IN THE COURT OF APPEALS OF IOWA

No. 9-699 / 08-1942
Filed November 25, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JONATHON DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Michael R. Mullins and Richard J. Vogel, Judges.

Robert Jonathon Davis appeals from the judgment and sentence entered upon jury verdicts finding him guilty of second-degree sexual abuse and third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Adams, Assistant Appellate Defender, and Tyler Eason, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, and Rose Anne Mefford, County Attorney, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Robert Jonathon Davis appeals his conviction, following a jury trial, of two counts of sexual abuse in the second degree and four counts of sexual abuse in the third degree in violation of Iowa Code sections 709.3 and 709.4 (2007). On appeal, Davis argues: (1) the district court erred in denying his motion to suppress statements he made to sheriff's deputies before receiving *Miranda* warnings;[1] (2) the district court erred in overruling his motion for a new trial based on newly discovered evidence; and (3) his counsel rendered ineffective assistance by failing to object to the constitutionality of the imposition of a special sentence pursuant to Iowa Code chapter 903B.1. Upon our review, we affirm.

I. Background Facts and Proceedings

On the morning of March 3, 2008, K.F., the seventeen-year-old step-daughter of Davis, was taken to the hospital by her friend and her friend's father after she reported to them that she had been sexually abused by Davis. While K.F. was at the hospital, Deputy Don DeKock of the Mahaska County Sheriff's Office was contacted to investigate the allegations. Upon his arrival, Deputy DeKock interviewed K.F. and arranged for a sexual assault kit to be completed. This kit was sent to the Iowa Department of Criminal Investigation (DCI) Laboratory in Ankeny for analysis on March 10, 2008.

Both K.F. and her mother told Deputy DeKock they wanted Davis removed from the family's house. Deputy DeKock decided to speak with Davis at that residence in rural Barnes City, Mahaska County. Since DeKock had been told by K.F.'s mother and K.F.'s friend's father that Davis had a temper and access to

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

automatic weapons, Deputy DeKock arranged for Deputies Richard Adams and Trevor Wells to meet him there. All three deputies were armed with their handguns.

When the deputies arrived at Davis's property around 3:30 p.m., it was cold and windy. Deputy DeKock parked his unmarked patrol car in the driveway near a long utility building that was on the property about 175 feet from Davis's house. Deputy Adams, with Deputy Wells as a passenger, followed and parked his marked patrol car behind Deputy DeKock's vehicle. As the deputies pulled into the driveway, Davis heard his Rottweiler dogs bark. He looked out his bedroom window, saw the two vehicles, and came out of his home wearing a hooded sweatshirt.

As Davis walked across his yard, Deputy DeKock asked him to identify himself. Deputy DeKock then told Davis that the deputies "needed to talk" to him and asked if they could go into the house. Davis declined and said they could talk outside. Deputy DeKock then asked if they could step into the long building to get out of the wind.

The long building, referred to by witnesses as a "pole barn" or a "machine shed," measures approximately 100 feet running north to south and 60 feet running east to west. The north, south, and west sides are enclosed, while the east side (the side facing the driveway) is open. Certain farm machinery was kept in the pole barn.

The deputies and Davis entered the pole barn as a group through the open east side. Davis, standing about six feet in, faced the west with his back to the open east side. Deputy DeKock stood in front and slightly to the left of Davis,

while Deputy Adams stood on Davis's left, and Deputy Wells stood to Davis's right. Each of the deputies was within a few feet of Davis. Each was wearing his standard issue county law enforcement uniform, and each had a pistol visible in a side holster. Each of the deputies is larger than Davis. Deputy DeKock is six-feet-one-inch tall and weighs approximately 250 pounds, Deputy Adams is six-feet-two-inches tall and about 290 pounds, and Deputy Wells is five-feet-nine-inches tall and weighs around 190 pounds. Davis is five-feet-five-inches tall and weighs approximately 165 to 170 pounds.

During the interview, Davis was never advised of his *Miranda* rights and was never told he was free to leave. Deputy DeKock testified that the exchange took place as follows:

> So the four of us then at that time stepped into the pole barn, and I advised Mr. Davis that I wanted to talk to him concerning some things going on with [K.F.]. His comment to me was 'Nothing is going on with [K.F.]. I haven't seen her all day.'
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> My response to him was I understood that, and then I proceeded to ask him some further questions.
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> . . . .
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> At that point in time I asked him that I understand—understood or had received information that he was treating [K.F.] more like a wife than his wife, and I asked him then is that true and he said yes.
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> . . . .
>
> I asked him if he had been doing some acts that he shouldn't be doing with [K.F.], and he said yes. I asked him if he had been doing a number of sexual acts with [K.F.] and he stated yes.
>
> . . . .
>
> I asked him if in fact he had intercourse with her on the previous evening, which would have been March 2nd, and he stated yes.
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> . . . .
>
> I believe then he asked—stated to me or said it in a question type or statement something about that 'I am in trouble' or 'Am I in trouble, ' and I said—answered, 'Yes' to him.

> Then he asked me if he was going to be arrested, and I advised him at that time, I said to the extent of, 'Yes, Robert, consider yourself under arrest at this time.'

At trial, Davis testified that he was unable to hear Deputy DeKock's questions clearly because he is deaf in one ear, he was wearing a hooded sweatshirt and stocking cap, the dogs were barking, and the wind was causing tree limbs to scrape against the pole barn's roof. Davis denied having had sex with K.F. and denied telling the deputies that he had had sex with her.[2] At the motion to suppress hearing, Davis also stated he felt intimidated at the time and did not feel free to leave their presence. Specifically, Davis stated that Deputy Adams rested his hand on his taser throughout the entire exchange and that Deputies Adams and Wells "stepped forward a little bit" when he shifted his weight from his bad leg, and that they did not step back until he stopped moving.

The State charged Davis by trial information with six counts of sexual abuse. On June 17, 2008, Davis filed a motion to suppress the statements made to the deputies while in the pole barn. The motion was overruled, and the case proceeded to trial on October 21, 2008.

At trial, K.F. testified to the progression of sexual abuse perpetrated by Davis starting with inappropriate touching when she was ten years old, oral sex at the age of eleven, and sexual intercourse at the age of twelve. K.F. stated that from the age of twelve to the age of seventeen, Davis would have her perform oral sex and engage in sexual intercourse on a weekly basis. K.F. stated that Davis told her he "would have to kill her" if she told anyone. K.F. also stated that

[2] While their recollection of the interview was more limited, both Deputy Adams and Deputy Wells testified that Davis made incriminating admissions about sexual activities with his stepdaughter.

Davis provided her with marijuana starting when she was eleven. K.F. further stated that Davis used anal sex as a way to punish her. K.F. also testified that the last sexual contact she had with Davis was on the night before she reported him to her friend (March 2, 2008). On that evening, K.F. stated that they had sexual intercourse on the floor of the upstairs bathroom.

K.F.'s younger brother also testified to an occasion six years ago where he apparently witnessed K.F. performing oral sex on Davis in the shop.

Davis testified in his own defense and asserted that the allegations were untrue, and that K.F. only made the claims after Davis grounded her for skipping school. Davis also asserted that he has genital herpes, and that despite the numerous claimed instances of sexual abuse, K.F. has never been diagnosed with the condition. Davis also pointed out that K.F.'s physical examination revealed her hymen to be extremely stretchy but intact, which does not support or disprove a finding that penetration ever occurred.

On October 23, 2008, the jury returned a verdict of guilty on all counts. Five days later, the DCI report of the sexual assault kit was completed and provided to Davis. The report revealed that a DNA analysis did not produce any evidence of fluids, foreign DNA, or foreign hairs.

On November 14, 2008, Davis filed a motion for new trial and a motion in arrest of judgment. On November 21, 2008, the court overruled the motions and sentenced Davis to a term of twenty-five years imprisonment on both counts of sexual abuse in the second degree. The court ordered these two sentences to be served consecutively with Davis serving at least seven-tenths of each term. Davis was also sentenced to a term of ten years on each count of sexual abuse

in the third degree, these four counts to be served concurrently, but consecutive to the sentences for sexual abuse in the second degree. The court further ordered a special sentence pursuant to Iowa Code section 903B.1, meaning that upon the completion of his terms of incarceration, Davis would be under the supervision of the Iowa Department of Corrections for life, with eligibility for parole as provided in Iowa Code chapter 906. Davis appeals.

II. Motion to Suppress

Davis first argues that the district court erred in refusing to suppress the statements made to the deputies in the pole barn because he was never advised of his *Miranda* rights. Motions to suppress based on *Miranda* violations are reviewed de novo. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). This review requires us to "make an independent evaluation of the totality of the circumstances as shown by the entire record." *Id*. We consider both the evidence from the suppression hearing and that introduced at trial. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). We also give deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, although we are not bound by such findings. *Turner*, 630 N.W.2d at 606.

"*Miranda* warnings are not required unless there is both custody and interrogation." *State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003).

> In determining whether an individual is in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Countryman, 572 N.W.2d at 557-58 (quoting *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293, 298 (1994)). We utilize an objective test, where the focus is on "whether a reasonable person in the defendant's position would understand himself to be in custody." *Countryman*, 572 N.W.2d at 558. Relevant factors to guide us in making this determination include:

> (1) the language used to summon the individual, (2) the purpose, place and manner of the interrogation, (3) the extent to which the defendant is confronted with evidence of [his] guilt, and (4) whether the defendant is free to leave the place of questioning.

Id.; *see also State v. Bogan*, __ N.W.2d __, __ (Iowa 2009) (discussing and applying these four factors).

On our review, we agree with the district court's well-reasoned treatment of this issue. Deputy DeKock told Davis the deputies needed to talk to him, but they did not compel him to go to a particular place. The pole barn was just a way to get out of the wind. *See Miranda*, 672 N.W.2d at 759 (factoring in whether the police "took charge of [the defendant's] movement"). Davis had already declined to allow the deputies into his house (because, according to the explanation he provided at trial, he had been playing videogames and "getting stoned"). The deputies accepted that decision.

The pole barn is also located on Davis's property. *See id*. ("[T]he general rule is that in-home interrogations are not custodial for purposes of *Miranda*."); *see also State v. Schwartz*, 467 N.W.2d 240, 245 (Iowa 1991) (holding that no warnings were necessary before incriminating statements were made to a deputy sheriff while questioning defendant in his own yard). Although this is a factor

against custody, it may be negated if "the usual comforts of home" are taken away such that the questioning "belie[s] its location." *Miranda*, 672 N.W.2d at 760.

In this regard, Davis argues that his exits were blocked by armed officers when he was in the pole barn. However, after reviewing photographs of the structure, we agree with the district court's findings that the place of the interview was an "open shed" and the "physical setting does not support any conclusion that the defendant could not have exited the shed." Davis was standing just a few feet from the long, open-air side of the pole barn. No officer was positioned between him and the open-air side. Davis also points out that the deputies were armed and their firearms were visible. However, this is frequently the case with law enforcement officials:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question.

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1977). Here, Davis was not handcuffed or subject to any physical restraint. *See Miranda*, 672 N.W.2d at 760 (stating the fact the defendant was handcuffed strongly indicated custody). In fact, Davis had approached the officers, rather than the other way around.

Further, the manner of questioning was direct, non-confrontational, investigative in nature, and not coercive or threatening. *State v. Smith*, 546

N.W.2d 916, 924 (Iowa 1996).[3] The evidence also shows that the questioning was relatively brief and to the point.

> [W]hile *Miranda* was most obviously concerned with the "marathon" routine of questioning a suspect, custody has been found in relatively brief interrogations where the questioning is of a sort where "the detainee is aware that questioning will continue until he provides his interrogators the answers they seek."

Miranda, 672 N.W.2d at 760 (quoting *United States v. Griffin*, 922 F.2d 1343, 1351 (8th Cir. 1990)).

Although Davis testified he did not feel free to leave, the custody determination depends on the objective circumstances of the questioning, not on the subjective views harbored by either the questioning officers or the person being questioned. *Countryman*, 572 N.W.2d at 557.[4] In any event, we do not believe Deputy DeKock went to the residence with a preconceived plan to arrest Davis, and that his goal was to get Davis to incriminate himself before carrying out an inevitable arrest. We believe it is more likely Deputy DeKock intended to question Davis and arrest him only if he admitted to the sexual activity with K.F., which apparently he did.

Based upon our review of the entire circumstances, we find Davis was not in custody. Therefore, we affirm the district court's denial of Davis's motion to suppress.

III. Motion for a New Trial

Davis next contends that the district court erred in denying his motion for new trial based on newly discovered evidence. "Motions for new trial on the

[3] Indeed, Davis asserted at trial that he did not really hear the questions.
[4] Deputy DeKock, unsurprisingly, testified that Davis was free to leave.

basis of newly discovered evidence are not favored, should be closely scrutinized and granted sparingly. In passing on the motion the trial judge is vested with wide discretion." *State v. Gilroy*, 313 N.W.2d 513, 522 (Iowa 1981) (quoting *State v. Farley*, 226 N.W.2d 1, 3 (Iowa 1975)). This broad discretion is particularly appropriate, because the trial court has a clearer view "to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant." *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992).

To prevail on a motion for new trial on the basis of newly discovered evidence, Davis must show by a preponderance of the evidence that the DCI report: (1) was discovered after the verdict; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material to the issues in the case and not merely cumulative or impeaching; and (4) probably would have changed the result of the trial. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996); *see also* Iowa R. Crim. P. 2.24(2)(*b*)(8).

> The showing of due diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought evidence where he had no reason to apprehend any existed. He must exhaust the probable sources of information concerning his case; he must use that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed. But he is not placed under the burden of interviewing persons or seeking in places where there is no indication of any helpful evidence.

State v. Farley, 226 N.W.2d 1, 4 (Iowa 1975) (quoting *Westergard v. Des Moines Ry. Co.*, 243 Iowa 495, 503, 52 N.W.2d 39, 44 (1952)).

Five days after the October 23 end of trial, the DCI laboratory completed its report based upon the evidence gathered through the sexual assault kit. This report showed that a DNA analysis did not produce any evidence of fluids,

foreign DNA, or foreign hairs. Upon receiving this information, Davis moved for a new trial. The district denied the motion, finding that "defense counsel was aware, or certainly should have been aware through depositions, that the evidence had been presented to the State Laboratory and results not yet reported at the time of trial."

We recognize, as Davis argues, that since the DCI laboratory is operated by the State, he "has no authority to obtain these results absent state assistance." However, Davis failed to show that he made a reasonable effort to obtain this evidence before trial. He neither pursued the matter with the prosecutor nor attempted to enlist the court's assistance. Instead, after he deposed the State's witnesses and presumably learned the analysis was taking place, he filed an August 8, 2008 demand for a speedy trial.[5]

Furthermore, Davis has not demonstrated that the outcome of the trial would have been different. According to K.F., Davis had used a condom on the night of March 2, and she had also bathed and showered afterward. The emergency services nurse who took specimens the next day testified that "if a person wears a condom, any likeliness of finding DNA evidence or type of semen goes way, way down." The district court observed that K.F.'s testimony was "believable." Her statements about the sexual abuse to other witnesses, once she began to discuss it, were consistent. At the same time, Davis's testimony

[5] Davis does not contend that the results of the DCI work were known to the State, even informally, before October 28, and he is not making a *Brady* argument on appeal. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963) (holding "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"); *accord State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996).

that he did not hear what Deputy DeKock was asking him at the pole barn seems less credible.

Since Davis failed to introduce any evidence that he made a reasonable effort to obtain the DCI report before trial, and since he has failed to show the report would have affected the outcome, we find the district court did not abuse its discretion in denying Davis's motion for new trial.

IV. Constitutionality of Iowa Code section 903B.1

At the outset, we note that the Iowa Supreme Court has recently upheld the imposition of a special sentence under Iowa Code section 903B.2[6] against constitutional challenges based upon cruel and unusual punishment, equal protection, separation of powers, and imposition of an illegal sentence. *See State v. Wade*, 757 N.W.2d 618, 623-30 (Iowa 2008). However, in *Wade*, a due process challenge was not briefed; therefore, the court held that issue to be waived. *Id*. at 622-23.

Since the supreme court did not address this issue, Davis contends his trial counsel was ineffective for failing to object to the imposition of the special sentence pursuant to Iowa Code section 903B.1 on the constitutional grounds of procedural and substantive due process. *See* U.S. Const. amends. V, XIV; Iowa Const. art. I, § 9. The federal and state due process provisions are nearly

[6] Iowa Code sections 903B.2 and 903B.1 impose nearly identical special sentences. *Compare* Iowa Code § 903B.2 (imposing upon individuals "convicted a misdemeanor or a class "D" felony under chapter 709, section 726.2, or section 728.12 . . . a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years . . . .") *with* Iowa Code § 903B.1 (imposing upon individuals "convicted of a class "C" felony or greater offense under chapter 709, or a class "C" felony under section 728.12 . . . a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life").

identical in scope, import and purpose. *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). Accordingly, in the absence of an argument that our analysis of the two provisions should differ, we construe them similarly. *Id*.

Claims of ineffective assistance of counsel have their basis in the Sixth Amendment to the United States Constitution, and are reviewed de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although these claims are generally preserved for postconviction relief, we will consider such claims on direct appeal when the record is adequate. *Id*. Here, the record is adequate to decide the issues presented.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove, by a preponderance of the evidence, both that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674, 693 (1984); *accord Maxwell*, 743 N.W.2d at 196. To establish the first prong, the defendant must overcome the presumption that counsel was competent and "show that counsel's performance fell outside the normal range of competency." *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). "Counsel is not ineffective when the issue counsel failed to raise has no merit." *Id*. Therefore, we must first determine whether there is any merit to the issues Davis claims his counsel should have raised. *Id*. If there is merit, we must then decide whether counsel's action fell outside the normal range of competency, and if so, whether Davis was prejudiced by such failure. *Id*.

A. Procedural Due Process

Davis first challenges Iowa Code section 903B.1 on procedural due process grounds. "Procedural due process protections act as a constraint on government action that infringes upon an individual's liberty interest, such as freedom from physical restraint." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 240 (Iowa 2002). In determining whether a statute violates an individual's right to procedural due process, "[w]e consider the type of process due and determine whether the procedures provided in the statute adequately comply with the process requirements." *Id*.

Following the guilty verdict by a jury, the district court imposed the special sentencing authorized by section 903B.1. Davis concedes that the imposition of this special sentence "accorded with the recognized procedures." However, Davis claims "the special sentence under Iowa Code Chapter 903B contemplates additional proceedings to implement the revocation of the defendant's release upon an assertion that defendant has violated a rule of supervision." The State argues that since Davis has not yet been placed on parole, he has not violated any terms of his extended parole, and thus the issue is not ripe for adjudication.

> A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative. The basic rationale for the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Wade, 757 N.W.2d at 627 (citations omitted).

This rationale is especially applicable in the present case because "[t]o the extent there are consequences from a parole violation, such decisions are executive or administrative decisions." *Id*. at 628. Because Davis's argument is based upon additional proceedings following a possible future parole violation and consequences from that violation, we conclude the issue is not ripe for adjudication. *See id*. at 627 (holding that a constitutional challenge to Iowa Code section 903B.2 based upon future parole violations was not ripe). Thus, Davis' trial counsel was not ineffective in failing to raise this premature procedural due process claim. *Westeen*, 591 N.W.2d at 207.

B. Substantive Due Process

Davis next contends section 903B.1 violates his substantive due process rights. Substantive due process "prevents the government from interfering with rights implicit in the concept of ordered liberty." *Seering*, 701 N.W.2d at 662 (citations omitted). In a substantive due process examination, we first determine the "nature of the individual right involved." *Id*. If a fundamental right is involved, we apply strict scrutiny analysis. *Id*. On the other hand, if a fundamental right is not involved, we only apply a rational basis analysis. *Id*.

Iowa Code section 903B.1 does not impinge upon a fundamental right. *State v. Kingery*, ___ N.W.2d ___, ___ (Iowa Ct. App. 2009). Therefore, the statute need only survive a rational basis analysis, which "requires us to consider whether there is a reasonable fit between the government interest and the means utilized to advance that interest." *Id*. at ___. As this court has already stated "there is a reasonable fit between the State's interest in protecting its citizens from sex crimes and the extended supervision required under section 903B.1."

Id. at ___. Therefore, there is no merit to Davis's substantive due process claim, and his trial counsel was not ineffective in failing to raise the issue.

V. Conclusion

Upon our review, we find the district court did not err in denying Davis's motion to suppress or his motion for new trial. We also find that his counsel was not ineffective for failing to challenge the constitutionality of Iowa Code section 903B.1 on due process grounds. Thus, we affirm.

AFFIRMED.