IN THE COURT OF APPEALS OF IOWA

No. 9-746 / 08-1921
Filed November 12, 2009

MCKINLEY M. ROBY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

A postconviction relief applicant appeals the district court's decision dismissing his application for postconviction relief, contending that his original trial and appellate counsel were ineffective in failing to challenge the adequacy of his jury trial waivers. **AFFIRMED.**

Scott Michels of Gourley, Rehkemper & Lindhold, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Mansfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

McKinley Roby appeals the district court's denial of his application for postconviction relief. He asserts that his attorneys provided ineffective assistance in connection with his waiver of his right to a jury trial.

I. Background Facts and Proceedings

The State charged McKinley Roby with third-degree sexual abuse with habitual offender and sexual predator enhancements. Roby filed a written waiver of his right to a jury trial. Before trial, the court engaged Roby in a discussion about the contents of this waiver. Roby acknowledged that he understood key aspects of the right he was giving up. Following trial, the court found Roby guilty as charged.

The case proceeded to a second trial to establish the habitual offender and sexual predator enhancements. A different judge questioned Roby about his previous jury trial waiver and elicited an on-the-record waiver of his right to a jury trial in this phase. After trial, the court found him guilty of being a habitual offender and a sexual predator and imposed a commensurate sentence.

Roby filed a direct appeal with the Iowa Supreme Court which was dismissed as frivolous. Roby next filed an application for postconviction relief, alleging in part that trial counsel was ineffective in allowing him to waive his right to a jury trial. Following a hearing on the application, the district court denied and dismissed the application.

II. Analysis

Iowa Rule of Criminal Procedure 2.17(1) (2002) provided that "[c]ases 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 . . . ." Roby contends that trial counsel was ineffective in failing to ensure that this waiver standard was satisfied. Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

To prevail on his ineffective-assistance-of-counsel claim, Roby must show that counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Roby cannot prevail for two reasons.

First, at the time of his trials, his attorney had no legally recognized duty to ensure that the district court engage in a colloquy with him about his waiver of a jury trial. *See State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) (overruling *State v. Lawrence*, 344 N.W.2d 227 (Iowa 1984)). The Iowa Supreme Court only imposed that duty after Roby's trials. *Id.* With respect to Liddell's claim that his trial attorney was ineffective in failing to insist on a colloquy, the court stated, "[I]t would be patently unfair to adjudge Liddell's counsel ineffective for failing to foresee today's decision, which diverges from precedent." *Id.* As the law at the time of Roby's trials did not require an in-court colloquy and trial counsel had no obligation to foresee a change in that law, trial counsel was not ineffective in failing to challenge the colloquy.

Second, Roby cannot prevail because the district court judges conducted adequate colloquies. Before the first trial, the court engaged in the following exchange:

> THE COURT: . . . Mr. Roby, I have reviewed your court file. I note on May 24, 2002, you did, along with Mr. Hoffey, execute a

waiver of right to trial by jury. Do you understand and remember signing that document?

THE DEFENDANT: Yes.

. . . .

THE COURT: Likewise, you have been advised by Mr. Hoffey and that should you desire to give up this right to trial by jury, it must be done in writing which you have done. And, also, we are doing this on the record at this time. Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: You understand that if in fact you do waive your right to have a jury trial, there will be no jury trial of course. We will not be selecting a jury today. And, again, there will no longer be the other requirements or any conviction or verdict the jury would reach would have to be unanimous of these 12 people. Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: You also understand that when we proceed to trial today, you will be proceeding to trial to me alone, and I will be the sole decision-maker about whether the State has proven you guilty beyond a reasonable doubt of the charge set forth in the Trial Information. Do you understand that as well?

THE DEFENDANT: Yeah.

THE COURT: Do you freely and voluntarily give up and waive this right to have a jury trial?

THE DEFENDANT: Yes, I do.

Before the second trial, the court engaged in the following exchange:

MR. HOFFEY: Also, Your Honor, should we get to that point, to be clear that Mr. Roby's waiver of a jury trial also applies to the enhanced sentencing procedures.

THE COURT: Okay.

[THE PROSECUTOR]: Mr. Hoffey, just so we're clear, I would like to make sure that Mr. Roby confirms that as well. He is nodding his head. I want to make sure the record reflects that is his wish.

THE COURT: [The prosecutor] brings up a valuable point. Mr. Hoffey, you indicated on behalf of your client the waiver of a jury trial would also apply to the enhancements either as an habitual offender or as a sexual predator. I am going to ask you again, Mr. Roby, is that also your desire at this time that you do in fact waive or give up your right to have a jury trial on the issue of being an habitual offender should that occur?

THE DEFENDANT: Yes.

> THE COURT: And, likewise, on the possible enhancement as a sexual predator, you also give up or waive your right to have a jury trial on that issue as well?
> THE DEFENDANT: Yes.

When the second phase began, the court stated:

> COURT: All right. Thank you. Mr. Hoffey, do you agree that we have covered your client's waiver of his right to a jury trial as to this phase of the proceedings also?
> MR. HOFFEY: I do.
> COURT: And, Mr. Roby, are you also in agreement with that?
> DEFENDANT: Yeah.
> COURT: All right. I wasn't a part of the earlier proceeding, so I'm not personally aware as to what may have transpired there. But, Mr. Roby, you are aware, are you not, that you do have a right to have a jury trial as to this phase of the proceeding, too?
> DEFENDANT: Yeah.
> COURT: And then all of the rights pertaining to the jury trial that Judge Zager or some other judge may have spoken to you about and you've waived previously, you do have those rights here in this phase, too. Do you understand that?
> DEFENDANT: Yeah.
> COURT: And do you give up your right to have a jury trial as to this phase of the proceeding?
> DEFENDANT: Yeah.

Roby maintains that these colloquies were insufficient because the court did not apprise him of his "right to participate [in] the jury selection process or confirm[] that he was not under the belief that leniency would be granted to him for waiving a jury trial." It is true that the Iowa Supreme Court identified these topics as appropriate for a jury-waiver colloquy. *Id.* at 813–14. However, the court was quick to note that the topics it identified are not "black-letter rules" or a "checklist" that must be present in every jury trial waiver situation. *Id.* at 814. The court also stated that substantial compliance with the rule is acceptable. *Id.*

We conclude that the district court substantially complied with the rule. In the first exchange, the court asked Roby if he understood the written waiver,

which contained references to the twelve-juror and unanimous-verdict requirements. The court reiterated those requirements and Roby's waiver of them, explained that the court would be the sole decision-maker, and ensured that Roby was "freely and voluntarily" giving up that right. In the second exchange, the court ensured that it was still Roby's intent to abide by his earlier waiver.[1] Accordingly, trial counsel did not breach an essential duty in failing to challenge the adequacy of the colloquies. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998) (stating that counsel does not breach a duty to his or her client in failing to pursue a meritless issue).

Roby also contends that his attorney on direct appeal was ineffective in failing to raise these arguments. Although Roby raised this issue before the postconviction relief hearing, the district court did not rule on it and no post-trial motion seeking a ruling on this issue. Therefore, we conclude error was not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").[2]

We affirm the denial of Roby's application for postconviction relief.

AFFIRMED.

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[1] Roby urges that since he had bifurcated trials on the underlying offense and the enhancements, "[t]he intent of [rule 2.17(1)] requires separate written waivers in bifurcated trials in order to ensure the defendant understands he has a right to a jury trial and is made aware of the consequences of waiving such a right." He cites no authority for this proposition. Therefore, we reject it. Iowa R. App. P. 6.903(2)(*g*)(3).

[2] In any event, *Liddell* was decided after the appeal was dismissed and, by its terms, only applies to waivers made after the decision became final. *Liddell*, 672 N.W.2d at 814. Therefore, direct appeal counsel would not have been ineffective.