESEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde, Judge.

Rosetta Taylor appeals her conviction for child endangerment. **REVERSED AND REMANDED FOR NEW TRIAL.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Harold Denton, County Attorney, and Jason Burns, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., Mahan, J., and Robinson, S.J.*

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

MAHAN, J.

Rosetta Taylor appeals her conviction for child endangerment. She claims she received ineffective assistance of counsel and that the district court erred in accepting a victim impact statement from the victim's temporary guardian. We reverse and remand for new trial.

I. Background Facts and Proceedings

In the fall of 2005 a teacher at Johnson Elementary School in Cedar Rapids contacted police because she was concerned about a nine-year-old student named Jazzmeika who had been absent from school for an extended period of time. Jazzmeika suffers from spina bifida and is therefore physically disabled. The child's legal guardian was her grandmother, the defendant.

On October 3, 2005, the Cedar Rapids Police Department executed a search warrant on defendant's home and found nine-year-old Jazzmeika alone in the house lying on a hospital bed. She wore heavily soiled diapers and sat in urine soaked blankets. Rotting food and feces covered the area surrounding Jazzmeika on the bed. Officers found the condition of the house to be unsafe and very unsanitary. Movement throughout the house was virtually impossible due to the large amount of debris.

The officers concluded Jazzmeika had been left in the house by herself for an extended period of time based on the fact other beds in the house were completely covered in debris, the sinks in the house did not appear to be operational, and the beds were not easily accessible due to the debris throughout the house. The defendant was not home when the search warrant was executed.

On October 7, 2005, the defendant was located and subsequently arrested and charged with child endangerment. After an adverse ruling on defendant's motion to suppress evidence seized during the execution of the warrant on her home, the defendant chose to proceed to a bench trial on the minutes of testimony only. The district court found her guilty of child endangerment in violation of Iowa Code section 726.6(1)(d). At the sentencing hearing, Officer Glenn Kieler provided a victim impact statement on behalf of Jazzmeika. Officer Kieler was one of the officers who executed the warrant on the defendant's home in which Jazzmeika was found. He and his wife subsequently took Jazzmeika into their home and became her temporary guardians for a number of months. Defendant was fined $500 and sentenced to 365 days in jail, 185 days of that to be suspended until September 15, 2008, and placed on supervised probation.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). Ineffective assistance of counsel claims are generally preserved for postconviction relief to allow the facts surrounding the record to be fully developed. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). If, however, the record is adequate, we will evaluate the defendant's claim on direct appeal. *State v. Schoelerman,* 315 N.W.2d 67, 71 (Iowa 1982).

III. Merits

On appeal, Taylor argues she was denied effective assistance of counsel due to defense counsel's failure to assure that the waiver of her right to a jury

trial was knowing, voluntary, and intelligent. She further claims the district court erred in accepting a victim impact statement from Officer Kieler. Because we remand this case for a new trial on the jury waiver issue, we do not reach the merits of Taylor's argument regarding the admittance of the victim impact statement.

To establish an ineffective assistance of counsel claim Taylor must show that (1) her defense counsel failed to perform an essential duty and (2) that prejudice resulted therefrom. *State v. Stallings,* 658 N.W.2d 106, 108-09 (Iowa 2003) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Failure to prove either is fatal to the claim. *State v. Liddell,* 672 N.W.2d 805, 809 (Iowa 2003). We will normally preserve an ineffective assistance of counsel claim for post-conviction relief to allow the record to be fully established. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, in this case, we find the record to be adequate to decide the issue on direct appeal.

A defendant has a constitutional right to a trial by jury. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Iowa Const. art. 1, § 10. However, this right may be "voluntarily and intelligently" waived. Iowa R. Crim. P. 2.17(1); *Stallings*, 658 N.W.2d at 109. It is defense counsel's duty to assure the sufficiency of the colloquy between the defendant and the court concerning the waiver of the defendant's right to a jury trial so as to protect the defendant from conviction under a mistaken application of the law. *See Stallings*, 658 N.W.2d at 112. The adequacy of a jury trial waiver is a matter vested in the court's sound discretion.

Id. at 108. There is, however, a strong presumption against finding a waiver of constitutional rights. *Id.* at 110.

Iowa Rule of Criminal Procedure 2.17(1) provides:

> *Trial by jury.* Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record within 30 days after arraignment, or if no waiver is made within 30 days after arraignment the defendant may waive within ten days after the completion of discovery, but not later than ten days prior to the date set for trial. . . .

There was no written waiver in this case. We do not require strict compliance with the writing requirement of this rule. *Stallings,* 658 N.W.2d at 110. However, a written waiver is prima facie evidence that the waiver is voluntary and intelligent. *State v. Lawrence,* 344 N.W.2d 227, 230 (Iowa 1984). Regardless of whether there is a written waiver, the record must clearly reflect that the waiver of the defendant's right to a trial by jury is voluntary, knowing, and intelligent. *Stallings*, 658 N.W.2d at 110. Both a written waiver and an in-court colloquy should be used to assure the right was properly waived. *Liddell*, 672 N.W.2d at 809-10; *Stallings*, 658 N.W.2d at 111. The in-court colloquy may bring to light further issues regarding the defendant's mental status and capabilities. *See Stallings*, 658 N.W.2d at 111.

Prior to the bench trial on the minutes of testimony, the district court engaged in a colloquy with Taylor regarding both the waiver of her right to a jury trial and the waiver of her right to call witnesses on her behalf and confront witnesses testifying against her. The district court's discussions with Taylor regarding the waiver of these rights were largely integrated with one another.

References to both waivers were made in alternating fashion and even in the same sentence. For instance, the district court stated in part:

> Ms. Taylor, do you understand that by proceeding on a stipulated record at trial, do you understand that you're giving up your right to have the State of Iowa call witnesses? That the people who are listed as witnesses on the Minutes of Testimony, if you choose to proceed with a jury trial, they would be produced in court."

The colloquy suggests that if Taylor gave up her right to a trial by jury she was also required to give up her right to confront the witnesses against her at a bench trial. This colloquy does not make clear that it was an option for Taylor to have a bench trial with live witnesses whom her attorney could cross-examine. It would have been the better practice to separate the colloquy involving waiver of jury trial from the colloquy involving a bench trial on the minutes of testimony.

In *Stallings* our supreme court suggested that a district court should inquire into the defendant's understanding of the difference between jury and nonjury trials by informing the defendant of the following:

1. twelve members of the community compose a jury,
2. the defendant may take part in jury selection,
3. jury verdicts must be unanimous,
4. the court alone decides guilt or innocence if the defendant waives a jury trial, and
5. the defendant will not be rewarded, by either the court or the prosecution, for waiving a jury trial.

658 N.W.2d at 111-12. Although the court is not required to inform the defendant of all five, the district court informed Taylor of only two of the five[1] and intertwined the discussion with a discussion of a waiver of the right to call and confront witnesses. In addition, there was no written waiver for the court to consider. We

[1] The district court's colloquy mentioned only that a jury consists of twelve people and that, without a jury, the court alone would decide the defendant's guilt or innocence.

cannot say, based on this evidence, that the court assured itself that Taylor voluntarily, knowingly, and intelligently waived her right to a trial by jury. Even with a written waiver, the court must assure the waiver is adequate. *Id.* at 111. It was defense counsel's duty to assure this. *Id.* at 112. He failed to do so. Even if he could show that Taylor was adequately informed of the right to a jury trial, it is still evident the court did not assure itself that Taylor fully understood what she was waiving.

Taylor has shown that her defense counsel failed in performing an essential duty. Specifically, he failed to make sure that the court conduct an adequate colloquy with Taylor to insure the waiver of her right to a trial by jury was voluntary, knowing, and intelligent. When such a failure imposes on a fundamental right, such as the right to a jury trial, prejudice is presumed. *Id*. Taylor has therefore met her burden.

REVERSED AND REMANDED FOR NEW TRIAL.