IN THE COURT OF APPEALS OF IOWA

No. 9-784 / 07-1518
Filed December 17, 2009

JOSEPH KONCEL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jackson County, Mary E. Howes, Judge.

Applicant appeals the district court's dismissal of his petition for postconviction relief. **AFFIRMED.**

Andrew M. Larson, Moline, for appellant.

Joseph J. Koncel, Anamosa, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, James Kivi, Assistant Attorney General, Phil Tabor, County Attorney, and Christopher M. Raker, County Attorney for appellee.

Considered by Sackett, C.J., Vaitheswaran, J., and Miller, S.J.*

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

SACKETT, C.J.

Applicant, Joseph Koncel, appeals from the district court's denial of his application for postconviction relief. We affirm. Joseph Koncel was convicted following a jury trial of the first-degree murder and first-degree kidnapping of Marty Budde. Koncel appealed to this court. We reversed the conviction of first-degree murder based on an error in a jury instruction, but we affirmed the kidnapping conviction. *See State v. Koncel*, No. 97-1988 (Iowa Ct. App. Dec. 28, 1998). In this appeal from the district court's denial of his claim for postconviction relief, Koncel contends his trial attorney was ineffective in (1) failing to seek to suppress Koncel's statements made during interrogation and failing to object to the admission of a transcript of the interrogation, (2) failing to strike two potential jurors, (3) failing to object to certain testimony about an exhibit, and (4) failing to call certain witnesses. He claims the attorney representing him at the postconviction proceeding was ineffective in failing to call Brian Houston as a witness. He further contends that his right to effective assistance of counsel was violated when the trial court prohibited his trial attorney from conferring with him about his decision to not testify at trial. Koncel also claims the postconviction court erred in finding his due process and equal protection rights were not violated at sentencing. We affirm.

I. SCOPE AND STANDARD OF REVIEW. Ineffective assistance of counsel claims involve a constitutional challenge and we therefore review them de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on ineffective assistance of counsel claims, Koncel has the burden of proving by a

preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983). With regard to the first prong, Koncel must overcome the 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). With regard to the second prong, Koncel must show that "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). We may dispose of ineffective assistance of counsel claims if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

II. BACKGROUND AND PROCEEDINGS. Decedent Budde's parents rented a farm to Koncel's mother. There was testimony that in the evening of March 5, 1997, Budde and a friend drove by the farm and noticed lights on in an out-building. After taking the friend home, Budde returned to the farm. The next morning Budde's wife reported him missing. The search led to the farm where a trail of blood was found. Budde's truck and body were located in a wooded area eight miles from the farm.

Koncel told the police his brother, Brian, and Budde had gotten into an argument in the late night hours of March 5, 1997, at the farm. At some point Koncel went outside and saw Budde badly beaten and semi-conscious. Koncel said he helped Brian load Budde in the back of Budde's truck and they drove to a secluded area where Brian pulled Budde into the surrounding woods.

Both brothers were charged and convicted of murder and kidnapping in the first degree. Each brother's conviction for murder was reversed due to instructional error. *See State v. Koncel*, No. 98-0169 (Iowa Ct. App. Feb. 7, 2001); *State v. Koncel*, No. 97-1988 (Iowa Ct. App. Dec. 28, 1998). The State elected to not retry Joseph Koncel on the murder charge and the district court imposed the sentence on Koncel's conviction for kidnapping in the first degree.

III. FAILURE TO MOVE TO SUPPRESS STATEMENTS MADE DURING INTERROGATION. Koncel first claims his trial counsel was ineffective in failing to move to suppress statements Koncel made when questioned by officers. He claims these statements were inadmissible because they were made in exchange for a promise of leniency. He also argues counsel was ineffective in failing to object to the admission of the transcript of the statements. Under the best evidence rule, he contends, any admissible statements should have been presented to the jury through the audiotape of the statements and not the transcript.

The admissibility of inculpatory statements made during interrogations depends on whether the statements were made voluntarily. *See State v. Munro*, 295 N.W.2d 437, 440 (Iowa 1980). We make this determination by examining the totality of the circumstances, including the characteristics of the accused, the details of the interrogation process, and the psychological impact of the officers' statements on the defendant and the defendant's reactions. *Id.* If the inculpatory statement "results from a promise of help or leniency by a person in authority it is

not considered voluntary and is not admissible." *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982).

> An officer can tell a suspect that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant. However, the line is crossed if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Under the latter circumstances, the officer's statements ordinarily become promises of leniency, rendering the statements involuntary.

State v. McCoy, 692 N.W.2d 6, 28 (Iowa 2005) (citations omitted).

Koncel contends that his statements were made involuntarily because they were induced by a promise of leniency. He identifies two places in the transcript where the sheriff's statements end mid-sentence and he claims the transcript does not have the full statements. According to Koncel the full statements, added in italics below, were:

> Sheriff: If you helped him load him up, you know, that's *fine Marty could have been alive still and that is not as serious as Brian's murdering Marty*.

> Sheriff: That's what I'm saying. But, we need to find out exactly what happened. And if you helped him load that body into that truck, we need to know. That's fine, tell us, you know, ok? We have, we have to pinpoint down exactly what took place. Ok? And then we'll get through this. Ok? But, *you have to provide something useful for the deal we've talked about.*

He claims that these full statements show that his admissions were induced by a promise of leniency. We disagree. Statements throughout the interrogation show that the sheriff was encouraging Koncel to be honest. At one point in the questioning, the sheriff told Koncel he could not make promises about whether Koncel would have to testify against his brother. Koncel's allegation that the sheriff's statements were not fully transcribed is not supported by any evidence.

As the State argues, it is plausible that the sheriff did not complete the sentence because Koncel began talking. Also, in the entire transcript of the interrogation, there is no reference to a potential deal or leniency for Koncel. No officer references such an agreement, Koncel's statements never mention a deal, and he never inquires about leniency or a deal during the interrogation. Under the totality of the circumstances, we find Koncel's statements were voluntary and admissible. His attorney was therefore not ineffective in failing to suppress the statements.

Koncel also contends the transcript of the interrogation was inadmissible under the best evidence rule. "When a party is attempting to prove the contents of a writing, recording, or photograph, the courts require the original to be produced, unless it falls under exceptions carved out by the Iowa Rules of Evidence." *State v. Khalsa*, 542 N.W.2d 263, 268 (Iowa Ct. App. 1995). At the postconviction trial, Koncel testified that his trial attorney found the audiotape to be inaudible and read the transcript. Koncel stated that his attorney discussed the possibility of suppressing the transcript with him. Koncel testified that at that stage in the trial, he intended to testify and therefore his attorney believed it would not matter whether the statements were suppressed or not. Koncel stated at the postconviction hearing, "In retrospect, I believe we should have at least put the motion forward." He admitted his attorney was very busy with the case and they had to prioritize and make decisions quickly because "there were a lot more important things to be done inside the case . . . ."

Koncel's own testimony at the postconviction hearing shows that his attorney did not perform outside the range of a reasonably competent attorney and that the trial attorney's decision to not move to suppress the statements was a reasonable strategic decision. Since Koncel planned to testify, the attorney believed the substance of the statements would be admitted through Koncel's own testimony, regardless of whether the transcribed interrogation was admitted. The attorney may have also found the transcribed statements to contain both exculpatory and inculpatory information. It may have been a strategic decision to have the information admitted through a transcript rather than the audiotape if the tape was inaudible. We will not find ineffective assistance rendered, "'where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail.'" *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (quoting *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989)).

IV. JURORS. Koncel contends that his trial attorney was ineffective in failing to strike two jurors, Mary Kubic and Marty Horlik. During voir dire, Mary Kubic expressed that she had formed an opinion on the case but would try to set her opinion aside. Trial counsel moved to have her dismissed for cause but the court denied the motion. Koncel argues trial counsel was ineffective in failing to use a peremptory strike to have her excluded. He also contends counsel should have had Marty Horlik excluded from the jury through a motion to excuse for cause or through a peremptory strike. Koncel submitted an affidavit from a cellmate to support this contention. The affidavit stated that Marty Horlik was a county employee who supervised prisoners while completing community service.

The affidavit stated that while Horlik supervised Koncel's cellmate during community service, they discussed the case and evidence against Koncel.

We have examined this argument and find it to be without merit. "Impartiality does not demand complete juror ignorance of issues and events." *State v. Walters*, 426 N.W.2d 136, 138 (Iowa 1988). Standing alone, the fact that a juror has been exposed to information about a case does not support the conclusion that the juror is prejudiced. *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985). The relevant inquiry is whether the juror holds a fixed opinion of the merits of the case and cannot judge the defendant's guilt or innocence impartially. *Walters*, 426 N.W.2d at 138. "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 139 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 756 (1961)). Mary Kubic indicated that she would follow the obligation of the oath, put aside what she had learned about the case previously, and base her decision on the evidence presented. The cellmate's affidavit only states that Horlik learned information about the case during his employment. Koncel provides no evidence that Horlik had a fixed opinion on Koncel's guilt or innocence. We also note that counsel may have had a strategic reason for choosing to use peremptory strikes on other jurors. Koncel has failed to establish ineffective assistance of counsel on this issue.

V. ADMISSION OF PHOTOGRAPH. Koncel contends his trial attorney should have objected to testimony about a photograph showing the bed of the pickup that allegedly carried decedent. The photograph was taken from behind

the driver's side of the cab and showed the back end of the pickup bed. There was testimony that there was a stain of what was thought to be blood shown in the photograph on both the bed and tailgate of the pickup.

Dr. Thomas Bennett, the state medical examiner, testified and was asked a series of hypothetical questions premised on the assumption that the stain in the photograph was blood. Bennett opined the victim was alive when put in the pickup due to the amount of alleged blood in the pickup. Koncel claims this theory formed the predicate action to convict Koncel of kidnapping. He contends his attorney should have objected to this testimony because there had been no testimony that the stain on the bed of the truck was actually identified as human blood, or specifically Budde's blood.

The State contends there is no basis to this claim because Koncel's own statements support a finding that he and his brother carried Budde and put him in the bed of the pickup while he was still alive. The State also contends that there was testimony that the tailgate was analyzed and contained blood matching the DNA profile of Budde, and the photograph showed that the stain on the tailgate and the bed of the pickup was a continuous blood stain.

There is no merit to this contention. Bennett's opinion was supported by the evidence and Koncel cannot show prejudice. Even if the photograph and related testimony was not admitted, Koncel's own statements indicated Budde was placed in the truck while alive.

VI. FAILURE TO CALL WITNESSES. Koncel contends his trial counsel should have called the Jackson County medical Examiner. The Bellevue Police

Chief apparently reported that upon arriving at the scene the doctor was shown the blood and hair on the tire and the blood in the yard and said, "if an individual lost this much blood they were probably dead." Koncel argues that this evidence would show that he disposed of a dead body, not that he kidnapped anyone.

Dr. Bennett, the state medical examiner, testified the blows to Budde's head would have been fatal if left untreated. Based on the amount of blood in the pickup truck, and the fact that Budde bled into the wounds received in the woods, a reasonable jury could find he was alive when kidnapped and died in the woods, with or without the county medical examiner's opinion. This argument was also addressed and rejected in Koncel's direct appeal. *See State v. Koncel*, No. 97-1988 (Iowa Ct. App. Dec. 28, 1998) (finding that since Koncel's own version of the events was that Budde was alive when loaded into the truck, his counsel had no duty to seek a pathologist's opinion that Budde was dead when loaded into the truck).

He also contends that his trial counsel should have called Brian Keuter, who would have testified he drove by the farm at 12:40 a.m. on March 6, 1997, and saw Budde's truck parked on a hill. Koncel argues this evidence was essential to his defense because the State argued that Budde died at approximately 12:30 a.m. and was removed from the scene in Budde's truck. Koncel asserts this testimony would have created reasonable doubt as to whether a kidnapping did occur. We disagree. The time of death was approximated and testimony that Budde's truck was seen at the farm at 12:40 a.m. would not contradict the State's evidence. Furthermore, Koncel cannot

prove prejudice because he admitted to police during interrogation that Budde was alive when placed in the truck bed.

Koncel contends that his postconviction attorney should have called his cellmate, Brian Houston, as a witness in the postconviction relief proceeding. Koncel made a pro se motion to continue the postconviction trial to allow Houston's testimony. The district court denied the motion finding the testimony would not be "so relevant and material to what I heard that it requires a continuance." Houston, while doing community service, was supervised by Marty Horlik, a county maintenance employee who served on Koncel's jury. Houston filed an affidavit stating he talked to Horlik about the case and why Koncel was arrested. The district court had the benefit of these documents and Koncel stated that Houston would have only testified to what was already in the affidavits and reports filed with the court. Houston's testimony at the postconviction relief hearing would have been repetitive of these exhibits. Koncel has failed to show how he was prejudiced by the failure to call this witness, given that the evidence to be provided by Houston's testimony was already included in exhibits admitted at the postconviction relief proceeding.

VII. FAILURE TO CONFER WITH DEFENDANT ABOUT TESTIFYING AT TRIAL. At trial, at the close of the State's evidence, the State moved to amend the trial information to add a charge of aiding or abetting in the murder of Marty Budde, and the court granted the amendment. Thereafter, in judge's chambers, Koncel's attorney requested a record be made regarding whether or not the defendant intended to testify. The attorney confirmed with Koncel that he

had been advised throughout the trial that, in the attorney's opinion, it was in Koncel's best interest to testify. The court then asked Koncel whether he would testify and Koncel stated that he did not want to testify. Koncel's attorney stressed to the court that he believed it was to Koncel's advantage to take the stand and the attorney had based the entire case on Koncel's testifying. Koncel confirmed he was electing to not testify. The attorney then requested a few minutes to confer with Koncel. The court stated that the attorney could not "rubber hose" the defendant into testifying and that the defendant must make the decision. The court asked Koncel whether conferring with counsel would make any difference in his decision. Koncel stated he had basically made the decision to not testify the day before. The court expressed concern that if Koncel conferred with counsel and then decided to testify, that it may not be of his free will. The court confirmed with Koncel that no one had talked him out of testifying and that Koncel alone was making the decision.

Koncel now argues his right to effective assistance of counsel was denied when the trial court refused to allow his trial attorney to confer with Koncel about testifying. He now believes if he would have conferred with counsel, he would have testified. He cites *Geders v. U.S.*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) for support. In *Geders*, the Supreme Court concluded that a court's order prohibiting a defendant from discussing the case with his attorney during an overnight recess violated the defendant's Sixth Amendment right to counsel. *Geders*, 425 U.S. at 91, 96 S. Ct. at 1337, 47 L. Ed. 2d at 601. We find this case inapplicable to the circumstances before us. In *Geders*, there was an overnight

recess in the middle of the defendant's testimony. *Id.* at 82, 96 S. Ct. at 1332, 47 L. Ed. 2d at 595-96. The court prohibited the defendant and his attorney from discussing any matters during the overnight recess due to the court's concern that the defendant would seek improper "coaching" about the impending cross-examination. *Id.* at 82-83, 96 S. Ct. at 1332-33, 47 L. Ed. 2d at 596-97.

In this case, the trial court asked Koncel whether he wanted to meet with counsel privately before making a final decision and Koncel indicated it would not change his decision. The trial court's ruling was intended to protect Koncel's constitutional right to decide whether to testify on his own behalf. The trial court was careful to assure Koncel made the decision independently and the record thoroughly documents that Koncel's decision not to testify was against counsel's advice. The attorney and trial court obeyed Koncel's wishes. Koncel cannot now complain that his right to effective assistance was denied when he was not allowed to meet with counsel. He cannot prove prejudice when he advised the court that there was no need to confer with his attorney. *See State v. Sage*, 162 N.W.2d 502, 504 (Iowa 1968) (stating that a defendant "cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be permitted to allege an error . . . which was committed or invited by him, or was the natural consequence of his own actions").

VIII. SENTENCING CLAIMS. Koncel's remaining claims involve the sentencing proceedings that occurred after our court reversed Koncel's conviction for murder due to instructional error. In the original sentencing proceeding, the court entered judgment against Koncel for both murder and

kidnapping in the first degree but specified that sentence was only being issued on the murder conviction because the sentence for kidnapping merged into the murder sentence. After our decision, the State decided not to reinitiate the murder charges, and instead sought to have Koncel sentenced for only the kidnapping conviction. Koncel contends there were various errors during this second sentencing proceeding. He argues (1) his right to due process was violated when he received no notice of the new sentencing proceeding, (2) the scheduling of the sentencing was a violation of Iowa Rule of Criminal Procedure 2.23(1),[1] and (3) his right to counsel was violated because the attorney representing him at the new sentencing had a conflict of interest.[2]

We need not determine whether these errors occurred. Even if there is merit in these claims, Koncel cannot establish any prejudice resulted. Kidnapping in the first degree is a class "A" felony, which required the court to

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[1] Iowa Rule of Criminal Procedure 2.23(1) provides in applicable part,

> Upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, the court must fix a date for pronouncing judgment, which must be within a reasonable time but not less than 15 days after the plea is entered or the verdict is rendered, unless defendant consents to a shorter time.

Koncel contends there was only a thirteen day period between his judgment and sentence because the court entered the order scheduling the new sentence proceeding on February 26, 1999, and the new sentencing proceeding occurred on March 11, 1999. Koncel misreads the rule. The jury returned a verdict of guilty on the charge of kidnapping in the first degree on October 8, 1997. This judgment was entered at the original sentencing on October 24, 1997. The verdict and judgment on the kidnapping conviction was affirmed by our court on December 28, 1998 and procedendo issued on February 8, 1999. The sentence was then imposed on the kidnapping conviction on March 11, 1999, well beyond fifteen days after the verdict was rendered. The day the court scheduled the new sentence proceeding, February 26, 1999, is irrelevant to the application of rule 2.23(1).

[2] Koncel's original trial attorney represented Koncel at the second sentencing. Koncel claims this was a conflict of interest since Koncel had raised ineffective assistance of counsel claims on direct appeal.

impose a life sentence. *See* Iowa Code §§ 710.2 (1997) (defining kidnapping in the first degree as a class "A" felony); 902.1 (requiring the court to commit a defendant adjudged guilty of a class "A" felony to the custody of the department of corrections for the rest of the defendant's life). The sentence would have been the same even if the alleged errors had not occurred.

IX. CONCLUSION. We affirm the district court's dismissal of Koncel's petition for postconviction relief. Koncel's trial attorney did not render ineffective assistance in failing to move to suppress the statements made during interrogation or in failing to object to admission of the transcribed interrogation. Koncel did not establish that Mary Kubic or Marty Horlik were not impartial jurors and failed to prove he was prejudiced by witness testimony regarding a stain found on the bed and tailgate of Budde's truck. Koncel also was not prejudiced by trial or postconviction counsel's failure to call certain witnesses and he was not denied effective assistance when the trial court refused counsel's request to confer with Koncel about testifying. There was no prejudice shown by any alleged errors in sentencing.

AFFIRMED.