IN THE COURT OF APPEALS OF IOWA

No. 2-065 / 90-1607

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

1126

RAYMOND BRODENE,

Appellant.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Brodene appeals his conviction, following a jury trial, for first-degree murder. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Dan Voogt, Assistant County Attorneys, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ., but decided en banc.

SCHLEGEL, J.

Raymond Brodene was accused of shooting and killing a gas station attendant during a robbery and was charged with first-degree murder. A jury found him guilty of that crime, and he appeals the resulting conviction. Brodene contends the district court erred by refusing to order a transcript to facilitate posttrial motions and by restricting his impeachment of a State witness. He also argues his trial attorney rendered ineffective assistance in several respects. We address the first issue below.

Brodene challenges the court's refusal to provide trial transcripts to newly-appointed counsel based on several constitutional grounds. When constitutional rights are in question, our review is de novo. State v. Johnston, 406 N.W.2d 794, 796 (Iowa App. 1987) (citations omitted).

Between trial and sentencing, Brodene's trial attorney withdrew, and a new attorney was appointed to represent Brodene. Brodene's new counsel filed a motion for extension of time to file posttrial motions and a request for production of court file, depositions, and trial transcript. The court denied the request for a copy of trial transcripts and granted counsel less than a month to file any posttrial motions. Based on the court's ruling, defense counsel filed an application to withdraw. In the motion, counsel argued competent preparation of the posttrial motions was impossible without a copy of the transcripts and adequate time to prepare.

A hearing was subsequently held on the matter. During the hearing defense counsel noted he was not involved in Brodene's defense at trial and was not present for any portion of the trial. Counsel further stated trial counsel would not confer with him because it was apparent from speaking to the county attorney's office and Brodene that ineffective assistance of counsel claims would likely be raised. Therefore, newly-appointed counsel argued the court's denial of the transcripts forced him to rely solely on Brodene's memory of the trial and the points that Brodene, who was not versed in the law, felt were of importance. The State argued the court should either: (1) order the transcripts and continue sentencing to give counsel an opportunity to prepare posttrial motions; (2) allow counsel to withdraw and reappoint original counsel; or (3) allow withdrawal of both attorneys and appoint new counsel.

Notwithstanding arguments by counsel for both parties, the court again denied Brodene's request for a copy of the transcripts and denied counsel's application to withdraw. In reaching its decision, the court found counsel should not be "permitted to kind of paw through [the transcript] and see what's there." The court noted counsel had not shown a particular need for a certain portion of the transcript. The court further found the granting of such a transcript to newly-appointed counsel would set a bad precedent for future cases. Defense counsel subsequently filed a motion for new trial; this motion was denied.

Brodene contends the district court erred by refusing to provide his new attorney with a copy of the trial transcript at public expense. He asserts the new attorney needed a copy of the transcript in order to prepare posttrial motions effectively. Brodene argues that by refusing to provide the transcript at public expense, the district court denied Brodene due process and impaired his sixth amendment right to counsel. Brodene also states the district court's ruling denied him equal protection by denying him a benefit which a nonindigent criminal defendant could have obtained by paying. The State argues Brodene has not demonstrated the district court erred and he was not prejudiced by the court's denial of his request for a transcript. We find both that the district court erred and that Brodene was prejudiced.

The Constitution provides an indigent defendant with the right to assistance of counsel for his or her defense in all criminal prosecutions. U.S. Const. amends. VI & XIV. See Iowa Const. art. 1, § 10; see also Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S. Ct. 792, 796-97, 9 L. Ed. 2d 799, 805-06 (1963). This right requires "more than a mere formal appointment." State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). The Constitution "requires appointment of effective counsel and counsel that are afforded 'an opportunity' and 'time' to prepare and present their indigent client's case." Id. (citation omitted). An opportunity to prepare implies something more than time and

may include the funds required to pay the necessary and essential costs of investigation and preparation of a case. Id. The court in Williams noted "[a]ssignment of counsel under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case will not satisfy the necessary requisites of due process of law." Id. (citing In re Orcutt, 173 N.W.2d 66, 70 (Iowa 1969)).

In considering a trial court's refusal to grant the defendant's request for the trial transcript of an alleged accomplice, the Iowa Supreme Court has stated:

> Basically the issue raised is defendant's right to counsel--effective counsel. This means not only providing defendant with a lawyer; it also means providing that lawyer with the opportunity--in both time and tools--to perform his [or her] often onerous task completely and conscientiously. Anything less is a denial of equal protection.

State v. Campbell, 215 N.W.2d 227, 229 (Iowa 1974) (citations omitted). On this issue, the United States Supreme Court has further noted:

> [T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 433, 30 L. Ed. 2d 400, 403 (1971) (emphasis added).

In Britt the Supreme Court identified two factors that are relevant to the determination of the necessity of a transcript:

> (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

Id. at 227, 92 S. Ct. at 434, 30 L. Ed. 2d at 403-04. The Court further noted a defendant need not demonstrate a particular need for the full transcript. Id. at 228, 92 S. Ct. at 434, 30 L. Ed. 2d at 404. It is sufficient to show a general need for the transcripts as a discovery device or for impeachment of a witness. Id. In addition, "the value and utility of a transcript is ordinarily self-evident and needs no demonstration." Campbell, 215 N.W.2d at 230.

In the present case, we feel the value of Brodene's trial transcript to newly-appointed counsel was self-evident. Counsel needed the transcripts as a discovery device to prepare and investigate any claims to be raised in the posttrial motion. Counsel could not allege any error or misconduct that occurred during trial without a copy of the transcript or without knowledge of the events that had transpired. Indeed, the court denied Brodene's motion for new trial partly on the basis that his allegations were merely conclusive.

The record reflects the trial transcripts were an essential discovery device for counsel to competently prepare any posttrial motions. Furthermore, the record shows no alternatives were available to fulfill the same function as the transcript. Trial counsel was unwilling to

speak with counsel about the proceedings due to potential ineffective assistance claims, and counsel could not rely on the county attorney's office or Brodene's memory in preparing the posttrial motions.

Under the circumstances of this case, we find Brodene was entitled to a copy of the trial transcript. We believe this denial resulted in substantial prejudice to Brodene because counsel was unable to adequately raise and investigate numerous claims of jury misconduct and ineffective assistance of trial counsel. The court's refusal denied Brodene transcripts which were available to any defendant with the means to pay for them. See Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585, 591, 100 L. Ed. 891, 899 (1956) ("There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."). Brodene was, therefore, denied his right to due process, equal protection, and his right to counsel in violation of the sixth and fourteenth amendments.

We reverse the trial court's refusal to allow a transcript to defendant's posttrial counsel. The district court's judgment of conviction and sentence is set aside. In view of the availability of a transcript to defendant following this appeal, we remand the case to the district court and order that defendant shall be permitted to file, within forty-five days from the issuance of procedendo in this appeal, motions in arrest of judgment, for new trial, or such other motions, as shall be deemed by counsel for

defendant to be appropriate. The district court shall hear such motions. The rulings thereon by the district court shall be appealable in the manner allowed for all final orders of the district court.

In view of our remand of this case, the other issues raised by defendant are not addressed at this time.

We do not retain jurisdiction.

REVERSED AND REMANDED.

All judges concur except Donielson and Habhab, JJ., who dissent.

DONIELSON, P.J. (dissenting)

I respectfully dissent to the majority's opinion and would affirm the defendant's conviction and sentence.

I. I agree the trial court erred in refusing to provide Brodene's newly appointed counsel with a copy of the trial transcript at public expense. Nevertheless, I do not believe the error constitutes grounds for reversal. Because Brodene suffered no prejudice as a result of the error, I conclude the error is harmless. A remand for the purpose of allowing Brodene to file a motion for new trial is simply an unnecessarily time consuming surrender to form over substance.

Brodene argues his new attorney's inability to examine a transcript of the trial proceedings prejudiced him by preventing him from raising specific assignments of error in a motion for new trial. For two reasons, I find no merit in this argument.

A. First, having reviewed the record, I find Brodene had no meritorious assignments of error to assert in a motion for new trial. Brodene's attorney did have the benefit of a transcript in preparing for this appeal, and I find none of Brodene's assignments of error on appeal meritorious.

Brodene argues the trial court committed reversible error in refusing to allow Brodene to impeach State's witness Ted Nelson with a prior conviction. I disagree. While the trial court should have allowed the line of

questioning, its failure to do so is clearly harmless in light of the overwhelming evidence of Brodene's guilt.

Brodene admitted he was at the gas station on Southwest 9th Street when the attendant was shot. A witness observed Brodene's car at the gas station about one hour before the victim was discovered, and he saw a man inside the vehicle. Another witness stopped by the station that evening between 6:30 and 7:30 p.m. She left when the attendant failed to respond to her attempt to activate the self-service gas pump. This witness heard something that sounded like firecrackers and saw a man in a black coat running from the back of the station with a noticeable limp. Brodene, who walks with a limp, was arrested wearing a black coat.

A cab driver testified he had picked Brodene up outside a business establishment called Tattoo Ted's Parlor at approximately 9:00 or 10:00 p.m. that night. Tattoo Ted's Parlor is located in the 4200 block of Southwest 9th Street. Brodene had told the cab driver he called for a cab because the transmission in his car had ceased functioning. The cab driver initially drove Brodene to the back of the lot in the rear of the tattoo parlor, where Brodene's car was parked, and Brodene locked his car. The cab driver then took Brodene to an apartment house on Southwest 9th Street.

The apartment house was the residence of Vicki Butler, a female friend of Brodene. Brodene stayed at Vicki

Butler's residence for a short period of time before returning to the tattoo parlor in a second cab so he could arrange for his car to be towed to his home. Brodene had a police scanner with him and was listening to it intently. Brodene brought a jar of change with him to Butler's apartment. The jar was later identified as the coin jar taken from the station.

After returning to the tattoo parlor in a second cab, Brodene rode with the tow truck driver when he towed Brodene's car home. The tow truck driver testified Brodene acted "pretty nervous" and listened to a police scanner during the trip. Brodene said he had purchased the scanner the same day.

The charge for the tow was thirty-two dollars. Brodene paid the charge in one dollar bills which he drew from a large wad of bills he was carrying. When the tow truck driver counted the money, he discovered many of the bills were covered with blood. The blood was later determined to be human. The money bag which had been taken from the gas station was found the next day outside the tattoo parlor.

When a police officer approached Brodene at approximately 5:00 the next morning and asked "who he was" Brodene replied, "I'm the one you're looking for." Gunshot residue later taken from Brodene's hands was consistent with him having held a gun. Brodene admitted he had hidden the gun used to shoot the attendant at Vicki Butler's apartment. He claimed he had given his gun to Jeff Gunter

when he was at the gas station working on his car because he was worried a police officer might stop by. Brodene testified he heard the sound of firecrackers when Gunter was in the station and Gunter had told him he accidentally shot the attendant and asked Brodene to take the gun. Brodene testified Gunter had gone to Butler's apartment to retrieve the gun on his own initiative.

Gunter testified he lives across the street from Brodene, and on the evening of the shooting, Brodene had come to his home, stated he was wanted for questioning, and offered Gunter twenty dollars to retrieve the gun from Butler's apartment. Gunter went to Butler's home and obtained the gun and a small pouch of ammunition. When Gunter returned home, he and Brodene watched the police search Brodene's home and car. Brodene then asked Gunter to keep the gun, and Gunter placed the gun outside in a doghouse. Later that afternoon, Gunter contacted the police and gave them the gun. The gun was later found to match bullets discovered at the gas station and recovered from the attendant's body. On the day of the robbery and murder, Brodene had told a friend he owed $1600 to drug dealers.

This evidence--based on testimony of State's witnesses other than Ted Nelson--constitutes overwhelming evidence of Brodene's guilt.

B. Second, even if Brodene had a meritorious assignment of error, he need not have filed a motion for

new trial in order to preserve the issue for appeal. Because any errors alleged in this case could have been addressed by the appellate court without first being set out in a motion for new trial, Brodene was not prejudiced by the trial court's refusal to provide him with a transcript.

II. I also find no merit in Brodene's ineffective assistance of counsel argument. Brodene's Miranda rights were not violated, and, therefore, Brodene's trial counsel was not ineffective in failing to so argue.

I would affirm Brodene's conviction and sentence.

Habhab, J., joins this dissent.

HABHAB, J. (dissenting)

I join with Judge Donielson in his dissent. The trial court should have ordered the furnishing of a transcript at public expense to Brodene's newly-appointed counsel. However, I do not believe the failure to do so is grounds for reversal for Brodene suffered no prejudice. He has the transcript of the trial proceedings before him on appeal and has urged to us those errors he perceives. To set aside the conviction and sentence and to remand this case to the trial court will only prolong a final decision on the unsettled questions.