IN THE COURT OF APPEALS OF IOWA

No. 7-150 / 96-0762

000253

SCOTT DAVID NEUENDORF,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
MAY 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

The applicant appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Alfredo Parrish and Matthew Boles of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

SACKETT, P.J.

Applicant-appellant Scott David Neuendorf was convicted in 1992 of second-degree sexual abuse after the jury found he and a second man took a woman in their car and raped her. Neuendorf's conviction was affirmed by the supreme court. The court preserved certain of Neuendorf's claims his trial counsel did not provide effective assistance of counsel for postconviction proceedings. *State v. Neuendorf*, 509 N.W.2d 743, 748 (Iowa 1993).

This application for postconviction relief followed. Neuendorf filed the application claiming his trial counsel was not effective for she did not file a motion to suppress and did not object when the State elicited testimony from Neuendorf concerning his silence after his arrest and his refusal to provide a written statement. At the hearing on his application, Neuendorf was granted leave to amend his application to add a claim that his trial counsel failed to disclose her prior relationship with one of the arresting officers. Neuendorf alleged that relationship constituted a conflict of interest.

After the hearing, Neuendorf's application for postconviction relief was denied. The trial court found trial counsel's social relationship with one of the arresting officers ended seven months prior to her representing Neuendorf and it had been disclosed to Neuendorf. The court further found after arrest Neuendorf was advised of his *Miranda* rights and had made voluntary statements and answered questions while being transported to jail. After arriving at the police station, the officers asked

Neuendorf to give them a written statement summarizing what he had said. He declined and asked to speak to a lawyer. All questioning then ceased. The court found this evidence established no *Miranda* violation had occurred.

The court further found Neuendorf opened the door to the State's inquiring into his refusal to provide a written statement for the police. The court also found his trial counsel's decision not to object to this line of inquiry was trial strategy. Finally, the trial court found Neuendorf had failed to present evidence of prejudice caused by the conduct and tactics of his defense counsel.

Neuendorf first contends his trial attorney should have filed a pretrial motion to suppress the statements he made to the police. He claims there was no evidence to indicate he understood or waived his *Miranda* rights. The State argues Neuendorf waived his *Miranda* rights. The State further advances the decision not to file a motion to suppress was a strategic decision because Neuendorf's statements to the police were generally consistent with the theory of defense he presented at trial. The State also argues the issue Neuendorf now raises that his statements were not voluntary is not preserved for review. The State also contends there was overwhelming evidence of Neuendorf's guilt.

Neuendorf bears the burden of showing he received ineffective assistance of counsel and rebutting the presumption of competency of counsel. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984); *Henderson v. Scurr*, 313 N.W.2d 522, 524 (Iowa 1981). He must first demonstrate trial counsel's performance fell below the normal

competency standard; i.e., that counsel failed to perform an essential duty. Second, he must prove prejudice. That is, he must demonstrate a reasonable probability of acquittal or of a guilty verdict for a lesser offense. *Strickland v. Washington*, 466 U.S. 668, 687-90, 104 S. Ct. 2052, ____, 80 L. Ed. 2d 674, 695-98 (1984); *Taylor*, 352 N.W.2d at 685.

We first address the State's claim Neuendorf cannot show prejudice because there is overwhelming evidence of guilt. The court in *Neuendorf* said the evidence showed a sharp contrast between the testimony of the victim and that of the defendant who testified the victim was a prostitute for hire and the sex act was consensual. *See Neuendorf*, 509 N.W.2d at 747-48. We therefore disagree with the State that overwhelming evidence of guilt demonstrates Neuendorf cannot show prejudice.

We next address Neuendorf's contention statements were elicited from him through interrogation while in custody without a proper *Miranda* warning or waiver. Neuendorf was arrested on a warrant at his place of employment. Two officers testified Neuendorf was read the *Miranda* warning, arrested, and put in the back seat of a police car. On the way to the station, he said it was not a kidnapping, she was a prostitute. He gave further statements as to what occurred on the evening in question. At the police station, when asked he refused to give a written statement and asked to first talk with an attorney.

Trial counsel testified she saw no merit to a motion to suppress in that Neuendorf had been given a proper *Miranda* warning and the statements he made were similar to his trial testimony.

There was no basis to support a motion to suppress. Contrary to Neuendorf's argument, the statements made by Neuendorf in the police car were voluntarily made after he had been advised of his rights under *Miranda*. We affirm the trial court on this issue.

Neuendorf next contends trial counsel should have asked for a mistrial [1] when the following occurred as the prosecutor cross-examined Neuendorf.

> PETITIONER: I recall being told I was arrested for first-degree kidnapping and second-degree sexual abuse and had a million dollar bond on me, and after that I don't really recall much of what they said until we arrived at the police station.
> PROSECUTOR: Okay. And what do you recall what happened then?
> PETITIONER: They asked me about giving a statement or something.
> PROSECUTOR: And what did you say?
> PETITIONER: I said I would like to talk to a lawyer.
> PROSECUTOR: Didn't you decline to give a statement?
> PETITIONER: Yes, I did.
> PROSECUTOR: And didn't you -- didn't they ask you to put this in writing?
> PETITIONER: Yes, they did.
> PROSECUTOR: And you didn't do that, did you?
> PETITIONER: No, I did not.

Trial counsel testified she did not object because she was not certain the objection would have been sustained and she may have opened the door in cross-examination of one of the officers, and she believed an objection would have been harmful to defense and a mistrial was not necessary. Neuendorf contends the door

---

[1] On direct appeal, Neuendorf contended his trial attorney should have objected to the questioning.

was not opened to the testimony and it was error for the postconviction court to find it had been.

When evidence of post-arrest silence is introduced to a jury, it can be grounds for a mistrial. *State v. Baccam*, 476 N.W.2d 884, 886 (Iowa App. 1991). The State had no basis for introducing it under this record. We disagree with the trial judge's conclusion the door had been opened. We note our displeasure with the prosecutor's decision to engage in this line of questioning using Neuendorf's silence for impeachment purposes following his request for an attorney. The prosecutor was aware of the answer and yet asked questions that elicited the challenged response. *See* admonition in *State v. Kyseth*, 240 N.W.2d 671, 674 (Iowa 1976).

This is an appeal of a postconviction proceeding, not a direct appeal. Consequently, we look at how the trial court may have ruled only as it applies to whether trial counsel's action in not objecting was reasonable trial strategy. Trial counsel advanced reasons for not objecting. We look at her reasons as they would have existed under the pressures of trial, not as we assess it under a written appellate record. Trial counsel was uncertain how the trial judge would rule and an objection would emphasize the testimony. She did not find it damaging to her theme of the case. She had valid reasons for her decision. We cannot say her strategy was unreasonable despite the fact it did not work. *See State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). We affirm.

AFFIRMED.