IN THE COURT OF APPEALS OF IOWA

No. 4-115 / 93-0780

FILED
MAY 26 1994
CLERK SUPREME COURT

LEROY WILLIAM BASHAM,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, Timothy J. Finn, Judge.

Basham appeals from the district court decision denying his application for postconviction relief. **AFFIRMED.**

Andrew J. Dunn of Parrish, Kruidenier, Moss & Dunn, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor and Richard J. Bennett, Assistant Attorneys General, and Steven J. Orth, County Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

Leroy William Basham appeals from the district court decision denying his application for postconviction relief. Basham claims his counsel was ineffective in failing to: (1) object to prosecutorial misconduct during closing arguments; (2) appeal an adverse ruling concerning change of venue; (3) conduct a searching voir dire concerning pretrial publicity; (4) file a motion to suppress defendant's statements which were illegally obtained; and (5) challenge a State's witness's testimony as coerced. We affirm.

On November 6, 1987, after a jury trial, Basham was found guilty of murder in the first degree. Basham was represented by attorney Steven K. Nalean. Nalean was also appointed to represent Basham on appeal.

The sole issue raised on appeal was whether the district court erred in failing to submit an instruction on involuntary manslaughter as a lesser-included offense. The Iowa Court of Appeals affirmed. State v. Basham, No. 88-22 (filed March 6, 1989).

Subsequently, Basham applied for postconviction relief. After a hearing, the postconviction court found sufficient reason the ineffective assistance of counsel claim was not raised on direct appeal since defendant was represented by the same lawyer on appeal as at trial. See State v. Turner, 345 N.W.2d 552, 558 (Iowa App. 1983).

The court determined: (1) the prosecutor's comments were not improper; (2) Basham could not show actual prejudice on the part of the jury or that publicity surrounding the case had not been so pervasive and inflammatory that prejudice must be presumed; (3) Nalean and the court conducted separate inquiries on whether potential jurors could be fair and impartial and there was no showing further inquiry would have established any of the jurors were prejudiced; (4) there was no showing Basham's statements to the police were illegally obtained and there was no showing the statements would have been suppressed; and (5) there was no showing the testimony of prosecution witness Brad Johnson had been coerced. The court denied the application for postconviction relief. Basham appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa

1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

Basham's first claim of ineffective assistance of his trial counsel is based on alleged prosecutorial misconduct. Basham argues his trial counsel should have objected to statements the prosecutor made during closing arguments which Basham claims were improper and highly prejudicial.

We have reviewed in detail those portions of the closing arguments which Basham claims were improper. We find that Basham has taken some of the remarks out of context. We find as a whole they were not improper.

Basham next claims his counsel was ineffective on appeal by not challenging the trial court's refusal to grant a change in venue.

Prior to trial, Basham's counsel, Steven Nalean, requested a change of venue because of pretrial publicity. This request was denied after an evidentiary hearing, at which counsel had submitted evidence of media accounts related to Basham's case. At the postconviction hearing, Nalean testified he did not raise the venue issue on direct appeal because he believed there was not grounds for reversal on that basis. He stated he believed defendant received a fair and impartial jury.

Although there was not a significant amount of time between the publication of the articles and the trial, after reviewing the articles, we agree with the postconviction court:

> (1) the articles did not indicate that the Applicant was guilty of the charge against him; (2) the articles were factual and informative in tone; (3) the articles were not inflammatory in tone; (4) there were no editorials concerning the case or denunciating the Defendant; (5) there were no "emotional" stories regarding the Defendant or the victim; and (6) the pretrial coverage was not inaccurate, misleading, or unfair.

We find Basham's attorney was not ineffective in failing to raise this issue on appeal.

Basham next claims his trial counsel failed to adequately question prospective jurors regarding exposure to pretrial publicity. As a result, according to Basham, it "was impossible to determine whether the jurors held any fixed opinions about the case because of pretrial publicity."

Both Basham's trial counsel and the trial judge questioned the jury concerning the pretrial publicity. These inquiries did not disclose any basis for believing there was any prejudice on the part of the jury. This, combined with our findings regarding the change of venue issue, lead us to conclude Basham has failed to establish that but for Attorney Nalean's alleged error in not asking more questions of the jury, the result of the proceeding would have been different.

Basham next claims his trial counsel was ineffective in failing to file a motion to suppress prior statements Basham had made to the police. Basham claims his pretrial statements were taken in violation of his Fifth and Sixth Amendment rights.

The evidence introduced at the postconviction proceeding shows that prior to questioning, Basham was advised of his Miranda rights. The record also shows Basham waived those rights in writing and agreed to speak with officers without the assistance of counsel. Basham makes no claim that he did not understand the proceedings or fully comprehend the significance of signing the waiver form. Nor does he make any claim that his waiver of rights or the statement itself was procured by any form of coercion, or promise of leniency.

Basham claims the law enforcement officers "kept badgering him." However, at no time during the interview did Basham state that he no longer wished to speak with the officers, or that he wished to speak with counsel. We find Basham's trial counsel was not ineffective in failing to file a motion to suppress these pretrial statements.

Basham next claims the State coerced prosecution witness Bradley Johnson into cooperating in the investigation of the murder. Basham's allegation is that Johnson was intimidated and coerced by the State to testify in a certain fashion at Basham's trial. Basham also claims Johnson was intimidated and coerced by the State into

denying this fact at Johnson's deposition for Basham's postconviction hearing. Basham states that prior to the deposition, Agent Wood spoke to Johnson by telephone and told him the purpose of the deposition and that it was a "bunch of bull." Basham also complains that during the deposition the County Attorney was nodding his head up and down agreeing with Johnson's testimony.

At the deposition for Basham's postconviction hearing, Johnson testified that no representative of the State had ever advised him how he should testify at the deposition, and that no coercion had been used to obtain his cooperation in the murder investigation or at Basham's trial. We find no credible evidence Johnson was coerced into testifying in this fashion at the postconviction deposition. We find this assignment of error is without merit.

Basham's final claim is that the cumulative effect of all the errors was so prejudicial, he was denied a fair and impartial trial. We find no merit in this claim. We affirm.

AFFIRMED.