IN THE COURT OF APPEALS OF IOWA

No. 9-623 / 08-0320
Filed December 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY LEE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Paul R. Huscher, Judge.

Johnny Lee Johnson appeals from the judgment and sentence entered on his convictions for two counts of murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Doug Hammerand, Assistant Attorneys General, and Mary Benton, County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Johnny Lee Johnson appeals from the judgment and sentence entered on his convictions for two counts of murder in the first degree. He contends his counsel was ineffective in failing to move to suppress his post-arrest statements to police. Because we find Johnson's counsel was not ineffective, we affirm.

I. Background Facts and Proceedings.

Sometime in March 2007, Johnson's wife, Kim Johnson, left the family's home in Coon Rapids and moved to an apartment in nearby Bayard. Johnson's teenage daughter, Jessica, moved in with Kim, and his teenage son, Josh, remained with him. In early April 2007, Johnson ran into an acquaintance, Mark Bonney, at the lumberyard in Bayard. Johnson asked Bonney if he knew that Kim had begun dating Greg White, and stated that he would like to get "his hands on" White. Bonney warned Johnson that White was strong and that he carried knives, but did not give serious consideration to Johnson's comment.

On the evening of April 29, 2007, Johnson built a bonfire at his home and drank "four or five" cans of beer. He then retrieved a loaded handgun from inside his home and drove to Kim's apartment in Bayard. Johnson parked about a block away from the apartment at just after 10:00 p.m. He was wearing a black sweatshirt with the hood pulled up over his head. As Johnson approached the apartment he noticed the wooden front door was open. Through the screen door, Johnson saw White in the kitchen, wearing only pajama pants. White did not notice Johnson outside the door.

Johnson knelt and shot White three times through the screen door. He then entered the apartment and shot White once more. Kim ran from Jessica's

bedroom, saw White on the floor, and ran back into the bedroom screaming and trying to shut the door behind her. Johnson followed Kim into the bedroom and shot her four times. He then went back into the hall and beat White on the head with the butt of his gun to make sure he was dead, crushing his skull. Johnson reentered the bedroom and beat the back of Kim's head with his gun, also crushing her skull. At that point, Jessica tried to push him off Kim, but he shoved her back to the bed. Johnson's hood fell away from his face, and Jessica realized he was her father. Johnson told her, "It is over. She was f'ing him. I'm going to jail, and I don't care." Johnson then left the apartment.

Jessica checked her mother for a pulse and tried to call 911. A neighbor, Shanda Thomas, heard the gunshots and ran outside. Jessica told Thomas that "her fucking dad shot her mom." As they waited for police to arrive, Jessica called her grandmother. Thomas heard Jessica tell her grandmother, "You need to get over here. Your fucking son shot my mom." Jessica then called her uncle, Joseph Johnson, and said, "Your fucking brother shot my mom."

Soon after receiving the call from Jessica, Joseph also received a call from Johnson. Johnson asked, "Did you hear what I did?" to which Joseph responded, "Yes, Jessie told me."[1] Joseph talked his brother into meeting him at the Guthrie County Sheriff's Office to turn himself in. When they arrived at the

[1] Johnson also spoke to his sister-in-law, Teresa Johnson, twice shortly after the shooting. The first time he said, "I have some sad news. I shot Kim." In his next phone conversation with Teresa, Johnson told her, "I shot them both" and told her, "You're going to have to take care of the children, because I'm going to jail probably." He continued, "I was stupid. I drove to town with a gun." Johnson explained to Teresa that he had gotten drunk and had driven to town to see if Kim was with another man, and if she was, "he was either going to do something, or he was going to kill them."

sheriff's office, Johnson noticed a scrape on his hand and told Joseph that he must have gotten it while "beating them . . . to make sure they were dead."

Johnson was handcuffed and brought inside the sheriff's office. Officer Jeremy Long read Johnson his *Miranda* rights, asked him a few questions, booked him, and placed him in a jail cell. At 1:27 a.m. Johnson submitted to a breath test, which measured his blood alcohol at .019. Johnson also gave a DNA sample.[2] At 1:39 a.m. Special Agent Mitch Mortvedt began to interview Johnson. The interview concluded at 3:38 a.m. Mortvedt interviewed Johnson again later that morning, from 10:02 to 11:31 a.m. During the course of these interviews, Johnson confessed to the shootings of Kim and White. Johnson explained the marital problems he and Kim had been going through, his discovery that Kim was dating someone else, and what led him to shoot the victims earlier that evening. Johnson also described exactly where he had thrown his gun on his drive home.[3]

On June 4, 2007, the State filed a trial information charging Johnson with two counts of murder in the first degree. Johnson pled not guilty. A jury trial began on January 8, 2008. During the trial, Johnson's counsel tried to limit Johnson's culpability to a manslaughter charge.[4] At the close of the evidence,

---

[2] Several evidentiary findings tied Johnson to the crime scene. DNA tested from the mouth of a Budweiser can found on the ground outside the apartment matched Johnson's. A muddy footprint consistent with Johnson's size 9 1/2 Dickies boots was discovered near the apartment. In addition, blood found on Johnson's jeans tested positive with Kim's DNA.

[3] The Iowa Division of Criminal Investigation (DCI) later confirmed that Johnson's C2-52 Czechoslovakian pistol had fired all eight shell casings found at Kim's apartment.

[4] Johnson's counsel argued that Johnson had acted out of a sudden passion when he observed "a man standing half naked" in his estranged wife's apartment. In support of that strategy, Johnson's counsel decided to place Johnson's somewhat sympathetic post-arrest statements (in which Johnson described that "it all happened so

Johnson's motion for judgment of acquittal was denied. On January 14, 2008, the jury returned verdicts finding Johnson guilty as charged. Johnson filed a motion for a new trial and a motion in arrest of judgment. Following a hearing, the court denied both motions. Johnson was sentenced to a life sentence on each count, to be served concurrently. He now appeals.

II. Ineffective Assistance of Counsel.

We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Id.* A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Although we generally preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). In this case, the record is sufficient to address Johnson's claim.

To prove counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Although counsel is not required to predict changes in the law, counsel must exercise reasonable diligence in deciding whether an issue is worth

---

fast," that he went "crazy for an instant," and that he "just frickin'—frickin' went nuts") before the jury without subjecting him to cross-examination.

raising. In accord with these principles, we have held that counsel has no duty to raise an issue that has no merit. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To prove prejudice resulted, a defendant must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Because counsel has no duty to raise a meritless issue, the validity of Johnson's constitutional claim must be determined. *See Dudley*, 766 N.W.2d at 620. Constitutional claims are reviewed de novo. *State v. Bumpus*, 459 N.W.2d 619, 622 (Iowa 1990). "If his constitutional challenges are meritorious, we will then consider whether reasonably competent counsel would have raised these issues and, if so, whether [Johnson] was prejudiced by his counsel's failure to do so." *Id*.

Johnson contends his trial counsel was ineffective in failing to move to suppress his post-arrest statements to police and object to their introduction at trial. He argues his right to counsel under the Fifth Amendment of the United States Constitution (and the comparable provision of the Iowa Constitution, article 1, section 9) was violated because police improperly continued interrogation and obtained his statements after he had requested an attorney.[5]

[5] Johnson alleges his right to counsel was also violated under the Sixth Amendment of the United States Constitution (and its Iowa counterpart, article 1, section 10). These provisions, however, are not applicable. The issue here is whether Johnson invoked his right to counsel during initial questioning following his arrest.

In contrast, the rights to counsel under the Sixth Amendment and article 1, section 10 attach upon the initiation of adversarial criminal proceedings, generally by formal charge, arraignment, preliminary hearing, information, or indictment. *State v. Peterson*, 663 N.W.2d 417, 426 (Iowa 2003). An arrest by itself, with or without a warrant, falls far short of an official accusation by the state against the suspect. *State v.*

Johnson alleges his counsel breached an essential duty by failing to seek suppression of his statements, and that he was prejudiced by this omission because "counsel would have had a good chance for success" had a motion to suppress been filed. Johnson also contends the "inculpatory statements were critical evidence against [him] and played a substantial role in linking [him] to the crime . . . ."

In *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966), the United States Supreme Court determined the Fifth and Fourteenth Amendments require the police to inform a suspect he has a right to remain silent and a right to counsel during a custodial interrogation. Absent *Miranda* warnings and a valid waiver of those rights, statements made during a custodial interrogation are inadmissible. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 725; *State v. Harris*, 741 N.W.2d 1, 5 (Iowa 2007). When a suspect invokes his right to counsel during a custodial interrogation, the police must stop questioning immediately until an attorney is present. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009).

The request for counsel must be unambiguous and unequivocal; that is, a suspect must articulate his desire to have counsel present sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *See, e.g.*, *Harris*, 741 N.W.2d at 7. Although it is generally considered good police practice to clarify a suspect's unclear request, officers have no obligation to stop questioning when an ambiguous or equivocal

---

Johnson, 318 N.W.2d 417, 434 (Iowa 1982); *see also* Iowa R. Crim. P. 2.4(2) (noting that an information or indictment must be filed in order to prosecute indictable offenses). As such, we will not address Johnson's arguments under these provisions.

request occurs. *Davis v. United States*, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362, 373 (1994); *Harris*, 741 N.W.2d at 7; *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997).

When a suspect has invoked his right to counsel, he is not subject to further police questioning "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981). Even when a conversation is initiated by the suspect and reinterrogation follows, the prosecution still has the burden to show the subsequent events indicated a valid waiver of his rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405, 412 (1983). In other words, when reinitiating questioning with police, the suspect must have "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46, 103 S. Ct. at 2834, 77 L. Ed. 2d at 412.

In this case, Johnson was subjected to two separate sessions of custodial interrogation by Special Agent Mortvedt on the morning of April 30, 2007, the first of which began several hours after he turned himself in to police.[6] Prior to any questioning, Johnson read the *Miranda* warning aloud to Special Agent Mortvedt. Johnson said he did not know whether he wanted to talk to police about the incident, and asked, "So do I need a lawyer?" He then asked again, "Do I need a lawyer?" Special Agent Mortvedt responded, "Well, I . . . I can't give any advice, Johnny. Um, I mean that's certainly your right" and continued the interrogation.

[6] The second session of interrogation did not contain any references to Johnson's right to counsel.

Johnson's questions at this point were not sufficient to invoke his right to presence of an attorney. "Merely asking whether counsel is needed is not sufficient to invoke the right to counsel and the protections provided by such invocation." *State v. Washburne*, 574 N.W.2d 261, 267 (Iowa 1997); *see also Harris*, 741 N.W.2d at 6 (determining the suspect's question, "If I need a lawyer, tell me now" was insufficient to invoke his right to counsel). As such, Special Agent Mortvedt was permitted to continue questioning Johnson after this exchange. *Harris*, 741 N.W.2d at 6 ("Officers have no obligation to stop questioning an individual who makes an ambiguous or equivocal request for an attorney.").

Special Agent Mortvedt proceeded to ask Johnson some background questions. As the questioning turned to Johnson's actions on the evening of April 29, 2007, the following exchange occurred:

> MORTVEDT: What'd you do after the bonfire then?
> . . . .
> JOHNSON: I don't know. I can't even tell you what else I did. I better not without a lawyer present.
> MORTVEDT: Okay.
> JOHNSON: I know what I did.
> MORTVEDT: I'm a . . . I . . . what's that? You know what you did?
> JOHNSON: Yeah, I was frickin' drunk and I went in to see her. I wanted to talk to her.

Johnson's statements place at issue whether a reasonable officer, in light of the circumstances, would have understood the statements as a request for an attorney. *See Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1885, 68 L. Ed. 2d at 386. Johnson's statements, "I can't even tell you what else I did. I better not without a lawyer present" may be viewed as analogous to the defendant's

statements in *Harris*, wherein the defendant stated, "I don't want to talk about it. We're going to do it with a lawyer. *Harris*, 741 N.W.2d at 7. In *Harris*, the Iowa Supreme Court concluded, "Harris clearly and unequivocally requested an attorney at this point in the interrogation." *Id.* (citing *Davis*, 512 U.S. at 461-62, 114 S. Ct. at 2356, 129 L. Ed. 2d at 373. Unlike the officers in *Harris*, however, Special Agent Mortvedt properly discontinued the questioning by his response, "Okay."

However, Johnson reinitiated communication with Special Agent Mortvedt when, without further questioning, Johnson stated, "I know what I did." Special Agent Mortvedt simply parroted Johnson's statement in question form, in responding, "I'm a . . . I . . . what's that? You know what you did?" Johnson then began to tell what happened, "Yeah, I was frickin' drunk and I went in to see her. I wanted to talk to her."

Johnson's statement clearly demonstrated "a willingness and a desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46, 103 S. Ct. at 2834, 77 L. Ed. 2d at 412. Johnson's statement therefore did not violate the *Edwards* rule, and Special Agent Mortvedt's decision to proceed with the interrogation was not improper. Questioning continued and Johnson subsequently confessed to the shootings.

Through a pro se brief, Johnson further argues his counsel should have moved to suppress his statements as involuntary.[7] We disagree. Shortly after

[7] Specifically, Johnson contends the circumstances surrounding the interrogations rendered his statements involuntary because:

> [W]hile under the influence of alcohol, confined to a cell, [he] was interrogated at least twice, in the middle of the night, for several hours at

the shootings, Johnson (after calling his brother and informing him that he had shot Kim) decided to turn himself in to police. Officer Long read Johnson his *Miranda* rights, and Johnson later read the *Miranda* rights aloud to Special Agent Mortvedt. He informed both officers that he had law enforcement experience, as he had previously been employed as a police officer for several years in Maine. The first interrogation began shortly after his arrival at the sheriff's office and lasted less than two hours. The second interrogation began more than six hours later and lasted less than one and one-half hours. Johnson understood the questions he was asked and appeared to be of normal intelligence. Although Johnson contends he was impaired due to the influence of alcohol, we note that his breath test revealed a blood alcohol content of .019, significantly below what is considered the legal limit for impairment.[8]

Under the totality of the circumstances, we find Johnson's statements were voluntary. *See, e.g.*, *State v. Countryman*, 572 N.W.2d 553, 558-59 (Iowa 1997); *State v. Pierson*, 554 N.W.2d 555, 561 (Iowa Ct. App. 1996). We find Johnson's pro se argument to be without merit.

Because Johnson has failed to show counsel failed to perform an essential duty, there is no need to address the State's claim that the failure to file a motion to suppress was due to trial strategy of defense counsel. However, we feel compelled to address the second prong Johnson is required to prove to establish his claim of ineffective assistance of counsel: prejudice. *Ledezma*, 626

> a time, that he knows of, by a 'Special Agent' . . . in order to secure incriminating statements, admissions and several material confessions[.]

[8] A person commits the offense of operating while intoxicated if the person operates a motor vehicle while having an alcohol concentration of .08 or more. *See* Iowa Code § 321J.2(1)(b).

N.W.2d at 142 ("If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.").

To establish prejudice, Johnson must prove a reasonable probability that, but for his counsel's failure, the result of the proceeding would have been different. *Maxwell*, 743 N.W.2d at 196. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ledezma*, 626 N.W.2d at 143 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

Here, there was overwhelming evidence of Johnson's guilt without regard to his own statements. For example, Johnson told Bonney that he would like to "get his hands" on White; Johnson's teenage daughter was an eyewitness to the murder of her mother as she recognized her father after his sweatshirt hood fell down revealing his face; Johnson told his daughter, "It's over. She was f'ing him. I'm going to jail, and I don't care"; Johnson parked a block away from the apartment although there was parking right outside the apartment; Johnson's DNA was on a beer can found near his wife's apartment; Johnson's muddy footprints were found near the apartment; Johnson's wife's blood was found on his blue jeans; eight shell casings matching Johnson's Czechoslovakian pistol were found in and around the apartment; Johnson admitted to his brother and sister-in-law, "I was stupid. I drove to town with a gun"; and Johnson explained to his brother that a scrape on his hand must have occurred "while he was beating [them] to make sure [they] were dead."

Upon our review of the facts of this case, we conclude Johnson's Fifth Amendment right to counsel was not violated.[9] Even if we assume there is merit to the claims, Johnson has failed to show any prejudice arose. As a result, trial counsel was not ineffective in failing to raise this meritless claim.

III. Conclusion.

We conclude Johnson's right to counsel under the Fifth Amendment was not violated during police interrogation after his arrest and his statements were admissible. No prejudice arose in any event. Therefore, we find Johnson's counsel did not render ineffective assistance by not making such claims. We affirm Johnson's convictions.

AFFIRMED.

[9] Similarly, we conclude Johnson was not denied effective representation when his counsel failed to challenge the statements under article 1, section 9 of the Iowa Constitution.